

People v. Rollo:¹ Admissibility of Prior Felony Convictions

The supreme court, confronted by a recurrent evidentiary problem, reaffirmed the duty of trial courts, under the rule of *People v. Beagle*,² to exclude evidence of prior felony convictions for impeachment purposes when its probative value on credibility is outweighed by the risk of undue prejudice. The procedure adopted by the trial court in *People v. Rollo* commenced with an evaluation of whether the prior felony evidence would unduly prejudice the defendant. Having found such prejudice, the court then allowed the fact of the prior conviction, but not the nature of the prior crime, to be brought out during cross-examination. The supreme court held that this novel procedure circumvented the balancing test mandated by *Beagle* and constituted an abuse of judicial discretion.³

The court's opinion is summarized in Part I of this Note. Part II examines the *Beagle* weighing process and compares it with the "compromise" procedure used in *Rollo*, demonstrating how the purported compromise accomplishes none of its intended results. Part III discusses the current pressure on the supreme court, generated by inconsistent applications of the *Beagle* requirements, to supplant completely the trial court's discretionary power with strict exclusionary guidelines. Part IV then explores the possibility of a negative legislative reaction to such judicial rulemaking. The Note concludes by arguing that, despite the possible legislative reaction, the court must not abandon its responsibility to establish workable standards for the protection of individual rights in the criminal justice system.

I

THE OPINION

Defendant Rollo was charged with receiving stolen property. At the trial, the prosecutor moved to introduce, for impeachment pur-

1. 20 Cal. 3d 109, 569 P.2d 771, 141 Cal. Rptr. 177 (1977) (Mosk, J.).

2. 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1972). The unanimous *Beagle* court established the rule that trial courts have discretion to exclude evidence of prior felony convictions offered as impeachment based on the exclusionary rule of CAL. EVID. CODE § 352 (West 1966). That section provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

3. 20 Cal. 3d at 120, 569 P.2d at 776, 141 Cal. Rptr. at 182.

poses, evidence that Rollo had previously been convicted of the crime of soliciting another to commit murder.⁴ The prosecutor relied on Evidence Code section 788,⁵ which authorizes admission of evidence of prior felony convictions for purposes of impeachment. Defense counsel objected to the proposed admission by making "a *Beagle* motion" based on Evidence Code section 352—that is, by arguing that the prior conviction was highly prejudicial and had little probative value on the issue of Rollo's veracity. The court, despite its acknowledgment that admission of the prior murder solicitation would be prejudicial, ruled that the prosecutor would be allowed to ask Rollo whether he had ever been convicted of a felony. Then, in an apparent attempt at compromise between competing interests, the court restricted any prosecution inquiry into the nature of that felony. In response to defense counsel's protests that the jury might make the highly prejudicial inference that the prior crime was the same as that for which defendant was on trial, the judge suggested "that counsel could 'straighten out' the matter on redirect examination if he so chose."⁶ Defense counsel decided not to avail himself of this "opportunity." At the close of trial, the court instructed the jury to use the evidence of the prior felony conviction only for determining the credibility of the defendant's testimony.

The supreme court held that the trial court had erred in permitting the prosecution to adduce the prior felony evidence and in forcing the defendant to choose whether to disclose the nature of the crime. The court affirmed the conviction, however, holding that under all the circumstances the error was not prejudicial.⁷

The court in *Rollo* restated the procedures laid down in earlier cases⁸ for determining the admissibility of prior convictions. When presented with a timely objection to the introduction of such evidence for impeachment purposes, a trial court must determine both the probative value and the prejudicial effect of the evidence. The judge must then weigh the two factors and exclude the evidence of the prior conviction if its probative value on the issue of credibility is substantially outweighed by the danger of undue prejudice.⁹

4. CAL. PENAL CODE § 653f (West Supp. 1979).

5. CAL. EVID. CODE § 788 (West 1966) provides: "For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony, unless . . ." (four exceptions follow which are not relevant here).

6. 20 Cal. 3d at 115, 569 P.2d at 773, 141 Cal. Rptr. at 179.

7. Joined by Justice Clark, Justice Richardson dissented from the majority's invalidation of the trial court's impeachment procedure. See note 44 *infra*.

8. See *People v. Rist*, 16 Cal. 3d 211, 545 P.2d 833, 127 Cal. Rptr. 457 (1976); *People v. Antick*, 15 Cal. 3d 79, 539 P.2d 43, 123 Cal. Rptr. 475 (1975); *People v. Beagle*, 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1972).

9. 20 Cal. 3d at 116, 569 P.2d at 774, 141 Cal. Rptr. at 180.

Although the trial court in *Rollo* had correctly determined that disclosure of the serious prior offense would present a substantial danger of undue prejudice,¹⁰ it had not, in the majority's opinion, ruled on the probative value of the murder solicitation charge to Rollo's credibility as a witness. Without such a determination, the court was "unable to engage in the weighing process implicit in section 352 and mandated by the *Beagle* analysis."¹¹ In holding that the impeachment procedure adopted by the lower court was erroneous, the court specifically disapproved of appellate court cases that suggested or supported this procedure.¹²

II

THE *BEAGLE* WEIGHING PROCESS

The court in *Beagle* reasoned that section 788 of the Evidence Code did not establish a mandatory rule; rather, the exclusionary rule of Evidence Code section 352 gave the trial courts discretion to exclude evidence of prior felony convictions.¹³ While refraining from establishing "rigid standards to govern [the] exercise of judicial discretion,"¹⁴ the *Beagle* court adopted certain factors enunciated in *Gordon v. United States*¹⁵ to guide trial courts in the balancing process implied by section 352.

Under the *Beagle* scheme, the court must initially assess the degree of dishonesty or untruthfulness implied by the prior conviction. Crimes that directly involve dishonesty or false statements are most relevant to the veracity of the witness.¹⁶ The temporal propinquity or remoteness of the conviction is a second factor that tends to show

10. The supreme court noted that the jury might draw the impermissible inference that a defendant who had once solicited the commission of a murder had demonstrated "such a defect of character or criminal disposition that he was likely to be capable of any offense and in particular was probably guilty of the charge now laid against him." *Id.* at 116, 569 P.2d at 774, 141 Cal. Rptr. at 180; cf. CAL. EVID. CODE §§ 787, 1101 (West 1966) (generally, evidence of a person's prior specific acts is not admissible to prove that on a particular occasion he acted in conformity with the character trait established by the prior specific acts).

11. 20 Cal. 3d at 116-17, 569 P.2d at 774, 141 Cal. Rptr. at 180.

12. See *People v. Roberts*, 57 Cal. App. 3d 782, 790, 129 Cal. Rptr. 529, 534 (2d Dist. 1976); *People v. Taylor*, 46 Cal. App. 3d 513, 536, 120 Cal. Rptr. 762, 777 (2d Dist. 1975); *People v. Obie*, 41 Cal. App. 3d 744, 752-53, 116 Cal. Rptr. 283, 287-88 (1st Dist. 1974).

13. See note 2 *supra*.

14. 6 Cal. 3d at 453, 492 P.2d at 8, 99 Cal. Rptr. at 320.

15. 383 F.2d 936, 940-41 (D.C. Cir. 1967) (Burger, J., now Chief Justice of the Supreme Court of the United States).

16. One commentator has remarked that although crimes of deceit may be more probative of a general propensity to lie, that fact nevertheless "seems irrelevant" since the pressures of a criminal trial would cause most guilty defendants to acquire such propensities quite readily. Comment, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763, 778 (1961) [hereinafter cited as *Other Crimes Evidence*].

probative value. Remote prior convictions are arguably less indicative of the witness' present propensity for falsehood.¹⁷

After this probative value analysis, the court must examine two elements that would tend to create a highly prejudicial effect against the witness, particularly one who is a defendant in a criminal trial.¹⁸ First, the similarity between the prior offense and the crime with which the defendant-witness is currently charged is critical in determining possible prejudice. The jury will more likely use evidence of a similar or identical prior conviction to draw the improper inference that if the defendant committed the crime once, he is likely to commit the same offense again.¹⁹ Finally, the court must consider how important it is that the jury hear the defendant's story. Even when the probative value of the prior conviction otherwise outweighs the prejudicial effect of its admission, the prior conviction should be omitted if its inclusion would keep the defendant from testifying.²⁰ The defendant who does not take the stand runs the risk of having the jury infer guilt from his silence.²¹

In *People v. Antick*,²² the supreme court established a fifth factor in the balancing process: a consideration of the strength of the prosecutor's case. The weaker the case against the defendant, the more the scale should be tipped against admission of the prior conviction. The court reasoned that where, for example, a prosecution is based solely on circumstantial evidence and the prior conviction sought to be introduced is similar to the crime for which the defendant is charged, the probability for misuse of the prior conviction increases. In this context, the jury is more likely to view the conviction evidence "as proof that defendant is the type of person willing to participate in unlawful activity and therefore is likely to have committed the crimes in question."²³

17. 6 Cal. 3d at 453, 492 P.2d at 8, 99 Cal. Rptr. at 320.

18. See *People v. Woodard*, 23 Cal. 3d 329, 590 P.2d 391, 152 Cal. Rptr. 536 (1979), where the court held that the rule of *Beagle* applies "whenever a party—plaintiff or defendant, in a civil or criminal case—moves for the exclusion of a witness' prior felony conviction." *Id.* at 338-39, 590 P.2d at 396, 152 Cal. Rptr. at 541.

19. 6 Cal. 3d at 453, 492 P.2d at 8, 99 Cal. Rptr. at 320.

20. *Id.* See also C. McCORMICK, EVIDENCE § 43, at 94 (1954): "On balance it seems that to permit . . . one accused of crime to tell his story without incurring the overwhelming prejudice likely to ensue from disclosing past convictions, is a more just, humane and expedient solution"

21. Studies of wrongfully convicted defendants have indicated that the innocent as well as the guilty are induced to remain silent by the threat of prior felony impeachments. See, e.g., E. BORCHARD, CONVICTING THE INNOCENT xvi (Da Capo Press ed. 1970).

22. 15 Cal. 3d 79, 539 P.2d 43, 123 Cal. Rptr. 475 (1975). In *Antick*, the trial court admitted evidence of two prior forgery convictions—seventeen and nineteen years old—in defendant's trial for burglary. The supreme court held that the trial court abused its discretion.

23. *Id.* at 98, 539 P.2d at 56, 123 Cal. Rptr. at 488. Another case clarifying the *Beagle* criteria is *People v. Rist*, 16 Cal. 3d 211, 545 P.2d 833, 127 Cal. Rptr. 457 (1976). In *Rist*, the trial court's ruling to admit evidence of defendant's five-month-old robbery conviction was held to be

The compromise procedure used by the trial court in *Rollo* was an attempt to avoid the dilemma posed by *Beagle*'s "hard choice" between total exclusion or admission of the prior felony evidence. On the one hand, there is the likelihood of prejudicial impact on the jury if it is informed of the nature of the prior conviction. On the other hand, if evidence of the prior conviction were ruled inadmissible, the defendant's testimony could be surrounded by a "false aura of veracity."²⁴ In reaffirming its commitment to *Beagle*'s "hard choice," the supreme court correctly demonstrated that the trial court's purported compromise can only mislead the jury and gravely prejudice the defendant.

A. The Jury

The jury must determine the credibility of every witness providing testimony in a trial. This judgment as to truthfulness is typically informed by such factors as the witness' demeanor on the stand and inconsistent statements.²⁵ In the case of a witness with a prior felony conviction, the jury may also consider this prior conviction in its assessment of the witness' general credibility.²⁶ In order to ensure the proper use of this evidence by the jury, the trial judge, after ruling that a prior felony conviction is admissible for impeachment purposes, must instruct the jury as to the limited use of this evidence.²⁷

In ruling on the trial court's unique procedure in *Rollo*, the supreme court focused on the jury's role as the final arbiter of the probative effect of such a conviction. The court observed that "it is that body [the jury] which is called upon to determine the credibility of the defendant who testifies in his own behalf, and one of the ingredients of its decision-making process will be the degree of persuasiveness it finds in the prior conviction."²⁸ Thus, the court reasoned, without knowledge of the precise prior offense which is offered to impeach the defendant, the jury is unable to use the conviction for its single permissible purpose—as a factor relevant to its determination of defendant's credibility as a witness.²⁹

reversible error. The defendant was here again charged with robbery, and the supreme court noted that other, dissimilar prior convictions were available for impeachment.

24. *People v. Beagle*, 6 Cal. 3d 441, 453, 492 P.2d 1, 8, 99 Cal. Rptr. 313, 320 (1972).

25. See Note, *Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime*, 78 HARV. L. REV. 426, 440 (1964) [hereinafter cited as *Procedural Protections*]. See also Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166, 167-71 (1940).

26. See CAL. EVID. CODE §§ 787, 788 (West 1966).

27. See CALJIC No. 2.23 (4th rev. ed. 1979).

28. 20 Cal. 3d at 118, 569 P.2d at 775, 141 Cal. Rptr. at 181.

29. A critical issue never addressed by the supreme court is the jury's ability to follow the instruction limiting the use of the prior felony evidence. The legal commentary is replete with acknowledgments of the highly prejudicial effect such evidence has on the jury. See generally

B. *The Defendant*

The primary evil of the trial court's impeachment procedure in *Rollo* is its failure to safeguard the defendant's right to a fair trial. The dangers inherent in a system that permits the jury to speculate freely as to the nature of the defendant-witness' prior offense are readily apparent. Such speculation may lead the jurors to imagine, as *Rollo's* counsel argued, that the defendant's prior conviction is similar to or identical with the charge for which he is on trial, or "that the conviction was for an offense especially damaging to the defendant's credibility, such as perjury."³⁰ A jury that is unable to judge the defendant's credibility from the nature of the prior conviction might also draw the improper inference that the conviction "at least" shows that the defendant has a criminal disposition.³¹

The trial court's proposed cure—allowing the defendant to disclose the nature of the prior felony—amounted to an illusory choice between nondisclosure, with the resultant improper speculation by the jury, or disclosure of a highly prejudicial prior offense which may have little or no bearing on the defendant's veracity as a witness. The net effect of the trial court's compromise, then, was not only to remove from the trial judge the "hard choice" required by *Beagle*, but also to shift to the defendant an even harder choice—harder in that the defendant must decide from a position in which he is already prejudiced whether to run the risk of even further prejudice.

Procedural Protections, *supra* note 24; Ladd, *supra* note 24; *Other Crimes Evidence*, *supra* note 15, at 763; Note, *Impeaching the Accused by His Prior Crimes—A New Approach to an Old Problem*, 19 HASTINGS L.J. 919 (1968).

Jury studies have demonstrated that use of prior crimes evidence to impeach a defendant's credibility adversely affects the accused's chance for acquittal. See H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 177-81 (1966); see also Letter from Dale W. Broeder to the Yale Law Journal (March 14, 1960), cited in *Other Crimes Evidence*, *supra* note 15, at 777. Another study found that 43% of the judges and 98% of the attorneys who responded to a nationally distributed questionnaire answered in the negative a question regarding the jury's ability to follow the limiting instruction to use the prior crimes evidence for purposes of evaluating the defendant's credibility and not as evidence of guilt. See Note, *To Take the Stand or Not To Take the Stand: The Dilemma of the Defendant With a Criminal Record*, 4 COLUM. J.L. & SOC. PROB. 215, 218 (1968).

Some courts have themselves recognized that it is foolhardy to believe that the factfinder will be able to follow the limiting instruction. See, e.g., *Bruton v. United States*, 391 U.S. 123, 126 (1968); *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (dictum); *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932) (dictum). Although the California Supreme Court has not explicitly addressed this problem on its own terms, the ineffectiveness of the limiting instruction may be an unstated factor in the court's gradual narrowing of trial court discretion to admit prior felony evidence. See text accompanying notes 31-44 *infra*.

30. 20 Cal. 3d at 119, 569 P.2d at 776, 141 Cal. Rptr. at 182.

31. *Id.* at 116, 569 P.2d at 774, 141 Cal. Rptr. at 180.

III

POST-BEAGLE PRESSURE FOR JUDICIAL RULE-MAKING

Unfortunately, the number of prior conviction impeachment cases that reach the supreme court indicate that "*Beagle* has not been adhered to in a number of reported decisions."³² The continued avoidance of the *Beagle* criteria by these recalcitrant trial courts and the courts of appeal has a number of causes: differing attitudes among trial judges as to what constitutes prejudice to a criminal defendant; the difficulty of establishing meaningful criteria to guide the trial courts in their exercise of discretion; and the absence of agreement as to which crimes indicate a propensity for falsehood.³³ In response to these repeated departures from the rule of *Beagle*, the supreme court has gradually narrowed the trial court's discretion to admit prior felony evidence.³⁴

The supreme court recently heard argument in two criminal appeals arising from the trial courts' allegedly erroneous refusals to exclude evidence of prior convictions for the same offense.³⁵ Both defendants refused to testify after their *Beagle* motion was denied. In light of the court's direction since *Beagle*, it is possible that the court will use the opportunity provided by these cases to announce a firm rule requiring trial courts to exclude evidence of prior convictions for the same offense.

In *People v. Spearman*,³⁶ the court of appeal affirmed the defendant's conviction for possession of heroin for sale. The court upheld the trial court's adverse ruling on the *Beagle* motion on the ground that no dissimilar prior conviction was available for impeachment. The appellate court's loose characterization of the trial court's exercise of discretion as being "within the bounds of reason" indicates an all too common failure to respond seriously to the critical issues raised by the appeal, namely, the prejudicial effect on the defendant if evidence of the identical prior conviction is admitted and the prejudice suffered by the defendant if, to avoid the danger of the prior conviction's admis-

32. *People v. Rist*, 16 Cal. 3d 211, 221, 545 P.2d 833, 840, 127 Cal. Rptr. 457, 464 (1976). Not all lower courts have failed to take the supreme court's pronouncements seriously. See, e.g., *People v. Nelson*, 63 Cal. App. 3d 11, 133 Cal. Rptr. 552 (4th Dist. 1976).

33. For an analysis of the types of crimes which shed light on the credibility of the offender, see 3A J. WIGMORE, EVIDENCE §§ 922-924 (Chadbourn rev. 1970); Ladd, *supra* note 24, at 178-82. See also note 15 *supra*.

34. See, e.g., *People v. Antick*, 15 Cal. 3d 79, 539 P.2d 43, 123 Cal. Rptr. 475 (1975); *People v. Rist*, 16 Cal. 3d 211, 545 P.2d 833, 127 Cal. Rptr. 457 (1976).

35. *People v. Spearman*, 136 Cal. Rptr. 776 (2d Dist. 1977), *hearing granted*, Cr. 20024 (June 22, 1977); *People v. Fries*, 136 Cal. Rptr. 759 (5th Dist. 1977), *hearing granted*, Cr. 20031 (June 23, 1977).

36. 136 Cal. Rptr. 776 (2d Dist. 1977), *hearing granted*, Cr. 20024 (June 22, 1977).

sion, he elects not to testify.³⁷

In the companion case of *People v. Fries*,³⁸ the court of appeal reversed the defendant's conviction on an armed robbery charge after the trial judge refused to exclude evidence of a conviction for the same offense suffered nineteen months earlier. The appeals court noted the trend in the cases following *Beagle* toward "limiting [the] discretion [mandated by California Evidence Code section 352] by setting forth and solidifying a series of guidelines for the proper balancing of the [*Beagle*] factors."³⁹ The court also relied on the "virtual elimination" by the supreme court in *People v. Rist*⁴⁰ of the trial court's discretion to admit similar prior convictions because of their highly prejudicial impact.⁴¹ *Rist* was further cited for the proposition that a defendant's failure to make an offer of proof as to the content of his proffered testimony does not excuse the judge from his duty to exclude the prior offense if the probative value does not exceed the danger of undue prejudice. The *Fries* court concluded, by analogy, that the defendant's failure to show affirmatively that the threat of impeachment was the reason he elected not to testify does not relieve the trial judge of his duty to decide the admissibility issue.⁴²

Despite the careful application of the *Beagle* criteria by the appellate court in *Fries*, the *Spearman* case is a more typical example of numerous cases in which the *Beagle* criteria have been either ignored or accorded minimal consideration.⁴³ The supreme court may well conclude that the large number of appeals resulting from the nonuniformity of lower court decisions justifies the formulation of stricter rules less susceptible to judicial side-stepping. With the opportunity presented by the *Spearman* and *Fries* cases, the court will hope-

37. Even more importantly, perhaps, the appellate court in *Spearman* did not present a convincing argument on the relevancy of the heroin sale conviction to the defendant's credibility as a witness. See *id.* at 778.

38. 136 Cal. Rptr. 759 (5th Dist. 1977), *hearing granted*, Cr. 20031 (June 23, 1977).

39. *Id.* at 761.

40. 16 Cal. 3d 211, 545 P.2d 833, 127 Cal. Rptr. 457 (1976).

41. 136 Cal. Rptr. at 761.

42. *Id.* at 762-63.

43. Despite the trial court's apparent failure to accord sufficient weight to the serious prejudicial effect of admitting the identical prior conviction in *Spearman*, the conviction in that case may nevertheless be upheld. This outcome would result because of the fifth factor in the discretionary balancing process, that is, the strength of the prosecutor's case. The court of appeal took note of this factor and was obviously influenced by the strong evidence presented against the defendant. Although this fifth factor analytically should only be used to justify *exclusion* of the prior felony evidence and thus should not excuse the trial court's admission of the prior conviction in *Spearman*, this same factor—the strength of the prosecutor's case—could be relied on by the supreme court to find harmless error in the *Beagle* violation.

In *Fries*, however, the evidence was wholly circumstantial; the admission of the prior conviction was undoubtedly highly prejudicial and possibly determinative of the outcome of the case.

fully take the last small step and "explicitly stat[e] an absolute rule"⁴⁴ prohibiting impeachment by a similar prior conviction.⁴⁵

IV

POSSIBLE LEGISLATIVE REACTION

The California Assembly recently defeated Assembly Bill 2000,⁴⁶ which would have codified the impeachment principles established by the supreme court decisions extending from *Beagle* to *Rollo*. One week prior to this action, however, the Assembly Criminal Justice Committee defeated AB 691, the Honesty in Impeachment Act.⁴⁷ That bill would have amended Evidence Code section 788 to permit impeachment of witnesses, including criminal defendants, by *any* prior felony conviction. The arguments put forth in support of AB 691 parallel the views stated by members of Congress during hearings on amendments to District of Columbia Code section 14-305,⁴⁸ then the equivalent of California Evidence Code section 788.

Section 14-305 received judicial treatment similar to that given section 788 in California. In *Luck v. United States*,⁴⁹ the District of Columbia Circuit Court of Appeals held that the District of Columbia statute did not require the trial court "to allow impeachment by prior conviction every time a defendant takes the stand in his defense."⁵⁰ Rather, the statute "leaves room for the operation of a sound judicial discretion to play upon the circumstances as they unfold in a particular case"⁵¹

The post-*Luck* history is remarkably similar to California's post-*Beagle* experience.⁵² A number of appeals challenged the trial judge's

44. 136 Cal. Rptr. at 761.

45. Justice Richardson, who dissented from the majority's opinion in *Rollo*, opposes the court's displacement of trial court discretion in this area. In his view, the court's recent decisions represent a "systematic dismantling of the principle, legislatively established in section 788, that a criminal can be impeached by proof of conviction of a felony. . . . [B]y continuously narrowing trial court options, [the court] has rather effectively erased section 788 from the Evidence Code." *People v. Rollo*, 20 Cal. 3d 109, 129, 569 P.2d 771, 782, 141 Cal. Rptr. 177, 188 (1977).

46. See 2 CAL. LEGISLATURE, ASSEMBLY FINAL HISTORY 1200 (1978).

47. See 1 *id.* at 484.

48. In relevant part, D.C. CODE ANN. § 14-305 (1967) provided:

A person is not incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime. The fact of conviction may be given in evidence to affect his credibility as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him is not bound by his answers as to such matters. . . .

The current statute on impeachment of witnesses by evidence of prior convictions of criminal offenses is found in D.C. CODE ANN. § 14-305 (1973).

49. 348 F.2d 763 (D.C. Cir. 1965).

50. *Id.* at 768.

51. *Id.*

52. "The trial judges, not unnaturally, vary widely in their receptivity to *Luck*. Those who

failure to exclude prior convictions. There was a lack of unanimity as to the type of prior offense properly admissible for purposes of determining credibility. Critics of the *Luck* approach found that it presented great problems of practical administration.⁵³

In 1970, after extensive hearings in both the House and Senate,⁵⁴ the code was amended as part of the District of Columbia's Court Reform Act. The new statute made impeachment by prior convictions mandatory for crimes punishable by death or imprisonment for more than one year or for crimes involving dishonesty or false statements, regardless of the punishment. The balancing test inaugurated by *Luck* was eliminated. Since the amendment's enactment, the courts have broadly interpreted the "dishonesty or false statements" provision to encompass such misdemeanor offenses as unlawful possession of narcotics⁵⁵ and carrying a pistol without a license.⁵⁶

Despite the defeat of AB 691, it may only be a matter of time before proponents of a bill similar to the current District of Columbia statute can garner enough votes in the California legislature to enact a mandatory impeachment rule. Moreover, it seems doubtful that any such amendment would limit mandatory impeachment to crimes involving dishonesty or false statements, given the absence of agreement as to what offenses fall within this category.⁵⁷

The defeat of AB 691 may, on the other hand, signify an appreciation by the California legislature that "[i]f . . . giving the trial judge authority to deal with the matter as he deems best is to be rejected, then the alternative surely cannot be automatic admissibility of any and all prior convictions, including those that are unrelated to truth-telling. Too much effort has gone for too long into the rationalizing of our criminal procedure to bring it, by deliberate choice, to this dead end."⁵⁸

are unsympathetic tend to confine their discretion narrowly; those who find it appealing are more expansive. What *Luck* did accomplish was to take the shackles off this latter group of judges and provide them with some latitude 'to strike a reasonable balance between the interests of the defendant and the public.' " McGowan, *Impeachment of Criminal Defendants by Prior Convictions*, 1970 L. & Soc. ORD. 1, 3. Judge McGowan authored the opinion in *Luck*.

53. For a summary of the comments submitted to House and Senate committees prior to the adoption of FED. R. EVID. 609, see 3 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶¶ 609 [01]-[03b] (1975).

54. Excerpts of remarks made during the hearings held in conjunction with the adoption of the District of Columbia Court Reform Act are noted in 3 J. WEINSTEIN & M. BERGER, *supra* note 53, at ¶ 609.

55. See *Durant v. United States*, 292 A.2d 157 (D.C. App. 1972).

56. See *Williams v. United States*, 337 A.2d 772 (D.C. App. 1975).

57. See note 32 *supra*.

58. McGowan, *supra* note 52, at 14-15.

CONCLUSION

In condemning the trial court's procedure in *Rollo*, the supreme court has reaffirmed its commitment to the "hard choices" mandated under *People v. Beagle*, either the total exclusion or the admission of prior felony evidence for impeachment purposes. The *Rollo* trial court's attempted compromise is symptomatic of the general uneasiness of the lower courts with the *Beagle* rules. Although the supreme court in *Rollo* did no more, in terms of precedent, than reaffirm the rule of *Beagle*, the trial courts' recurrent nonadherence to those well-established prescriptions may impel the court to pronounce firm rules of exclusion under certain specific circumstances.

Despite the mixed reaction of California legislators to the current judicial trend, the court should not be deterred in its efforts to protect criminal defendants from undue prejudice by the spectre of a legislative reworking of the Evidence Code. It is to be hoped that the legislature will not demand a return to the pre-*Beagle* interpretation of section 788, allowing impeachment by any prior felony convictions. The legislature, no less than the supreme court, has a duty to insure that the rules of evidence best serve the truth-seeking function.⁵⁹ A return to the pre-*Beagle* era of automatic admissibility would be an abrogation of that duty.

*Fran M. Layton**

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*Williamson v. Superior Court.*¹ The court held that the attorney's work-product doctrine will not protect the report of a defendant's expert from discovery where the defendant, having designated the expert as a potential witness, subsequently withdrew the expert as a witness pursuant to what the court characterized as an illegal agreement to sup-

59. The fundamental basis upon which all rules of evidence rest—if they are to rest upon reason—is their adaptation to the successful development of the truth. And since experience is of all teachers the most dependable, and since experience also is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule.

Funk v. United States, 290 U.S. 371, 381 (1933) (Sutherland, J.).

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1. 21 Cal. 3d 829, 582 P.2d 126, 148 Cal. Rptr. 39 (1978) (Tobriner, J.) (4-2 decision).

press evidence. Accordingly, the court issued a writ of mandate compelling full disclosure of the expert's report.

Plaintiff filed suit against his employer (Shell Oil Co.), a tire manufacturer (Firestone Tire & Rubber Co.), and a tire-changing equipment manufacturer (Big Four Automotive Equipment Corp.) for injuries sustained while changing a tire. Plaintiff alleged defects in both the tire-changing machine and the tire. Big Four employed an expert who reported that Firestone's defective tire caused the injury, not Big Four's tire-changing machine. Big Four designated the expert as one of its trial witnesses, and plaintiff prepared to depose the expert. Prior to the deposition, Big Four, in consideration for Firestone's promise to indemnify Big Four for any liability arising from the lawsuit, withdrew its designation of the expert as a witness and refused to allow the plaintiff access to either its expert or the report.

The supreme court reasoned that the expert's report, prior to his designation as an expert witness, was attorney's work product and hence was protected from discovery by Code of Civil Procedure section 2016(b),² which shields work product from discovery unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery or will result in injustice. But once the expert's status changed from consultant to witness, his opinion became a factor in the case and his report lost its protection.

The court conceded that a party may protect its expert from discovery by withdrawing any expert witness at any time prior to disclosure of the witness' testimony. But the court distinguished a unilateral strategic decision to withdraw the witness from an indemnity agreement between codefendants to exclude evidence unfavorable to one of the codefendants. The court rejected the defendants' characterization of their agreement as "proper cooperation between parties sharing a common interest."³ Firestone's and Big Four's interests necessarily conflicted, the court found, and therefore the indemnity agreement amounted to Firestone paying Big Four to suppress evidence—an agreement void in California as against public policy. Since the withdrawal of expert testimony resulted directly from an illegal agreement to suppress evidence, the court held that denial of discovery would result in injustice within the meaning of section 2016(b), and so ordered full disclosure of the report.

2. CAL. CIV. PROC. CODE § 2016(b) (West Supp. 1977) provides in part:

The work product of an attorney shall not be discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing his claim or defense or will result in an injustice, and any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances.

3. 21 Cal. 3d at 836, 582 P.2d at 130, 148 Cal. Rptr. at 43.

Justice Richardson dissented on two grounds. First, the defendants' illegal agreement to suppress evidence, while unenforceable between the defendants, should not necessarily be taken as a waiver of one defendant's work product protection. Second, Justice Richardson read the "prejudice or injustice" standard of section 2016(b) more narrowly: since the plaintiff in this case had full access to the facts underlying Big Four's expert's opinions, there was no reason why his own experts could not reach the same conclusions through independent investigation.

Justice Richardson's arguments suggest that the court's holding may have less to do with the policies behind the work product privilege than with the court's distaste for the spectre of a party in Big Four's position "auctioning off a witness' testimony to the highest bidder."⁴ Although the court may have been correct in stating that "no policy underlying the work product doctrine justifies defendants' conduct in the present case,"⁵ it is perhaps also correct to say that neither does any work product policy justify the court's holding. Big Four clearly did not waive the privilege, and the court made no claim that the plaintiff would be disadvantaged by failure to gain access to the report.

The court's emphasis seems to have been on removing the incentives for litigants to enter into arrangements of this sort. To the extent that these agreements constitute the purchasing of a tactical advantage, there seems to be no reason to tolerate them—they do little to further the legitimate goals of the litigation process, and could promote a situation that is both unseemly and unfair.

4. *Id.* at 838, 582 P.2d at 132, 148 Cal. Rptr. at 45.

5. *Id.*