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More on the Impeachment of Criminal Defendants

Jeffrey Bellin
William & Mary Law School, jbellin@wm.edu

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Jeffrey Bellin
Associate Professor of Law
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More on the Impeachment of Criminal Defendants

I previously blogged (**here**) about the courts' flawed application of federal evidence rule 609 (and state variants) – a rule that purports to restrict impeachment of testifying criminal defendants with past crimes.

The courts' failure to meaningfully restrict this type of impeachment is significant in numerous ways, but perhaps the most compelling is its effect on innocent defendants. Professor John Blume's fascinating empirical study of defendants cleared through post-conviction DNA testing provides powerful empirical evidence to support the widespread intuition that prior conviction impeachment stops *even innocent* defendants from testifying. See John Blume, *The Dilemma of the Criminal Defendant with a Prior Record- Lessons from the Wrongfully Convicted*, Journal of Empirical Legal Studies (2008) (concluding that "the current legal regime discourages defendants, even factually innocent defendants from telling their story at trial") (**available here**).

One can imagine jurors in the cases Prof. Blume studied wondering why an innocent defendant would not testify, and proclaim his or her innocence to the jury. Well, as Professor Blume found, the likelihood of impeachment with prior convictions – something the jury will rarely contemplate – is often the answer.

Given the power of this type of impeachment to keep even innocent defendants off the

stand, one would hope that courts would be wary of permitting it. As noted in my earlier**post**, the opposite is true.

Recent blog posts (**here**, **here**and **here**) discussing the constitutional implications of enhancing the punishment for assault crimes based on the genders of the offender/victim bring to mind a further example of courts expanding the already too large universe of prior conviction impeachment.

Texas criminal law once paralleled the states referenced in the blog posts in defining as "aggravated" any assault "[w]hen committed by an adult male upon the person of a female." Satterfield v. Texas Dept. of Public Safety 221 S.W.3d 909, 911 -912 (Tex.App.–Beaumont 2007). The aggravating factor was eliminated by the Texas legislature in 1973. The current Texas Penal Code does not differentiate assaults based on the respective genders of the perpetrator and victim. See Tex. Pen. Code § 22.01.

Yet pre-1973 Texas criminal law still resonates in the state's evidence law regarding the impeachment of witnesses. In Texas, a witness's credibility can be impeached with a conviction for misdemeanor assault, so long as the assault was "by a man against a woman." Hardeman v. State 868 S.W.2d 404, 405 (Tex.App.-Austin,1993). This rule arises from a judicial interpretation of Texas Rule of Evidence 609, which permits witness impeachment with non-felony convictions only if a conviction is for a crime of "moral turpitude." Consistent with the general view, Texas courts do not consider misdemeanor assault to be a crime of "moral turpitude." The Texas courts, however, carve out an exception if the perpetrator is male and the victim is female. Note that the Texas courts here go, without explaining this interpretive quirk, beyond the modern legislative definition of the misdemeanor assault offense to define subsets of the crime, and thus preserve an unfortunately vast number of offenses for use as impeachment.

As the Texas courts explain in justifying their ruling, an "assault by a man against a woman is generally regarded by the members of our society as more morally culpable," 868 S.W.2d at 405. Polling would likely support that intuition. But that is also

the very reason that permitting such crimes as "impeachment" will keep defendants off the stand. Given the expectation that jurors will more readily convict a defendant if they learn that, on a previous occasion, he assaulted a woman, one expects that defense counsel will be extremely hesitant to allow a jury to hear about it. And since it is likely that the guilt-phase jury will only learn of the past conviction (via impeachment) if the defendant testifies (see, e.g., 868 S.W.2d 404, 405), the predictable consequence of the Texas doctrine, will be that more defendants – whether guilty *or innocent* – will decline to testify in their own defense.

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