Impeaching Defendants With Their Prior Convictions: Reconsidering the Dangerous Propensities of Character Evidence After People v. Castro

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Proposition 8, adopted in 1982, called for the admission of "any" prior felony conviction "without limitation" as impeachment evidence. In People v. Castro, the California Supreme Court held that only convictions involving "moral turpitude" were admissible under the terms of the Proposition, despite its seemingly unqualified language. Even as to this class of convictions, admissibility further depended on whether the offer survived the trial court's discretionary power to exclude evidence when its prejudicial potential outweighed its probative value. The decision gave little guidance as to the meaning of "moral turpitude"; as to how the trial court was to exercise its discretion; or as to the scope of appellate review of the trial court's discretion. This Article identifies four models for assessing the probative value of such convictions, including the majority's "moral turpitude" standard, and criticizes each. It takes the view that such convictions are all but irrelevant in the special context of a defendant testifying on her own behalf. Ideally, this would argue for the flat exclusion of such convictions; absent such a rule, however, Evidence Code section 352 provides a sufficient protective mechanism if trial courts are encouraged to employ it to guard against abuses in the use of prior convictions and are reinforced in this effort by adequate appellate review.

INTRODUCTION

Among Alexis de Tocqueville's memorable observations was his proposition that political issues ultimately reach American courts enshrouded as legal issues.¹ He might have added that they often erupt in

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¹ 2 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 290 (H. Reeve ed. 1954).
the less obviously political terrain of procedural and evidentiary rules.

A case in point is the current controversy over the admissibility of a criminal defendant's prior convictions for impeachment purposes. From one perspective, this is a matter of technical, if not abstruse, evidentiary doctrine located in the complex domain of character evidence and of concern primarily to legal practitioners. Prior convictions are one branch of the much debated topic of using character evidence as a basis for inferring conduct on a particular occasion.  

In its most recent form, the issue was triggered by the adoption of Proposition 8, a California constitutional initiative, on June 8, 1982. That Proposition, among numerous other things, amended article I of the California Constitution by adding § 28(f), providing in part: "Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding." 


The particular use of character evidence of concern in this Article is to assist in evaluating the truthfulness of a witness's testimony at trial. CAL. EVID. CODE §§ 780, 785-788 (West 1966). Character evidence can also be used to draw inferences about a person's primary conduct — whether the defendant committed the charged criminal act. The fact, for example, that a person had committed several robberies might be considered useful evidence to show that she possessed a general disposition toward lawlessness, violence, or dishonesty. This disposition, in turn, might indicate that she committed a similar crime on the charged occasion. This use of character evidence to prove conforming conduct is, however, generally barred by California law. CAL. EVID. CODE § 1101(a) (West 1966); see also People v. Spearman, 25 Cal. 3d 107, 116, 599 P.2d 74, 78, 157 Cal. Rptr. 883, 887 (1979); People v. Antick, 15 Cal. 3d 79, 96-97, 538 P.2d 43, 54-55, 123 Cal. Rptr. 475, 486-87 (1975); People v. Beagle, 6 Cal. 3d 441, 453, 492 P.2d 1, 8, 99 Cal. Rptr. 313, 320 (1972). This general doctrine is subject to the exceptions set forth in CAL. EVID. CODE §§ 1102, 1103 (West 1966 & Supp. 1985).

Although I have distinguished between two potential uses of character evidence, they are, analytically, two aspects of a single technique: the offer of character evidence as circumstantial proof of conforming behavior on a given occasion. In one use, the evidence is thought to elucidate a defendant's primary behavior; in the other, it is offered to elucidate the defendant's behavior in court as a witness on her own behalf, i.e., to help resolve the veracity of her testimony. Though the two uses are analytically the
Of course, this issue is not merely one of concern to practitioners; many people do take their character evidence seriously. The subject has excited continuing, indeed irrepressible, interest in the courts, among scholars, and in the overtly political arena. The admissibility of prior convictions for impeachment purposes was "extremely controversial" and the most fully considered issue as the Federal Rules of Evidence worked their way through Congress. In 1982, the subject erupted as a question for direct voter resolution in the politically charged context of a California constitutional initiative on Proposition 8, the so-called "Victims' Bill of Rights." The initiative was aimed at changing major portions of the criminal process, including some of the rules limiting the use of prior felony convictions that had developed in California case law. With virtually no information about those limits provided to the voters, they were asked, among other things, to decide whether prior

same, practical and historical reasons have combined to produce separate rules, doctrines, and analyses to cover each.

Still unresolved is the extent to which the enactment of another provision of Proposition 8, CAL. CONST. art. I, § 28(d) (the "truth in evidence" provision), effectively abolishes present statutory rules excluding character evidence, such as CAL. EVID. CODE §§ 787, 1101(a) (West 1966). Article I, § 28(d) suggests this abolition by providing that relevant evidence may not be excluded from a criminal trial. However, § 28(d) explicitly preserves CAL. EVID. CODE § 352 (West 1966). Under § 352, courts are empowered to exclude evidence on a case-by-case basis when the prejudicial tendency of the evidence is adjudged to outweigh its probative value. But the very reasons underlying the categorical, statutory exclusion of such evidence in the first place, under provisions such as CAL. EVID. CODE §§ 787, 1101(a) (West 1966), are largely those that are recognized as compelling grounds for exclusion on an ad hoc basis under § 352. A likely scenario, then, is that in the course of successive applications of § 352, rules will emerge that will more or less restore the exclusionary rules now crystallized in such provisions as CAL. EVID. CODE §§ 787, 1101(a) (West 1966).

4 See, e.g., supra note 2.

5 J. WEINSTEIN & M. BERGER, supra note 2, ¶ 609[04], at 609-4; id. at 609-70. During congressional consideration of the issue, Representative Hogan spoke of a "raging debate" on the subject. Id. at 609-13 (quoting Representative Hogan). Indeed, the intensity of the dispute is suggested by the fact that several senators, dissatisfied with some of the Supreme Court's proposed provisions for dealing with prior convictions, in response sought to modify the Court's rulemaking power. Id. ¶ 609[01], at 609-50 to -52.

6 See supra note 2. Proposition 8 also involved restitution to victims, safe schools, criminal evidence, bail, and a variety of changes in the Penal and Welfare and Institutions Codes.


8 See id. at 310-12, 696 P.2d at 115-18, 211 Cal. Rptr. at 723-26. The Legislative Analyst's discussion of this provision, distributed to all voters in the CALIFORNIA BAL-
felony convictions should be admissible "without limitation." 9

The issue was political in the most conventional sense: it surfaced in a political context and was accompanied by strident law and order rhetoric. 10 The explicit aim of those favoring liberalized admissibility was to "toughen" a system of criminal administration viewed as "soft" on criminals and indifferent to the plight of victims. 11

The issue can also be seen, however, as political in another, more subtle sense. The beliefs that people hold about the importance of character in understanding criminal conduct are often related to a systematic way of thinking about crime and personal responsibility. A strong affinity for character as a behavioral explanation dovetails neatly with a law and order orientation, emphasizing the wrongdoer's free will, her personal moral default, and the justness of her punishment. 12 Explanations for crime as rooted in structural, social, and economic conditions — discrimination, joblessness, lack of education, poverty, destructive family situations, or drug culture — are rejected in favor of a perspective focusing on a socially contextless individual suffering from a moral

LOT PAMPHLET, PRIMARY ELECTION, June 8, 1982 [hereafter CALIFORNIA BALLOT PAMPHLET], was limited to the following paragraph: "Prior Convictions. The measure would amend the State Constitution to require that information about prior felony convictions be used without limitation to discredit the testimony of a witness, including that of a defendant. Under current law, such information may be used only under limited circumstances." Id. at 54. The issue was not explored further in either the arguments for or against Proposition 8. Id. at 34-35. A major obstacle to detailed public understanding was the technical complexity of many of the issues and their sweeping range. See supra note 6. That raised the issue of whether Proposition 8 violated the single-subject rule of CAL. CONST. art. II, § 8(d). A challenge to Proposition 8 along these lines was tendered to, and rejected by, the California Supreme Court in Brosnahan v. Brown, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982). See Lowenstein, California Initiatives and the Single-Subject Rule, 30 UCLA L. Rev. 936 (1983).

9 See supra note 2 for the relevant portion of CAL. CONST. art. I, § 28(a).

10 See, e.g., CALIFORNIA BALLOT PAMPHLET, supra note 8, at 34 (arguments advanced by Lieutenant Governor Mike Curb and then Attorney General George Deukmejian in support of Proposition 8).

11 See CAL. CONST. art. I, § 28(a) (preamble) (enacted as part of Proposition 8); see also People v. Castro, 38 Cal. 3d 301, 311, 696 P.2d 111, 116, 211 Cal. Rptr. 719, 724 (1985).

12 An illustration of this point is found in the testimony of Dr. Thomas Szasz, who, testifying as a psychiatrist in opposition to a murder defendant's insanity defense, said that the defendant was not psychotic but instead was a "bad person" who had "lived a life badly, stupidly and evilly from the time of her teens." L.A. Times, Jan. 26, 1981, Pt. I, at 18, col. 3. The tenor of this testimony reflects his general philosophic view, which stresses an individual's moral responsibility for behavioral choices and rejects attempts to transform what he sees as ethical choices into false "scientific" issues of health or illness. See T. SZASZ, LAW, LIBERTY, AND PSYCHIATRY (1963).
Thus, the appeal of character evidence lies not only in its value as probative evidence in determining behavior, but also in its validation of the same concept of personal responsibility that underlies the "wicked person" approach to criminal responsibility.

This is not to say that one must necessarily hold a law and order perspective to value character evidence; one may see character as a powerful explanatory device without rejecting liberal or even radical social explanations for crime. Indeed, one may believe that character explains much errant behavior even if that character is socially or externally determined. Thus, Marx believed that one way in which social oppression victimized the oppressed was precisely through the mechanism of personality malformation. As a matter of contemporary social fact, however, it is hard to deny a connection between an affinity for character explanations of human behavior and law and order ways of thinking about crime, criminals, society, and punishment. To recognize this does not answer the question of the appropriate uses of prior convictions or of character evidence in particular cases. Understanding this appeal of the use of prior convictions does, however, suggest a context for Proposition 8 and a perspective for understanding the arguments for

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13 This view likewise does not take kindly toward efforts to avoid personal responsibility by attributing antisocial conduct to mental illness. See T. Szasz, supra note 12. Not surprisingly, Proposition 8 also abolished the diminished capacity defense, by adding § 25(a) to the California Penal Code; sharply restricted the insanity defense's scope, by adding § 25(b) to the Penal Code; and rendered inadmissible evidence "concerning an accused person's intoxication, trauma, mental illness, disease or defect" to disprove the requisite mens rea of a criminal offense, by adding § 25(a) to the Penal Code.

14 As, for example, in the following statement:

Is it not a delusion to substitute for the individual with his real motives, with multifarious social circumstances pressing upon him, the abstraction of "free will" — one among the many qualities of man for man himself? . . . Is there not a necessity for deeply reflecting upon an alteration of the system that breeds these crimes, instead of glorifying the hangman who executes a lot of criminals to make room only for the supply of new ones?


15 Marx and Engels spoke of a degraded proletariat as "the 'dangerous class,' the social scum, that passively rotting mass thrown off by the lowest layers of old society." K. Marx & F. Engels, *The Communist Manifesto* 92 (S. Moore trans. 1967). Thus, they conceived of a dehumanized mass, broken and brutalized by capitalism, which internalized the worst "character" traits fostered by that system, precisely as social product. *Id.*
admission of such evidence apart from technical doctrine.

In People v. Castro, the court confronted the task of divining the meaning of article I, section 28(f), added to the California Constitution with the adoption of Proposition 8. Section 28(f) purported to make admissible "any" prior felony conviction "without limitation" for impeachment purposes. The defendant had been tried for receiving stolen property. After she testified in her own defense, the prosecution introduced two prior convictions for impeachment purposes, one for possession of heroin and the other for possession of heroin for sale. For reasons to be examined later, these convictions would have been inadmissible under the pre-Proposition 8 case law. The issue in Castro was whether the "without limitation" language of article I, section 28(f) abolished all judicial discretion to exclude such evidence. The court rejected such an exuberantly literal reading of section 28(f). It reasoned, first, that not every prior felony conviction was relevant to credibility. As to convictions that were not, section 28(f) did not mandate admission, despite its apparently unconditional language. Indeed, had section 28(f) so intended, it would have violated federal due process protections. What convictions, then, were relevant? The court rea-

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17 See supra note 2.
18 See infra notes 72-78 and accompanying text.
19 Justice Kaus wrote a plurality opinion speaking for three of the justices; the remaining four members of the court divided between three opinions, each concurring and dissenting. As I read it, a majority of the justices ended up supporting the major propositions in the plurality opinion. For convenience, therefore, I treat Kaus's opinion as though it speaks for the court. I recognize full well that this plethora of opinions provides fertile soil for dispute as to proper nose-counting on one or another issue.
20 Id. at 313-14, 696 P.2d at 117-18, 211 Cal. Rptr. at 725-26; id. at 327-30, 696 P.2d at 128-30, 211 Cal. Rptr. at 736-38 (Bird, C.J., concurring and dissenting).
21 Id. at 313-14, 696 P.2d at 117-19, 211 Cal. Rptr. at 725-27; id. at 322, 696 P.2d at 124, 211 Cal. Rptr. at 732 (Grodin, J., concurring and dissenting); id. at 330-32, 696 P.2d at 130-32, 211 Cal. Rptr. at 738-40 (Bird, C.J., concurring and dissenting).
soned that they consisted of those "necessarily involv[ing] moral turpi­
tude," or put another way, those reflecting a "general readiness to do evil." Moreover, the moral turpitude determination was to be made by consulting the indispensable elements of the crime in general, rather than the specific and adventitious facts underlying the conviction.

Even as to convictions involving moral turpitude, the determination of relevancy was merely the starting point for analysis. For such evidence, as was true for evidence "across the board," had to pass muster under Evidence Code section 352. "[I]s there hard evidence that . . . [the voters] intended . . . to abrogate entirely the discretion of the trial court under section 352, a traditional, inherent and, in truth, indispen­sable tool of the law of evidence?" There was not, the plurality opinion responded. The voters had expressed "continued trust in the discre­tion of the trial courts" despite the mandatory tone of section 28(f).
Finally, the court rejected the pre-Proposition 8 "Antick line" of cases, implying that these cases had introduced excessively rigid appellate control over the trial courts’ exercise of discretion; or even if in fact the Antick line had not suffered from this defect, so the matter had been perceived by the drafters of article I, section 28(f). In adopting that provision, the voters, then, had asserted their power to reject the Antick line.

Applying its analysis to the case before it, the court concluded that the defendant had been improperly impeached with a conviction for simple possession of heroin; such offense did not exhibit moral turpitude. Possession for sale, however, was an admissible conviction, because it did. Reversal was not warranted, however, since the error had not been prejudicial.

Castro expanded to an unknown degree the potential admissibility of prior convictions. It also introduced marked uncertainty into the process. It offered little guidance as to the scope of the offenses within the moral turpitude standard; as to the relevance of such convictions in the special context of the impeachment of a witness-defendant; or as to the correct, "nonrigid" way for appellate courts to supervise the admissibility process. The aftermath of Castro, therefore, provides a good occasion for rethinking the genuine relevance of prior conviction evidence, especially in the context of its use against a witness-defendant. Such analysis is indispensable to the intelligent exercise of the discretion mandated alike by sound evidentiary policy, by Evidence Code section 352, by Castro itself, and perhaps by the due process clause as well.

Part I of this Article outlines the doctrines concerning the use of prior convictions both before and after Proposition 8. Part II analyzes the relevance of prior convictions for impeachment purposes and concludes that such evidence has remarkably little evidentiary value in the special context of the witness-defendant. Part II also considers, and criticizes, four theoretical models as to the relevance of prior conviction evidence, including several that have played a prominent role in the evolution of the California doctrine. It concludes that ideally the whole-

Evidence Code, Sections 352, 782 or 1103." (emphasis added). The court held that subdivision (f) remains subject to § 352, by virtue of the just quoted language of (d), despite the apparently uncompromising language of admissibility found in subdivision (f). Id. at 309-12, 696 P.2d at 115-17, 211 Cal. Rptr. at 723-25.

30 Id. at 308, 696 P.2d at 115, 211 Cal. Rptr. at 723. For Castro’s review of those cases, see id. at 307-08, 696 P.2d at 114, 211 Cal. Rptr. at 722.

31 Id. at 308, 312, 696 P.2d at 114, 117, 211 Cal. Rptr. at 722, 725.

32 Id.

33 Id. at 318-19, 696 P.2d at 121-22, 211 Cal. Rptr. at 729-30.
sale exclusion of such convictions when used against witness-defendants would be preferable to any of the four models.\textsuperscript{34} Absent such a rule of flat exclusion, however, it argues for the alert use of Evidence Code section 352 to guard against the potential abuses of prior conviction evidence offered for impeachment purposes.

I. CHARACTER EVIDENCE IN CRIMINAL TRIALS: IMPEACHMENT THROUGH PRIOR CONVICTIONS

A. The Utility of Prior Convictions

The backdrop of the issue is quite familiar. The factfinder is often presented with squarely conflicting testimony on crucial issues of fact. To decide the case, the factfinder, whether judge or jury, must decide whom to believe. Because the believability, or credibility, of a witness is itself an issue of fact, litigants may resort to various forms of evidence to attack an opposing witness's credibility.\textsuperscript{35} One entrenched form is evidence of a witness's character for truthfulness.\textsuperscript{36} The common sense underpinning of such evidence can be stated as follows: We conduct our lives on the belief that people have identifiable character traits and that knowing these traits will help us determine how a person will behave on specific occasions. If evidence of one's character is helpful in assessing conduct in the world at large, why not in the courtroom as well? And why not in respect to the particular activity of testifying as a witness on the stand? Thus, if a person possesses a lax general commitment to tell the truth, that fact is relevant to assessing the person's credibility as a witness.

Accepting this premise, as does California law,\textsuperscript{37} the issue arises as to the degree of hospitality such evidence ought to be accorded. In many respects, the adoption of article I, section 28(f) did not affect the answer to this question. Proof of character can still be made through witnesses

\textsuperscript{34} I would recognize an exception when the defendant opens the door by falsely testifying to the absence of a prior criminal record or of prior criminality. I exclude from this discussion the subject of impeachment of nonparty witnesses because many of the considerations in that context are different. For a pre-Proposition 8 case considering that issue, see People v. Woodard, 23 Cal. 3d 329, 590 P.2d 391, 152 Cal. Rptr. 536 (1979).

\textsuperscript{35} CAL. EVID. CODE §§ 780, 785-788 (West 1966).

\textsuperscript{36} CAL. EVID. CODE § 780(e) (West 1966) identifies evidence of a witness's "character for honesty or veracity or their opposites" as relevant to credibility and to be admitted "except as otherwise provided by statute."

\textsuperscript{37} Id.; see also People v. Castro, 38 Cal. 3d 301, 314, 696 P.2d 111, 119, 211 Cal. Rptr. 719, 727 (1985) (quoting Justice Holmes in support of this approach).
prepared to render their opinion of the defendant's character for veracity, or by witnesses prepared to testify to the defendant's reputation in that regard.\textsuperscript{38} The issue of concern here arises in the context of the seemingly narrow question of whether the witness's character may also be proved by evidence of specific prior misdeeds reflecting on her disposition toward truthfulness. The general answer, both before and after the adoption of Proposition 8, has been to reject this form of proof.\textsuperscript{39} However, to this general rule of preclusion, an exception was historically annexed in favor of prior convictions.\textsuperscript{40} Thus, evidence of specific acts to demonstrate the defendant's mendacity was permitted under a limited circumstance and in a special manner. The specific conduct must have resulted in a felony conviction,\textsuperscript{41} and the impeaching proof was restricted to evidence of the conviction itself, rather than the detailed facts of the prior crime.\textsuperscript{42} For our purposes, however, the crucial fact is that not all convictions were admissible.

The following sections consider the contrasting approaches developed before and since the adoption of Proposition 8 toward the breadth of admissibility of prior convictions. Before proceeding to that subject, however, it is worth noting the striking practical importance of how broadly the scope of admissibility is defined. This is partly true for the well-recognized reason that evidence about the defendant's prior conviction may trigger jury prejudice.\textsuperscript{43} More significantly, this adverse news

\textsuperscript{38} CAL. EVID. CODE § 1100 (West 1966) makes all forms of character evidence — whether opinion, reputation, or specific act evidence — admissible to prove a relevant character trait unless otherwise excluded by statute. Neither opinion nor reputation evidence concerning credibility is generally excluded by statute. Therefore, such evidence is admissible in principle, though subject to discretionary exclusion under id. § 352. See generally 3A J. WIGMORE, supra note 2, § 920.

\textsuperscript{39} CAL. EVID. CODE § 787 (West 1966). See generally 3A J. WIGMORE, supra note 2, § 979. As to whether this result is changed by article I, § 28(d) of the California Constitution, adopted with the passage of Proposition 8, see supra note 3.

\textsuperscript{40} CAL. EVID. CODE § 788 (West 1966) (originally codified at CAL. EVID. CODE § 2051 (West 1955)).

\textsuperscript{41} Id.


\textsuperscript{43} MCCORMICK ON EVIDENCE, supra note 42, § 43, at 99. The jury, though instructed in the limited use of evidence, may be unwilling or unable to conform its conduct to the instruction. Similar limitations, in other contexts, have been regarded as "unmitigated fiction." Krulewitch v. United States, 336 U.S. 440, 453 (1949); see also People v. Fries, 24 Cal. 3d 222, 227-28, 594 P.2d 19, 23, 155 Cal. Rptr. 194, 198
about the defendant comes packaged in awesome form. The prior conviction is not mere "opinion" or "reputation" testimony concerning the defendant, dependent for its persuasive force on the vagaries of how an opinion or reputation witness is perceived by the factfinder. Prior felony convictions represent the judicial system's official certification that the defendant was guilty beyond a reasonable doubt of serious criminal behavior. While the jury must still weigh the bearing of the evidence on witness credibility, its factual validity is not easily controverted. In short, prior convictions are surrounded by an air of authority that does not normally accompany other forms of character evidence.44

The significance of prior convictions is not exhausted by their weighty aura. They also possess a high degree of practical availability. First, a substantial number of defendants have previously suffered one or more convictions.45 Thus, a fund of available impeaching evidence exists. Furthermore, this evidence is readily available — generally no


"Ironically, this fact is a principal justification for recognizing an exception in favor of admitting prior convictions. Restricting proof of specific conduct to prior convictions is said to benefit the defendant by sparing her the hazard of having to defend against unanticipated and speculative collateral charges of misconduct that might be sprung at trial. See People v. Castro, 38 Cal. 3d 301, 316-17, 696 P.2d 111, 120, 211 Cal. Rptr. 719, 728 (1985); McCormick on Evidence, supra note 42, § 42.

44 The figures are not readily available. BUREAU OF CRIMINAL STATISTICS AND SPECIAL SERVICE, CALIFORNIA DEPARTMENT OF JUSTICE, DIVISION OF LAW ENFORCEMENT, CRIME AND DELINQUENCY IN CALIFORNIA 52 (1980) reports that of the 37,876 adult felons convicted in 1980, 14.9% had prior prison records which, by definition, means they had suffered prior "felony" convictions, CAL. PENAL CODE § 17 (West 1970); 21.8% had no prior criminal records; and 63.2% had a "miscellaneous prior record." To an extent not indicated, this last category includes some, perhaps many, with prior felony convictions — for example, those cases in which felony sentence had been imposed and then suspended, or in which the defendant had been convicted of a felony but with the imposition of sentence suspended. Of those defendants convicted of felonies during 1980, then, the number who had had prior felony convictions may have substantially exceeded 14.9%. Furthermore, these figures do not reveal the prior convictions of defendants who pleaded not guilty and were subsequently acquitted. For the years after 1980, the annual volumes of Crime and Delinquency in California do not include analogous statistics. H. Kalven, Jr. & H. Zeisel, The American Jury 145 (1966) report that 47% of defendants in all criminal cases have prior criminal records (22% for similar crimes, 25% for different crimes). However, their data does not distinguish between prior felony and prior misdemeanor convictions.
further from the prosecution's elbow than the nearest computer terminal linked to the state's repository of conviction data. In contrast, the production of opinion or reputation testimony requires considerable labor. The would-be impeacher must identify the potential witnesses, locate them, evaluate them, induce them to testify, ensure their presence at trial, and then hope they survive cross-examination. In short, opinion and reputation evidence lacks both the automatic credibility and routine availability generally associated with prior convictions. Indeed, in the routine assembly-line criminal case "character evidence concerning credibility" has probably come to mean no more, no less, than prior conviction evidence.

B. Admissibility of Prior Convictions: Pre-Proposition 8 Doctrines

1. People v. Beagle Limitations on Admissibility of Prior Convictions for Impeachment

Commencing with the 1965 adoption of the California Evidence Code, California case law concerning prior convictions has evolved in a series of stages. Until 1972, Evidence Code section 788 was widely understood to authorize the admission of all felony convictions. Any felony conviction would do, regardless of the crime, and courts had no discretionary power of exclusion. A major change occurred in 1972 with the California Supreme Court's decision in People v. Beagle. The court unanimously held that the admissibility of prior convictions was not automatic; the evidence had to survive the balancing called for by Evidence Code section 352. Although Beagle declined to fashion hard and fast rules concerning the exercise of this discretion, it delineated four factors entitled to weight: 1) whether the conviction was for a crime relating to credibility; 2) whether the conviction was too remote in time; 3) whether, in the case of a defendant-witness, the conviction was for the same crime as the one for which the defendant stood charged; and 4) whether the admission of the conviction would unfairly discourage the defendant from taking the stand to testify. The first two factors

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46 See People v. Beagle, 6 Cal. 3d 441, 451-52, 492 P.2d 1, 7, 99 Cal. Rptr. 313, 319 (1972), and the cases cited therein, disapproved by Beagle.
47 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1972).
48 Id. at 452-53, 492 P.2d at 8, 99 Cal. Rptr. at 320; see also People v. Castro, 38 Cal. 3d 301, 307, 696 P.2d 111, 113, 211 Cal. Rptr. 719, 721 (1985).
49 6 Cal. 3d at 453, 492 P.2d at 8, 99 Cal. Rptr. at 320. In identifying these factors, the court adopted then Circuit Judge Burger's approach delineated in Gordon v. United States, 383 F.2d 936, 940-41 (D.C. Cir. 1967), cert. denied, 390 U.S. 1029 (1968); see also J. WEINSTEIN & M. BERGER, supra note 2, ¶609[03], at 609-68 to
identified questions about the relevance of the evidence. The last two reflected a recognition of its prejudicial potential.

Disagreements over the proper application of Beagle spawned much litigation in the following decade, often before lower courts that were unsympathetic to restrictions on the use of such evidence. The California Supreme Court ultimately reaffirmed and refined the Beagle criteria in its pre-Proposition 8 Antick line of cases, exemplified by People v. Spearman. That case provides a useful foil for the evaluation of People v. Castro, because, presumably, it illustrates the "rigidified" review of trial court discretion that became such an important part of the Castro critique.

2. People v. Spearman: Evolution of the Beagle Doctrine

In People v. Spearman, the defendant was charged with several drug offenses, including possession of heroin for sale. Apparently he was no stranger to drug trafficking, having been convicted of possession for sale some two years earlier. Bringing the prior conviction to the jury's attention would, of course, be an unwelcome development from the defendant's viewpoint. The law at that time afforded the defendant both good and bad news. The defendant's character was inadmissible to prove his criminal propensity: his prior conviction could be offered neither to show a general criminal tendency nor a particular tendency to commit drug offenses. However, the conviction was admissible as credibility evidence if it met the criteria set forth in Beagle. If admitted,
the jury would, in effect, receive the following instruction: You are not permitted to reason from the prior conviction that the defendant is disposed to commit crime. You are permitted to reason that, because he has misbehaved previously, he is less entitled to belief when he denies that he committed the crime with which he is now charged.\(^{56}\)

The defendant, perhaps lacking confidence in such a prophylactic instruction, moved for an order in limine barring the evidence on Beagle grounds. The trial judge denied the motion. The defendant “chose”\(^{57}\) not to testify and was convicted. The supreme court reversed, upholding his contention that the prior conviction should have been barred. The court identified three considerations justifying its decision: (a) the prejudice resulting from identity of the prior conviction with the current charge; (b) the inhibiting effect of admitting the prior conviction on the defendant’s desire to testify; and (c) the irrelevancy of the prior conviction to credibility.

\(\text{a. Identity of the Prior Conviction with the Current Charge}\)

The prior conviction offered at Spearman’s trial was identical to one of the charged offenses — possession of heroin for sale. Under Beagle, this similarity weighed against admissibility because of the danger that the jury would use the conviction for the forbidden purpose of propensity evidence.\(^{58}\) By the time of Spearman, the fact of identity had become more than a factor weighing against admissibility. Identical prior convictions were not merely to be "sparingly,"\(^{59}\) they were never to be used; and the failure to abide by this restriction was itself sufficient ground for reversal.\(^{60}\)

\(^{56}\) The actual instruction called for by CALJIC No. 2.23 reads:

The fact that a witness had been convicted of a felony, if such be a fact, may be considered by you only for the purpose of determining the credibility of that witness. The fact of such a conviction does not necessarily destroy or impair the witness' credibility. It is one of the circumstances that you may take into consideration in weighing the testimony of such a witness.

\(^{57}\) 25 Cal. 3d at 112, 599 P.2d at 76, 157 Cal. Rptr. at 885.

\(^{58}\) 6 Cal. 3d at 453, 492 P.2d at 8, 99 Cal. Rptr. at 320.


\(^{60}\) Spearman, 25 Cal. 3d 107, 116, 599 P.2d 74, 79, 157 Cal. Rptr. 883, 888 (1979). Justice Richardson, dissenting, quite reasonably attributed to the majority the adoption of a rule "that a defendant's credibility may no longer be impeached by admission of a
Identity of the charged offense and the impeaching conviction is quite common. For example, larcenous crime is a frequent occurrence, and particularly so among certain segments of the population. Therefore, this ground of exclusion alone significantly imperiled impeachment by prior conviction, particularly since exclusion did not depend on an absolute identity between the two crimes.

b. Effect of the Prior Conviction in Discouraging the Defendant from Testifying

The threatened use of the prior conviction had caused Spearman to decline to testify. While the evidence of guilt appeared strong, it was not "irrebuttable." Had the defendant testified, "unquestionably" the defendant "might" have presented exculpatory evidence. The trial court's refusal to bar the prior conviction had prevented the defendant from presenting his version of the events and, under the circumstances, constituted reversible error.

prior conviction of an offense identical or similar to the offense charged." Id. at 119, 599 P.2d at 81, 157 Cal. Rptr. at 890 (dissenting opinion); see also People v. Barrick, 33 Cal. 3d 115, 126, 654 P.2d 1243, 1249, 187 Cal. Rptr. 716, 722 (1982).

It was sufficient that the crimes were "similar." See, e.g., People v. Barrick, 33 Cal. 3d 115, 120, 128, 654 P.2d 1243, 1245, 1251, 187 Cal. Rptr. 716, 718, 724 (1982) (no distinction between "auto theft" and "theft"). A number of cases considered whether the identical or similar convictions could be "sanitized" by restricting the proof to the bare fact of the prior conviction, without identifying the nature of the charge. Since the jury would be denied knowledge of the tenor of the prior crime, prosecutors argued that jurors would be less likely to draw improper inferences as to the defendant's particular criminal disposition. The California Supreme Court condemned this technique. People v. Rollo, 20 Cal. 3d 109, 569 P.2d 771, 141 Cal. Rptr. 177 (1977). Reference to a conviction alone, without specifying the underlying crime, would furnish the jury with a largely meaningless fragment of information, inducing dangerous jury speculation. Although the defendant had been accorded the "option" to end jury speculation by revealing the underlying crime, this was an "archetypal Hobson's choice," id. at 120, 569 P.2d at 776, 141 Cal. Rptr. at 182: one of remaining silent and facing improper jury speculation, or of testifying to the nature of the prior conviction and incurring the risk that the jury would draw an impermissible inference of guilt.

The court also held that the same-crime problem could not be finessed by withholding mention of the specific crime and asking the defendant simply whether he had been convicted of a felony "involving theft." People v. Barrick, 33 Cal. 3d 115, 654 P.2d 1243, 187 Cal. Rptr. 716 (1982); see also People v. Cole, 31 Cal. 3d 568, 581, 645 P.2d 1182, 1190, 183 Cal. Rptr. 350, 358 (1982); People v. Betts, 110 Cal. App. 3d 225, 167 Cal. Rptr. 768 (1980) (prior conviction involving "trait of honesty").

Interestingly, the court in People v. Beagle, 6 Cal. 3d 441, 453, 492 P.2d 1, 8, 99
Of course, in principle, no evidence is absolutely irrebuttable. And the greater the allowance one makes for the possibility of exculpation, the closer one comes to a rule of automatic reversal whenever the defendant declines to take the stand because of threatened impeachment. A number of lower courts had displayed no such charity toward a defense claim of reversible error. When the case against the defendant seemed strong and there was little they could imagine the defendant saying that would not be self-defeating, these courts found it easy to conclude that the defendant would not have taken the stand in any case. To reverse would confer a windfall upon a defendant who either would not have testified, or whose testimony would in any event have swayed no one.

In contrast, the supreme court emphasized the difficulties in reliably predicting that the defendant's testimony would not have mattered, and it leaned toward liberality in applying the reversible error test. It also

Cal. Rptr. 313, 320 (1972), had not spoken of this issue in reversible error terms, i.e., as one that would arise only once other Beagle errors had been found, and when it accordingly became necessary to weigh the effect of these errors to determine whether the conviction could stand. Rather, the effect of admitting prior convictions in discouraging the defendant from testifying had been conceived of as a serious problem in itself, at times sufficient to warrant reversal even if the prior convictions were otherwise relevant and not prejudicial. See People v. Barrick, 33 Cal. 3d 115, 129, 654 P.2d 1243, 1251, 187 Cal. Rptr. 716, 724 (1982). Thus, the court at one time viewed the testimony-discouraging effect not merely as a factor in prejudicial error analysis but as a cognizable harm in itself.


In Spearman, after observing that the evidence against the defendant was strong but not irrebuttable, the court imagined the things the defendant might have said defensively. Assuming such testimony would have been forthcoming, the court declined to “reject the possibility that the jury might have believed appellant.” 25 Cal. 3d at 119, 599 P.2d at 80, 157 Cal. Rptr. at 889. “By refusing to indulge in speculation, this court preserves the right of every accused person to present his version of the case to the jury.” Id.; see also id. at 119 n.8, 599 P.2d at 80 n.8, 157 Cal. Rptr. at 889 n.8. Finally, the court relied on the observation of R. Traynor, The Riddle of Harmless Error 20-21 (1970), that depriving a litigant of the opportunity to present her version of the case is normally reversible since there is no way of gauging the effect of the deprivation effect upon the jury's decision. See also People v. Barrick, 33 Cal. 3d 115, 129-30, 654 P.2d 1243, 1251-52, 187 Cal. Rptr. 716, 724-25 (1982); People v. Fries, 24 Cal. 3d 222, 228-29, 594 P.2d 19, 23-24, 155 Cal. Rptr. 194, 198-99 (1979); People v. Rist, 16 Cal. 3d 211, 223, 545 P.2d 833, 841, 127 Cal. Rptr. 457, 465 (1976) (since defendant did not take the stand, the degree of prejudice resulting from the court's failure to exclude the conviction was “not possible” to determine and the usual
emphasized that the jury might misperceive the defendant's failure to testify and draw improper inferences of guilt from silence. Furthermore, the court rejected any requirement that the defendant make an offer of proof to show the importance of his intended testimony, reasoning that this requirement itself would violate the privilege against self-incrimination. In summary, this ground for exclusion alone — the testimony-deterrent effect of the threatened impeachment — created a near impenetrable barrier to the use of convictions in the case of the nontestifying defendant.

Other arguments could also have been mustered to support the broad presumption of reversibility. As noted, some lower courts had justified their refusal to reverse on the basis of a belief that the defendant could not have offered testimony useful to the defense. However, if the case against the defendant was so compelling that her testimony would be useless, why was impeachment through prior convictions necessary? If she testified, her words, by hypothesis, would be greeted with scorn because of their inherent improbability. Thus, the very premise for refusing to reverse — the defendant's inability to speak usefully in her own defense — militated against the need to employ the prior convictions in the first place. However, if her testimony indeed would have been important, the deterrent effect of admitting the prior convictions would be exceedingly costly.

Another possible argument in support of a broad rule of reversibility is that the right to testify is fundamental not only because of its instrumental contribution to sound factfinding, but because of the importance tests for reversible error were not applicable). But cf. People v. Fisher, 153 Cal. App. 3d 826, 835, 200 Cal. Rptr. 683, 688 (1984) (the supreme court's decisions do not mandate "reversal 'per se' whenever the defendant refused to testify" due to the trial court's erroneous failure to exclude prior conviction).

If the defendant took the stand, however, a different result was reached. In People v. Rollo, 20 Cal. 3d 109, 569 P.2d 771, 141 Cal. Rptr. 177 (1977), the court found the Beagle error not reversible since the defendant in fact had not been deterred from testifying. He testified, he lost, and he was entitled to no presumption of reversibility. Defendants might easily have drawn the following moral: Think twice before taking the stand when your Beagle motion fails.

E.g., People v. Barrick, 33 Cal. 3d 115, 129-30, 654 P.2d 1243, 1252, 187 Cal. Rptr. 716, 725 (1982); Note, To Take the Stand or Not to Take the Stand: The Dilemma of a Defendant with a Criminal Record, 4 Colum. J.L. & Soc. Probs. 215, 221-22 (1968) (statistical data showing juries infer guilt from silence).


The Beagle court had said it intended no such result. 6 Cal. 3d 441, 453-54, 492 P.2d 1, 8-9, 99 Cal. Rptr. 313, 320-21 (1972).
of enabling defendants to present their version of the facts, regardless of whether the judge thinks they have anything significant to say.\footnote{71} 

c. The Relevance of the Prior Conviction to Credibility

The Spearman court gave a final, and crucial, reason for holding the prior conviction inadmissible: the evidence lacked the saving grace of relevance. To reflect on a witness's credibility, a "prior conviction must involve dishonesty."\footnote{72} That is, the conviction must involve an "intent to lie, defraud, deceive, [or] steal, etc."\footnote{73} Furthermore, the dishonest intent had to constitute a necessary element of the offense, if not of its very statutory definition, rather than be merely an incidental fact of a particular case.\footnote{74} Voluntary manslaughter, for example, would not satisfy the test, because it lacked any of the required elements of dishonest intent. In contrast, issuing a check without sufficient funds would qualify, since one of the crime's necessary elements was "the 'intent to defraud.'"\footnote{75}

The prior conviction in Spearman, possession of heroin for sale, failed the necessary-element test. A showing that acts of dishonesty, such as theft and deception, commonly occur within the heroin trade would not suffice either. No evidence to this effect had been presented

\footnote{71} The strength of this interest would be immediately apparent if the defendant were literally barred from taking the stand. In that circumstance, no evidence of guilt, however strong, would justify denying the defendant the right to speak. See Coe v. Armour Fertilizer Works, 237 U.S. 413, 424 (1915); Karst, The Supreme Court 1976 Term — Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 HARV. L. REV. 1, 30 (1977); see also Chambers v. Mississippi, 410 U.S. 284 (1973); Fuentes v. Shevin, 407 U.S. 67, 80-82 (1972); Washington v. Texas, 388 U.S. 14 (1967).

\footnote{72} Spearman, 25 Cal. 3d at 114, 599 P.2d at 77, 157 Cal. Rptr. at 886; see also People v. Barrick, 33 Cal. 3d 115, 123-24, 654 P.2d 1243, 1247-48, 187 Cal. Rptr. 716, 720-21 (1982). The dishonesty test stands in sharp contrast to the moral turpitude standard later adopted by the Castro court in interpreting article I, § 28(f). Indeed, Castro characterized the very same crime as that involved in Spearman — possession of heroin for sale — as falling within the moral turpitude standard, and thus relevant to credibility. See supra notes 23-34 and accompanying text.

\footnote{73} "The only relevant consideration is whether the prior conviction itself contains as a necessary element" the dishonest intent. Id. at 116, 599 P.2d at 78, 157 Cal. Rptr. at 887 (emphasis in original). The California Law Revision Commission had proposed this view at the time of the adoption of the California Evidence Code. 7 CALIFORNIA LAW REVISION COMMISSION REPORT 141-43 (1965). This view was, however, not incorporated in CAL. EVID. CODE § 788. Castro, 38 Cal. 3d at 316 n.10, 696 P.2d at 119 n.10, 211 Cal. Rptr. at 727 n.10.

\footnote{74} Spearman, 25 Cal. 3d at 115, 599 P.2d at 77, 157 Cal. Rptr. at 886.
at trial, nor could it have been under controlling doctrine.\textsuperscript{76}

To summarize, by the time \textit{Spearman} was decided, the case law had developed from the loose standard announced in \textit{Beagle} to a fairly elaborate and fixed set of rules interpreting the \textit{Beagle} factors. First, convictions were deemed irrelevant to credibility unless the underlying offense possessed as a necessary ingredient one of the elements of dishonesty suggested in \textit{Spearman}. Second, the conviction could not be for the same or similar offense as that for which the defendant was currently on trial.\textsuperscript{77} Third, if the defendant refused to testify after losing a \textit{Beagle} exclusionary motion, the court was disposed to resolve doubts in the defendant's behalf by concluding that the defendant's silence was caused by the threatened impeachment; that her testimony might have been significant; and that it might have been believed by the jury.\textsuperscript{78} Against this backdrop, the changes wrought by \textit{People v. Castro}\textsuperscript{79} can be appreciated.

\section*{II. The Relevance of Prior Convictions}

\subsection*{A. The Relevance of Character in Assessing Credibility of the Witness-Defendant}

Before considering \textit{Castro} further, it is useful to consider a fundamental issue of relevance: whether prior convictions have any logical relation to credibility in the special context of a defendant testifying in her own behalf. The issue has received far less attention than it deserves. Both the \textit{Castro} and \textit{Spearman} courts uncritically assumed that at least a certain category of convictions was always relevant to credibility (though they differed in their definitions of that category). The issue remains whether convictions, whatever the offense, are relevant in the special context of the witness-defendant. Only if this question is answered in the affirmative can one usefully proceed to the issue as traditionally defined: a refined inquiry into the precise contours of the relevant category. A discussion of the fundamental issue of relevance is warranted in principle; moreover, it is required by \textit{Castro}. For \textit{Castro} does not mandate the admission of convictions involving moral turpitude; it only permits it. Admissibility ultimately turns on the trial court's exercise of discretion under Evidence Code section 352. Manifestly, this requires courts to assess the genuine probative value of the

\textsuperscript{76} See \textit{supra} note 74.
\textsuperscript{77} See \textit{supra} notes 58-62 and accompanying text.
\textsuperscript{78} See \textit{supra} notes 63-70 and accompanying text.
\textsuperscript{79} 38 Cal. 3d 301, 696 P.2d 111, 211 Cal. Rptr. 719 (1985).
evidence, so as to facilitate meaningful comparison with those factors arguing for exclusion. There is little in Castro that provides guidance concerning these issues and a good deal that is confusing.

First, the court made "no attempt to list or even further define"\textsuperscript{80} the felonies involving moral turpitude; and none of the justices on the court supposed this to be an easy task.\textsuperscript{81} Moreover, to qualify under the moral turpitude standard, said the plurality, the conviction must "necessarily"\textsuperscript{82} bespeak that quality. To apply this standard, then, one must begin with an ethical vision concerning moral turpitude; then one must have an empirical sense of the set of crimes that "necessarily" manifest it — keeping in mind the court's rule forbidding any examination of the specific facts of the offense to make individualized determinations. That might suggest that the category of included crimes be narrowly defined, since many offenses can be imagined that, varying with circumstances, would demonstrate moral degradation to a high degree, to a low degree, or perhaps not at all. It is far from clear, however, that the majority of the court drew this conclusion. The plurality opinion did present a number of hints as to crimes it believed within the moral turpitude standard. These are described below.\textsuperscript{83}

Additionally confusing was the fact that, in endorsing the relevance of moral turpitude offenses, the majority did not speak of the weight to which they were entitled or even the process by which their weight might be assessed. It concluded no more than that there is "some basis — however tenuous"\textsuperscript{84} for inferring that one who has been convicted of such a crime "is more likely to be dishonest than a person about whom no such thing is known."\textsuperscript{85} Finally, it left unclear the process by which prejudice was to be weighed against probative value, and, in particular, the role of appellate courts in monitoring the trial courts' exercise of

\textsuperscript{80} \textit{Id.} at 314, 696 P.2d at 118, 211 Cal. Rptr. at 726.

\textsuperscript{81} The plurality opinion referred to the necessity of proving that every conviction offered for impeachment involved moral turpitude, "difficult though this may prove to be." \textit{Id.} at 316, 696 P.2d at 120, 211 Cal. Rptr. at 728; see also \textit{id.} at 316 n.11, 696 P.2d at 120 n.11, 211 Cal. Rptr. at 728 n.11 ("administratively \ldots [the moral turpitude standard] has proved awkward"); \textit{id.} at 322, 696 P.2d at 124, 211 Cal. Rptr. at 732 (Grodin, J., concurring and dissenting) ("difficult problems of judicial administration"); \textit{id.} at 323, 696 P.2d at 125, 211 Cal. Rptr. at 733 (Lucas, J., concurring and dissenting) (moral turpitude standard is "confusing and uncertain"); \textit{id.} at 336, 696 P.2d at 134, 211 Cal. Rptr. at 742 (Bird, C.J., concurring and dissenting) (moral turpitude standard is an "open-ended invitation to judicial chaos").

\textsuperscript{82} \textit{Id.} at 306, 696 P.2d at 113, 211 Cal. Rptr. at 721.

\textsuperscript{83} See infra notes 122-27 and accompanying text.

\textsuperscript{84} Castro, 38 Cal. 3d at 315, 696 P.2d at 119, 211 Cal. Rptr. at 727.

\textsuperscript{85} \textit{Id.}
discretion. It apparently reaffirmed the vitality of People v. Beagle, but it rejected, to an unspecified degree, the pre-Proposition 8 "Antick line," typified by Spearman, which had sought to apply the Beagle standards. It remains to be seen whether the decisionmaking process can be shifted from "rigid" rule toward expanded trial court discretion, without inviting unprincipled and arbitrary distinctions in the treatment of prior convictions, varying from judge to judge.

Loose appellate control presupposes that the cases present themselves in such subtle factual variation as to make disposition on the basis of rule inappropriate. Does this characterization apply to the screening of prior convictions? In some respects, it almost surely does not. Thus, Castro purported to emancipate the California courts from the rule-bound regime of the Antick line of cases. Yet, ironically, the supreme court's first essay in this direction entailed laying down yet another rule, simply one more to its liking (that moral turpitude henceforth was the measure of the relevance of prior convictions). And the court designated possession of heroin for sale as a charter member of the moral turpitude class. Are trial courts, in the name of discretion, now free to reject either that general standard, or its application to the crime of possession for sale, if they so desire? Presumably not, and for good reason. As to such an abstract and general issue — which crimes, by virtue of their indispensable elements, manifest moral turpitude — there can be only one right answer. One can debate whether the court's answer was indeed the right one. But once provided, that answer presumably must be the same for all courts, and there can be no room for creative discretion. To what degree and in what respects, then, does Castro intend a less "rigid" approach than had prevailed before? To what degree can a less "rigid" approach be adopted that does not become victim to incompatible and unanalyzable intuitions, varying with the courtroom in which the decisions are made? The scope and standard of appellate review in this area remain in considerable confusion.

The argument to be developed here starts with accepting, for the sake of argument, the court's moral turpitude standard. The argument proceeds with the contention that character evidence, so limited, barely reaches the threshold of relevance in the special context of the witness-

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6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1972); see Castro, 38 Cal. 3d at 306-07, 696 P.2d at 113-14, 211 Cal. Rptr. at 721-22; supra notes 46-50 and accompanying text.

87 Castro, 38 Cal. 3d at 308, 696 P.2d at 115, 211 Cal. Rptr. at 723.

88 Id. at 308, 696 P.2d at 114, 211 Cal. Rptr. at 722.
defendant.\textsuperscript{89} Trial courts must necessarily grapple with this issue of relevance in exercising their discretion to weigh the admissibility of prior convictions. To be relevant at all, evidence must help refine the factfinder's assessment of probabilities concerning a disputed fact in light of all the other known circumstances.\textsuperscript{90} A salient known circumstance in the context at hand is that the witness has taken the stand to testify in her own defense. Assume that the defendant has suffered prior convictions for crimes that speak strongly of her mendacity (however one defines the category of convictions for which this is true). The issue then is whether such evidence is relevant under the special circumstance in which she takes the stand to testify in her own behalf. An almost instinctive response is to say "of course."\textsuperscript{91} However, for all its common sense relevance, such evidence is all but irrelevant in this context.

The argument rests on two assumptions. First, innocent defendants, being innocent, have little motive to lie; accordingly, if they choose to testify, they will usually testify truthfully. (Occasional exceptions arise when an innocent person is motivated to testify falsely to protect a third party, or to improve the evidence of innocence by gilding the lily.\textsuperscript{92}) Second, guilty people, being guilty, will of necessity testify falsely when they take the stand in support of a not guilty plea. (This assumption, also, is not universally valid. For example, a guilty person may testify truthfully when she merely seeks to rebut a particular item of false testimony without herself offering any false testimony, or when she is testifying to some preliminary issues going to admissibility rather than to guilt or innocence.)

Although it is impossible, by definition, to know at the outset of a trial whether a defendant is guilty or innocent, to the degree one grants the above two assumptions, it follows that whether the defendant is guilty or innocent, the prior convictions have little relevance. If the defendant is innocent, the prior convictions are irrelevant, since, for the

\textsuperscript{89} In itself this is not a very demanding test given that evidence is deemed "relevant" if it has "any tendency in reason" to further the proof of a material fact. CAL. EVID. CODE § 210 (West 1966).

\textsuperscript{90} For a general discussion of relevance, see 3A J. WIGMORE, supra note 2, § 37.

\textsuperscript{91} The common sense underpinnings of such evidence have been described earlier, supra note 36 and accompanying text.

\textsuperscript{92} This possibility no doubt makes the argument less than 100% valid but, I believe, it remains true for the most part. In any event, the primary aim of the criminal system, however, is not to punish innocent people because they have lied but to foreclose exoneration of the guilty. Facilitating the punishment of innocent persons serves a dubious societal interest, even assuming they have violated their obligation to tell the truth.
most part, she lacks the motive to lie. Prior convictions might make us question the defendant's character for veracity but not her self-interest, which is to tell the truth when she is indeed innocent. For such a person, happily, self-interest and morality tend to march hand-in-hand. Accordingly, since character plays little role in shaping the innocent person's testimony, it is generally irrelevant to her decision to tell the truth.

Turn now to the guilty person. It must be kept in mind that this individual is not only guilty but that she has elected to take the stand. A moment's reflection will show that if she is guilty, there is a strong possibility that she will lie. This is true not because she has suffered prior convictions. Rather, because she is guilty, she cannot testify truthfully that she is innocent. Thus, the defendant's truthfulness depends not on her character but on her actual innocence. It follows that it would aid us greatly in determining her truthfulness if we knew whether she was guilty. But this is the very issue yet to be determined at trial. This is when the prior convictions really help: not by revealing the defendant's character for credibility but by disclosing her propensity toward criminality. The greater the weight accorded to the prior convictions, the more likely that she is a criminal type, that she committed the crime in question, and that she is therefore lying when she proclaims her innocence. In short, the inference progresses from past convictions to guilt, rather than from past convictions to credibility. The evidence serves little role for its proclaimed legitimate purpose — that of helping to assess credibility — but a major role for its theoretically prohibited purpose — that of assessing criminal propensity.

A counter argument might take the following form: Admittedly, the defendant's character for veracity does not matter once she elects to proclaim her innocence. Having made that decision, truthfulness no longer depends on her character but on her guilt. This fact, however, merely pushes the appropriate inquiry one step back — to the point when the defendant is considering whether to proclaim innocence. That decision is not foreordained; at the outset of the trial false testimony is merely

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93 Even the least upright of men, when he is not under the influence of some seducing interest, and is surrounded by the restraints of law, and exposed to the shame and punishment of false testimony, will not be so much his own enemy, as to commit a dangerous crime [perjury] without any view of profit.

J. Bentham, A Treatise on Judicial Evidence 250 (M. Dumont trans. 1825). Bentham said this in support of the testimonial competence of persons who had suffered felony convictions. See Uviller, supra note 2, at 867-68.

94 See supra note 3.
one of the defendant's options. A second option is not to testify at all, leaving the state to carry its burden of proof. A third option is to manifest contrition and to plead guilty. In selecting from these options, the defendant's character does come into play. The chronic liar, the argument proceeds, is more likely to employ falsehoods to resist conviction than is the generally truthful person (even when that person is guilty of the charged offense). And, it follows, if we know the defendant has a shaky commitment to the truth, we are entitled to receive her decision to assert innocence with skepticism.

This argument perhaps makes out a case for the formal relevance of the evidence. But the evidence takes on genuine importance only if one is prepared to make the following assumption: When a person is indeed guilty of a serious crime, the truthfulness of her testimony is likely to be determined not by inexorable survival pressures but by her character for truthfulness. One must assume, in short, that the person's character remains an important determinant for truthtelling even when she is charged with a serious crime, is indeed guilty, and contemplates the prospect of conviction. In the words of one court, since "every criminal defendant may be under great pressure to lie, the slight added relevance which even a perjury conviction may carry would not seem to justify its admission." Indeed, one might speculate, the greatest force inhibiting guilty defendants from lying is not the product of their character, but the pragmatic advice of counsel that lying is a risky strategy, given the adversary's power to cross-examine and to rebut.

Thus, the relevance of character evidence at best is formal and minimal. Prior convictions disclose little with respect to the defendant who has no motive to lie and little with regard to the guilty defendant who has elected to take the stand to proclaim innocence. This is not the view that prevailed in California either before or after the adoption of article I, section 28(f), that is, under either the Spearman or the Castro doctrines. Both cases share the assumption that prior convictions, provided their scope were defined properly, possessed substantial probative value even — perhaps especially — in the context of the witness-defendant. The difference between the two approaches, thus, is one of degree (though hardly unimportant on that account). Different theories underlie these two approaches. By analyzing these theories through concep-

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* See supra note 89.
tual models, the fallacies in both doctrines can be explored.

**B. The Relevance of Prior Convictions to Impeach Credibility: Four Models**

Let us now accept, for the sake of argument, the largely unrealistic assumption underlying both *Spearman* and *Castro,* that prior convictions can cast a powerful light on a defendant's credibility at trial. Or, to put the point somewhat differently, let us suppose the witness was someone other than the defendant; the argument just considered as to irrelevance of character evidence in the context of a witness-defendant would then not apply. This brings us to the issue as it has been conventionally defined. Assuming that at least some prior convictions might usefully contribute to fathoming a witness's credibility, which ones?

A major hurdle in developing a discriminating response is the difficulty in resolving several confusing issues of an empirical and psychological sort. For example, what is the nature of character evidence and can it be meaningfully compartmentalized into different traits such as veracity, honesty, peacefulness, or law-abidingness? Is there any relationship between these traits? How broadly should these traits be defined if they are to shed light on witness credibility?

The answers commonly given can be seen as variations on four competing models. These can be labeled the "veracity," "honesty," "global" (or "moral turpitude"), and "contextual" models. The point of considering these alternatives is not that the approach of *Spearman, Castro,* or any other competing rule conforms perfectly to any of these models. The models help, however, to sort out various perspectives and provide a useful framework for evaluating the competing ways of thinking about the subject.

1. **The Veracity Model**

The veracity model affords the most limited scope for admitting prior convictions. The narrow trait of veracity is deemed the only trait sufficiently connected with a person's truth-telling tendencies to be worth considering. The propensity toward veracity is seen as a natural component of character, subject to its own more or less autonomous controls. Adherents to this perspective might view the behavioral portions of the mind as consisting of autonomous compartments, each regulating a narrow facet of behavior. Each compartment is capable of producing good or bad behavior of one category without affecting for good or ill the behavior of another category. As Wigmore put it, "[c]haracter is only an abstract group-term; what actually exists is a number of virtu-
ally separate traits, [for example] honesty, violence, benevolence [and others].”97 Under this model, evidence that a person was violent, or a lawbreaker, would speak to the wrong compartment. Only evidence that the person had lied, distorted, or deceived in the past would bear on whether the person was likely to lie, distort, or deceive when testifying.

If we somehow had access to these compartments, we could study the character trait directly. But we lack direct access. However, a wealth of circumstantial evidence exists in the person’s behavioral choices in a multiplicity of life situations. From these we can extrapolate the person’s characteristic mode of behavior — truthful or untruthful — and determine probable truthfulness when she testifies at trial. A good illustration of a conviction admissible under the veracity model would be perjury98 — similar conduct under similar circumstances. Other examples might be convictions involving false statement, false pretense, forgery,99 income tax fraud, and certain other forms of criminal fraud, each involving deception.100 Indeed, in each case deception is not merely an accidental feature of the way the particular crime was committed; it

97 J. WIGMORE, SCIENCE OF JUDICIAL PROOF 106 (1937) (emphasis in original).
98 See, e.g., People v. Fries, 24 Cal. 3d 222, 226, 229 n.7, 594 P.2d 19, 22, 24 n.7, 155 Cal. Rptr. 194, 197, 199 n.7 (1979).
100 This definition of the scope of relevant convictions is similar to that adopted in Rule 609(a)(2) of the Federal Rules of Evidence, rendering convictions involving “dishonesty or false statement” generally admissible. The Congressional Reference Report concerning that provision said it was intended to adopt the crimen falsi standard: “Crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement or false pretense, or any other offense in the nature of crimen falsi the commission of which involves some element of untruthfulness, deceit or falsification bearing on the accused’s propensity to testify truthfully.” S. REP. No. 1277, 93d Cong., 2d Sess. 14, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7051, 7061.

Difficulties with the federal definition of crimen falsi are vividly described by Uviller, supra note 2, at 871-72; see also CALIFORNIA LAW REVISION COMMISSION, TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE, ART. IV, WITNESSES 756 (1964), which distinguishes between convictions for perjury and for embezzlement: “A conviction for perjury suggests a bad character for truthfulness. A conviction for embezzlement suggests a bad character for honesty.” The Commission offered no explanation for the distinction. Perhaps its view was that perjury involved lying, whereas embezzlement need not. Embezzlement, however, involves an abuse of trust that might best be regarded as implicitly deceitful. There is thus a fluidity of definition here, and embezzlement probably stands on the borderline between the veracity model and the honesty model considered below. The matter of characterization is vital under any rule that draws the line of admissibility between crimes of nonveracity and crimes of dishonesty.
is part of its very definition. Any crimes conforming to the veracity model probably also would comply both with the Spearman honesty test and the Castro moral turpitude test.

2. The Honesty Model

The honesty model represents a broader view of relevance. It considers as relevant not only crimes of nonveracity — those requiring an intent "to lie, defraud [and] deceive"101 — but also any other crimes that evidence "dishonesty."102 Even though this category lacks false statement as a required element, the prior convictions speak with sufficient force to credibility to warrant their use for impeachment purposes. This view most closely approximates the Spearman standard. Under Spearman, crimes within the honesty model (over and above the crimes of nonveracity) reduce to those with a larcenous element, meaning those reflecting an "intent to . . . steal,"103 such as larceny, robbery, theft, and burglary.104 Robbery, from this viewpoint, is a hybrid crime since it is both larcenous and assaultive. Theft, the larcenous aspect of robbery, reflects on honesty; the use of force or fear, the assaultive aspect, does not.105

Whatever else may be said for or against the Spearman approach, it offered the not inconsiderable advantage of a rule of thumb, a virtually self-applying standard, in an area where many observers have commended administrative convenience rather than finely honed discretionary decisionmaking.106 This virtue proceeds from two features of

102 Id. Dishonesty and falsehood were seen as distinct categories in Evidence Code § 786, which restricted evidence going to credibility to the traits of "honesty or veracity." CAL. EVID. CODE § 786 (West 1966); see also J. WEINSTEIN & M. BERGER, supra note 2, at 609-27 to -29 (congressional debate over the phrase "dishonesty or false statement" in Rule 609(a) of the Federal Rules of Evidence).
103 Spearman, 25 Cal. 3d at 114, 599 P.2d at 77, 157 Cal. Rptr. at 886; see supra notes 72-76 and accompanying text.
104 Under this theory, the relevance of a burglary conviction to impeachment would depend on the specific intent element of the particular burglary, since the general crime does not require that the entry be made with a larcenous intent. CAL. PENAL CODE § 459 (West Supp. 1985); see People v. Holt, 37 Cal. 3d 436, 453-54, 690 P.2d 1207, 1216-17, 208 Cal. Rptr. 547, 556-57 (1984).
106 Judge Burger adopted a "rule of thumb" approach in favoring the admission of crimes of "dishonest conduct" and the exclusion of crimes of violence. Gordon v. United
The first is its insistence that dishonesty be determined by reference to the necessary elements of the offense, rather than by the adventitious facts of the offense (as did Castro, also, under its moral turpitude test). The second is that Spearman defined the elements that met its test with a high degree of specificity (as Castro did not). There may be occasional debate as to whether an offense falls within the Spearman honesty standard; there will be a superabundance of debate as to whether an offense falls within the Castro moral turpitude standard (at least, once one moves beyond offenses already within the honesty model, as to which the moral turpitude standard adds nothing beyond what is already accomplished under Spearman).

Thus, the Spearman honesty standard may be convenient. Is the standard, however, conceptually or experientially coherent? Why, for example, do crimes of larceny bear on credibility? Even if they do, why do they alone earn their way into the expanded category of the honesty model? In short, what accounts for the view that such crimes offer some distinctive insight into veracity?

The answer has perhaps been regarded as so self-evident, so intuitively sound, as to require no explanation. For Judge (now Chief Justice) Burger, it was simply a matter of “common human experience” that acts of stealing should be included with “acts of deceit, fraud, [and] cheating” as conduct “universally regarded” as reflecting on a person’s honesty and integrity.

Mason Ladd wrote:

Personal crimes of murder, assault, and mayhem, show a vicious disposition but not necessarily a dishonest one. On the other hand robbery, larceny, and burglary, while not showing a propensity to falsify, do disclose a disregard for the rights of others which might reasonably be expected to express itself in giving false testimony whenever it would be to the advantage of the witness. If the witness had no compunctions against stealing another’s property or taking it away from him by physical threat or force,
it is hard to see why he would hesitate to obtain an advantage for himself or friend in a trial by giving false testimony."109

This is largely a conclusionary statement, and the reasons do not explain what is distinctive about theft. The reasoning could equally apply to all calculated, rather than impulsive, crimes, and in particular, to all self-serving criminal activity undertaken at the expense of others.

Yet this view of theft crimes' special relevance has an undeniable appeal. Parents might, for example, instruct their child that honest people do not steal, without feeling that they were abusing the language. The same parents would be far less likely to say that honest people do not fight, kill, or take heroin. While such conduct might be condemned, the condemnation would be phrased in terms of the heartlessness, destructiveness, or self-destructiveness of the conduct, not its dishonesty.

There is, however, a lack of fit between the category of included offenses and the principle of relevance offered in its justification. For example: Is possession of heroin for sale — the prior conviction involved in Spearman — properly regarded as irrelevant under the honesty standard, as the Spearman majority held? Or, under that very standard, is the offense rightly viewed as "loaded with deception,"110 and one that by its "very nature . . . speak[s] eloquently of the credibility"111 of the person committing it, as urged by the Spearman dissent? Further, is the crime of rape marked by "an element of stealth which bears some rational relationship to dishonesty,"112 as a lower court decided; or as one not "significantly" involving honesty or integrity, as the California Supreme Court later ruled (without explanation)?113 Is robbery a crime of dishonesty because it involves the ele-

109 Ladd, supra note 2, at 180. G. FLETCHER, RETHINKING CRIMINAL LAW § 1.1, at 5 n.5 (1978) informs us that the English Theft Act of 1968, c.60, § 1 defines stealing as an act of one who "dishonestly appropriates property belonging to another" (emphasis added).

110 Spearman, 25 Cal. 3d at 121, 599 P.2d at 82, 157 Cal. Rptr. at 891 (Richardson, J., dissenting); see also United States v. Ortiz, 553 F.2d 782, 784 (2d Cir.), cert. denied, 434 U.S. 897 (1977) ("[A] narcotics trafficker lives a life of secrecy and dissembling in the course of that activity, being prepared to say whatever is required by the demands of the moment, whether the truth or a lie.").

111 Spearman, 25 Cal. 3d at 122, 599 P.2d at 82-83, 157 Cal. Rptr. at 891-92 (Richardson, J., dissenting).


113 People v. Rist, 16 Cal. 3d 211, 221, 222 n.10, 545 P.2d 833, 840, 841 n.10, 127 Cal. Rptr. 457, 464, 465 n.10 (1976); see also Spector, Impeaching the Defendant by His Prior Convictions and the Proposed Federal Rules of Evidence: A Half Step Forward and Three Steps Backward, 1 LOY. U. CHI. L.J. 247, 249 (1970) ("There is absolutely no connection between a conviction for rape and the willingness to tell the
ment of stealth, as the supreme court had held. Or is it a crime with no bearing on credibility because:

There is no deceit in armed robbery. You take a gun, walk out, and put it in a man's face and say, "Give me your money," or walk up to the counter of the cashier and say, "This is a holdup; give me your money." There is no deceit in that. They are not lying. They mean business. They will murder you if you do not do it.

Locating the source of the difficulty is easy. Deception of some sort typically pervades each of these examples, as, indeed, it does most crimes. But the deceptions are of various sorts. Depending on the crime, the deception may occur at different stages and may perform different functions for the perpetrator. What types of deception should count in determining whether the crime bears on credibility? More specifically, is the defining characteristic that a given crime is normally committed covertly, secretive, or by stealth? If so, then, to be sure, larcenous crimes would generally qualify as crimes of dishonesty. But so would most crimes, including rape. In both examples, the victim often is deceitfully maneuvered into a position of vulnerability so that the crime can be perpetrated without interference. But if this were the relevant form of deception, few crimes would be excluded under Spearman since concealment in aid of the consummation of crime is a commonplace feature of premeditated crimes.

Perhaps, however, it is not that kind of concealment that is the touchstone. Perhaps the crucial issue is whether the perpetrator would normally conceal the crime following its commission to avoid apprehension. If so, again, this is hardly a unique feature of larceny, since candid revelation is not a feature of most crimes.

A third possibility is that the relevant concealment is that which the perpetrator employs to facilitate her retention of the spoils of the crime. If so, larcenous crimes are indeed a special case. They typically involve deception not only to avoid interference, apprehension, or punishment, but also to bolster the criminal's effective "title" to the stolen property by falsely holding it out as her own after the crime. But again, why is this form of deception especially important for impeachment purposes?

Perhaps, finally, the fact that legitimately distinguishes the larcenous

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114 See supra note 105 and accompanying text.
116 See People v. Rollo, 20 Cal. 3d 109, 126, 569 P.2d 771, 780, 141 Cal. Rptr. 177, 186 (1977) (Richardson, J., dissenting) (solicitation of murder relevant to credibility since it consists of "secret, conspiratorial conduct").
crimes is that they include as a *necessary element* the intent to steal. But this simply states the issue: Why is an intent to steal sufficient to render the crime relevant to credibility but not, for example, an intent to commit rape?

The answer provided by *Spearman* utterly begged the question. It simply declared as a self-evident truth that any crime marked by an intent to steal counted as a crime of dishonesty and that others did not.¹⁷

If theoretical coherence is lacking, the practical importance of including convictions for larcenous crimes among those relevant to credibility is considerable. The number of convictions for crimes within the narrow veracity model is small; the additional number embraced within the honesty model — the larcenous crimes — is large.¹⁸ Moreover, it is primarily minority group members who accumulate the commonest

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¹⁷ *But see* J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 609[04], at 609-72 to -73 and cases cited in nn. 14-18.

¹⁸ The following statistics from *BUREAU OF CRIMINAL STATISTICS AND SPECIAL SERVICES, CALIFORNIA DEPARTMENT OF JUSTICE, DIVISION OF LAW ENFORCEMENT, CRIME AND DELINQUENCY IN CALIFORNIA 111* (1980) (Table 31, Felony Arrests Reported) are suggestive:

Total felony arrests reported during the year: 372,435

Of this total, crimes probably relevant to credibility under the *Spearman*-honesty model because they possess a larcenous element, but not relevant under the narrower veracity model, include robbery (26,715), kidnapping (2943) (at least to the degree that such crimes were for the purpose of ransom), burglary (84,160) (to the degree that an intent to steal was present), theft (51,047), motor vehicle theft (29,514): 193,929 (maximum)

Crimes probably relevant to credibility under both the *Spearman*-honesty model and the narrower veracity model, because the crime employs falsehood, lying or deceit as a definitional element, include forgery, check offenses, credit card offenses (11,578), and "other" (14,432) (to whatever degree this category may embrace crimes crimes of nonveracity): 26,010 (maximum)

The statistics suggest that as many as eight of the nine crimes admissible under the *Spearman*-honesty model may be inadmissible under the veracity model. Although the categories employed do not precisely correspond to either the veracity or honesty models, and the information concerns total arrests, rather than convictions, the conclusion can still be drawn from these statistics that the *Spearman*-honesty model sharply expands potential admissibility compared to what would be allowed under the veracity model.
types of larceny convictions — theft, robbery, and burglary.\textsuperscript{119} Indeed, as a matter of social reality, impeachment by prior convictions is in effect a mechanism largely employed against minority group members when they once again find themselves prisoners on trial.

3. The Global (Moral Turpitude) Model

The global model regards the segmentation of character into tight compartments as artificial and invalid. Advocates of this model view distinctions between veracity and honesty on the one hand, and general character on the other, as exaggerated. They reason that a criminal past bespeaks bad character and that bad character implies an attenuated commitment to truthfulness. So, at any rate, jurors should be permitted to conclude. At the hands of the most uncompromising advocates of this view, any and all prior convictions would pass the test of relevance. No argument to the contrary would be heard.\textsuperscript{120} Any "felony offense necessarily bears on one’s credibility regardless of the nature of

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|c|c|}
\hline
\textbf{Crimes and number} & \textbf{White} & \textbf{Hispanic} & \textbf{Black} & \textbf{Other} & \textbf{Total Non-White} \\
\textbf{(larcenous element)} & & & & & \\
\hline
Robbery (26,715) & 24.3\% & 26.3\% & 47.4\% & 2\% & 75.7\% \\
Burglary (84,160) & 47.7 & 25.3 & 24.9 & 2 & 52.3 \\
Theft (51,047) & 48 & 21.6 & 28.2 & 2.2 & 52 \\
Motor Vehicle Theft (29,514) & 40 & 27.4 & 30.7 & 2 & 60.1 \\
Kidnapping (2493) & 38.2 & 29.5 & 29.5 & 2.8 & 61.8 \\
\hline
\textbf{Crimes and number} & & & & & \\
\textbf{(lying or deceit)} & & & & & \\
\hline
Forgery, check offenses, & 52.1 & 13.3 & 32.4 & 2.2 & 47.9 \\
credit card offenses (11,578) & & & & & \\
Other (14,432) & 52 & 20.4 & 25.2 & 2.4 & 48 \\
\hline
\end{tabular}
\caption{Arrest Statistics for 1980}
\end{table}

\textsuperscript{119} Again, viewing the arrest (rather than conviction) statistics for 1980, see supra note 118, the following picture emerges:

\textsuperscript{120} Such is the view embraced by Justice Lucas in Castro, 38 Cal. 3d 301, 323, 696 P.2d 111, 125, 211 Cal. Rptr. 719, 733 (1985) (concurring and dissenting); see also People v. Woodard, 23 Cal. 3d 329, 343-45, 590 P.2d 391, 399-401, 152 Cal. Rptr. 536, 544-46 (1979) (Clark, J., dissenting). It is too difficult to make refined, individualized decisions as to which are probative and which are not. See id. at 343-44, 590 P.2d at 400, 152 Cal. Rptr. at 545 (quoting B. Witkin, CAL. EVIDENCE § 1243, at 1146 (2d ed. 1966)). Therefore, as a matter of judicial convenience, all convictions should be admitted and the jury permitted to weigh evidential value. See J. Weinstein & M. Berger, supra note 2, ¶ 609[02], at 609-54 to -55. For the conflicting views in Congress over whether all felony convictions should have been made automatically admissible under the Federal Rules of Evidence or made subject to discretionary exclusion, see id. at 609-4 to -40. See generally id. ¶¶ 609[01]-609[03].
that offense."121

This, of course, is not the point of view articulated by the majority in *Castro*. In adopting the moral turpitude test, it emphasized that that category embraced something less than every possible offense. Judging from the sparse hints in the *Castro* plurality opinion, the following convictions would be disfavored for impeachment purposes: An ancient and fairly minor conviction;122 conspiracy to tattoo a person under 18;123 and simple possession of heroin.124

Convictions of the following sort, however, received at least tentative endorsement in *Castro* under the moral turpitude standard: Possession of heroin for sale;125 "child molestation, crimes of violence, torture, brutality and so on";126 and crimes which are "assaultive in nature."127 The link from such crimes to credibility, the plurality said, is "not so irrational that it is beyond the power of the People to decree that in a proper case the jury must be permitted to draw it, if it wishes, and the 'no limitation' language of subdivision (f) makes it abundantly clear that the People so decreed."128 Such crimes are potentially admissible because they reflect "moral turpitude," a "general readiness to do evil," "moral depravity," or "bad character."129

Further insight concerning the nature of, and justification for, this standard may come from the dissents of Justice Richardson in several pre-Proposition 8 cases. His outlook appears to have been similar to that of the *Castro* plurality; furthermore, the *Castro* plurality assumed that the dissenters, Justice Richardson prominently among them, had been vindicated by the adoption of article I, section 28.130

Justice Richardson had argued that crimes such as possession of her-


122 The court's example was the impeachment of an elderly victim of a mugging for a youthful conspiracy to disturb the peace, *id.* at 309, 696 P.2d at 115, 211 Cal. Rptr. at 723, though such offense was apparently excludable not because it fell outside of the moral turpitude category, but rather on Evidence Code § 352 grounds.

123 *Id.* at 314 n.7, 696 P.2d at 119 n.7, 211 Cal. Rptr. at 727 n.7.

124 The *Castro* majority held this prior conviction irrelevant to credibility. *Id.* at 317, 696 P.2d at 121, 211 Cal. Rptr. at 729.

125 The admissibility of which was affirmed in *Castro*, as manifesting an "intent to corrupt others." *Id.*

126 *Id.* at 315, 696 P.2d at 119, 211 Cal. Rptr. at 727.

127 *Id.* (quoting People v. Rist, 16 Cal. 3d 211, 222, 545 P.2d 833, 840, 127 Cal. Rptr. 457, 464 (1976)).

128 *Id.*

129 *Id.*

130 *Id.* at 307-08, 696 P.2d at 114-15, 211 Cal. Rptr. at 722-23.
oin for sale, solicitation to commit murder, and others, were highly probative on the issue of witness credibility. Even so, he was not a full-fledged member of the global club. He was prepared to draw distinctions as others would not. For him, crimes involving only assaultive behavior or crimes against the public peace were inadmissible. Possession of heroin for sale, on the other hand, was "necessarily... loaded with deception." More fundamentally, he noted: "A jury, if it was permitted to learn, might reasonably question the honesty or veracity and therefore the credibility of those who deliberately and knowingly shun the common standards of decent and legal behavior by choosing to profit from the sale of heroin." He thus anticipated the Castro court's decision affirming the relevance of convictions of possession of heroin for sale to credibility. The commission of this crime represented a general rejection of societal norms. Its bearing on credibility might have been indirect, but its relevance to credibility was no less.

Even if Justice Richardson's general theory of relevance were accepted, as the Castro plurality seemed to do, uncertainties as to the scope of the crimes to which it applies — or in Castro's terms, the scope of the moral turpitude category — is no small matter. The problem with Justice Richardson's approach, however, is more fundamental. Even if his relevance theory was valid, the use of the convictions embraced by this view would create a broad danger of prejudice. The danger, ironically, is underscored by the very theory offered in support of this expansive model. That theory is that any criminal convictions demonstrating a lack of integrity, ruthless self-seeking, or will-

133 See supra note 120.
134 See People v. Spearman, 25 Cal. 3d 107, 120-21, 599 P.2d 74, 81, 157 Cal. Rptr. 883, 890 (1979) (crimes of violence, per se, do not reflect on honesty or credibility) (Richardson, J., dissenting); J. WEINSTEIN & M. BERGER, supra note 2, ¶ 609[02], at 609-55 ("relationship between crimes of violence and truthtelling is particularly tenuous"); Ladd, supra note 2, at 180 ("Personal crimes of murder, assault, and mayhem, show a vicious disposition but not necessarily a dishonest one."). But see People v. Woodard, 23 Cal. 3d 329, 343-45, 590 P.2d 391, 399-401, 152 Cal. Rptr. 536, 544-46 (1979) (Clark, J., dissenting).
136 Id.
137 See supra note 81 and accompanying text.
ingness to “shun the common standards of decent and legal behavior” show also that the defendant is likely to place a low value on telling the truth. Lawlessness of this sort and untruthfulness are thus inseparable. Perhaps so, but does not this very theory make such lawlessness good, or even better, evidence that the defendant had the propensity to commit the charged crime? Although the limiting instruction purports to bar such use, the limitation is almost impossible for the jury to understand or to follow. It attempts to preclude a use that is supported by the very theory deployed to demonstrate the conviction’s relevance to credibility. The problem is not merely that the jury is apt to use the evidence for extraneous, unintended, and improper purposes. Rather, in using it precisely for the intended purpose — to reveal the defendant’s indifference to social and legal norms — the jury will necessarily use it as evidence of criminal propensity. The jury is invited to reason that if the defendant sustained this prior conviction, she would not hesitate to lie to cover her tracks at trial. If the jurors take that step, how can they resist, logically or psychologically, the next step and reason that, by the same token, the defendant would not hesitate to commit the crime for which she now stands charged?

This danger of prejudice is, then, not an accidental or perverse result of the use of a conviction for a proper limited purpose; it is a virtually inevitable result of the jury’s adoption of the theory endorsed by Castro and articulated so well by Justice Richardson. Almost to a certainty, the jury will conclude from the prior conviction first that the defendant probably committed the charged crime, and derivatively, that she is lying in her present testimony. This is precisely the reverse of the logical progression the law proclaims it wishes the jury to employ in considering prior conviction evidence.

The danger of prejudice is most pronounced under the expansive moral turpitude standard; it is least pronounced under the narrowly defined veracity model. The reason for this is worth examining. It does not primarily lie in the fact that the former category embraces a far greater number of convictions than the latter, though it does. The reason is, rather, that the potential for prejudice is of a different order of magnitude in the two cases. Under the veracity model the danger of runaway jury inferences is fairly muted. When the prior conviction involves nonveracity as a definitional element, one might at least entertain

138 Spearman, 25 Cal. 3d at 121, 599 P.2d at 82, 157 Cal. Rptr. at 891 (Richardson, J., dissenting).
139 For the pattern instruction on this point, see supra note 56.
140 See supra note 43.
the hope that the jury could focus on that feature and understand the judge's instruction that it was to use the conviction to assess veracity and for no other purpose. Such a conviction calls for no intermediate inference of general bad character. But, as already noted, the same can hardly be said of a conviction that demonstrates the defendant's "general readiness to do evil." Having, then, in theory rejected the use of character evidence as a basis for inferring criminal propensity, the moral turpitude approach in effect admits the evidence by reclassifying it as credibility evidence.

Doubtless many believe propensity evidence ought to be admissible and that the general bar against character evidence should be rescinded. Important reasons have until now been deemed sufficient to warrant exclusion of such evidence. These reasons are both instrumental and noninstrumental. The instrumental aspect is well understood. Prior convictions invite the punishment of the defendant for being a bad person. Their use therefore threatens to lower the effective standard of proof and interfere with the instrumental goal of accurate factfinding.

The noninstrumental concern is this: In focusing on the kind of person the defendant is, evidence of past criminality threatens to hold people accountable not merely for what they do, but for what they are. Such use interferes with the goal of treating the defendant as a person on trial only for the charged crime, unencumbered with the burden of coping with prior judgments of wrongdoing. The issue here goes beyond a mere concern about the debasement of the factfinding process. It expresses a view that would have weight even if one could be assured that prior convictions would be given no greater weight than they rationally deserved in assessing guilt. The underlying principle is one of absolution, the belief that once people have paid the price for their prior wrongs they are entitled to a fresh chance and the opportunity to proceed anew. To permit the use of criminality as character evidence represents an important departure from this value.

Decisions regarding the admissibility of character evidence represent a disguised value choice concerning the parts of the defendant's past that are open for review in a criminal prosecution. The general bar on character evidence is an attempt to ensure that the focus is on the charged conduct — on the deed, not the doer. This is not the occasion to redebate the virtues of the general ban on propensity evidence. The point is rather that the objections are too important to be set aside.

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141 Castro, 38 Cal. 3d at 314, 696 P.2d at 119, 211 Cal. Rptr. at 727.
142 See supra note 3.
143 Id.
disingenuously, indirectly, or unwittingly. The exercise of the discretion called for by Evidence Code section 352 seems an appropriate occasion for recognizing the value of permitting previously convicted defendants to commence their lives afresh as they again find themselves defendants in court.

4. The Contextual Model

The contextual model differs from those already considered because its goal is neither per se to broaden nor to narrow the range of admissibility. It calls, rather, for a broader information base in making the decision. It rejects the bare fact of conviction as an abstraction bereft of detail, texture, color, and humanity. Without the contextual qualifiers, the prior conviction is seen as facilitating the stereotypic treatment of the defendant. This model reasons that people compartmentalize their commitment to truthfulness and to honesty in refined ways. These qualities are not wholesale, but retail qualities that require a detailed knowledge of the underlying facts and the motivating circumstances if one is to draw meaningful conclusions concerning the actor's veracity. Relying on the abstract evidence of a conviction runs afoul of an insight we all share since our first exposure to the tales of Robin Hood: the gross identification of an offense can mask vast differences in the meaning of the underlying conduct and in its implications concerning the actor's character. This contextual model is approximated in certain cases and rules. It is, however, rejected under California law, both under Castro and Spearman before it, which made the relevance of prior convictions turn on an abstract inquiry concerning the indispensable elements of the offense in general rather than upon the specific, accidental, facts of the particular offense.

If one is drawn to the contextual model, one confronts the following

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144 The state in Castro made no suggestion that article I, § 28() be read to authorize the use of prior convictions as evidence of the defendant's general criminal propensity, 38 Cal. 3d at 314, 696 P.2d at 118, 211 Cal. Rptr. at 726, and the Castro plurality expressed no such justification for admitting prior convictions. Id.


146 But see People v. Fries, 24 Cal. 3d 222, 235, 594 P.2d 19, 28, 155 Cal. Rptr. 194, 203 (1979) (Richardson, J., dissenting) ("Robin Hood aside, I never heard of an honest robber.").

147 See, e.g., United States v. Papia, 560 F.2d 827, 847 (7th Cir. 1977); United States v. Hayes, 553 F.2d 824 (2d Cir. 1977); People v. Sorge, 301 N.Y. 198, 93 N.E.2d 637 (1950).

148 See supra notes 41-42 and accompanying text.
dilemma. The proscription against inquiry into the underlying facts is in part for the defendant's benefit. But the effort to serve this interest results in substituting the formal fact of conviction for the texture of the underlying conduct, except insofar as the defendant elects to explain the factual context. This option again presents the defendant with a "Hobson's choice." An exhaustive inquiry into the detailed facts may unduly emphasize collateral issues surrounding the prior conviction; but if the defendant chooses not to disclose the facts surrounding it, the jury is presented with only the stark fact of conviction, inviting speculation to the defendant's prejudice.

C. Conclusion: The Absolute Ban of Prior Convictions for Impeachment Purposes as a Fifth Model

The foregoing discussion suggests problems with the theoretical underpinnings of the various models used for assessing the relevance of prior conviction evidence, including those versions embodied in Castro, in Spearman, and in the unlimited global model, which would admit all felony convictions without exception. This is so even if one believes that properly screened prior convictions in principle are capable of providing important insight into the credibility of witness-defendants.

The case, however, for admitting any prior convictions against a criminal defendant is poor. Contrary to usual assumptions, prior convictions lack essential relevance, given the special posture of the testifying defendant; and the inferential leap from past convictions to current credibility is fraught with danger. Further, the more expansive the definition of the scope of relevant convictions, the greater the danger. The more the theory of relevance does not turn on some discrete element of untruthfulness (as under the veracity model), the more its relevance must depend on inferences about the defendant's bad or antisocial tendencies. This makes it nearly inevitable that the jury will draw inferences from the defendant's bad or antisocial character extending to her primary conduct. Indeed, it seems that the principal value of convictions lies precisely in the fact that they may provide at least as good evidence of criminality as of credibility. The use of prior convictions as criminal propensity evidence, forbidden in theory, is then received parading as credibility evidence.

If one were writing on a clean slate, the best solution would be to bar all prior convictions as impeachment evidence in the special context

149 People v. Rollo, 20 Cal. 3d 109, 120, 569 P.2d 771, 776, 141 Cal. Rptr. 177, 182 (1977); see supra note 62.
of the witness-defendant. The slate, however, is not clean. Fortunately, the power of trial courts to exercise the discretion called for by Evidence Code section 352 provides ample protection, if the courts are permitted to take account of all the ways in which prior conviction evidence may be problematic and dangerous and if they are adequately monitored in this effort by appellate review.