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IMPEACHMENT AND REHABILITATION OF WITNESSES BY CHARACTER EVIDENCE IN MISSOURI

(Continued from the April Issue)

ARTHUR N. BISHOP, JR.*

VII. CHARACTER OF PROSECUTING WITNESS IN SEX AND MORALS CASES

Outside of the atomic bomb, hormones, and the cost of living, probably more public attention has been focused on the problem of sex, sex education, and marital sexual relations than any other social problem of our day. Two recent books have stirred worldwide discussion (with, of course, the exception of Soviet Russia, which admits it "had no problems" in its "utopia") of whether today's sex laws are proper, adequate, or outmoded.¹⁷⁴ The psychologists are generally convinced that the latter is the case; the "moralists" that the laws are never tough enough on the male; and the lawmakers that it is better to "wait and see" what the public wants.

The hoopskirted female in Missouri, despite the hush-hush topic of sex, her inability to vote, and her general legal status of inferiority, had less protection under the rape statute than does the shorts-clad, leggy teen-ager of the fabulous 'fifties, who is replete with cocktail, cigarette, convertible, and "casanova"! Is it not astounding to observe that the age of consent in our early law was twelve, while in times when the average teen-ager knows more about the "facts of life" than her grandmother did when she was married, the age of consent is sixteen?¹⁷⁵

Our rape statutes in force today are as follows:¹⁷⁶

559.260. *Rape, punishment:* Every person who shall be convicted of rape, either by carnally and unlawfully knowing any female child under the age of sixteen years, or by forcibly ravishing any woman of the age of sixteen years or upward, shall suffer death, or be punished by imprisonment in the penitentiary for not less than two years, in the discretion of the jury.

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174. The "Kinsey Reports".

175. See 40 V.A.M.S. § 559.260 (1949), for history of rape statutes.

176. MO. REV. STAT. (1949).

559.300. *Carnal knowledge of female between ages of sixteen and eighteen—penalty*: If any person over the age of seventeen years shall have carnal knowledge of any unmarried female, of previously chaste character, between the age of sixteen and eighteen years of age, he shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in the penitentiary for a term of two years, or by a fine of not less than one hundred dollars nor more than five hundred dollars or by imprisonment in the county jail not less than one month or more than six months, or by both such fine and imprisonment, in the discretion of the court.

From the outset, then, character of the prosecutrix, as regards prior chastity, is not in issue as bearing on consent of one under the age of consent, but does bear on the issue of consent in the intermediate group (currently, sixteen to eighteen) and on women above the age of consent. The courts have so held, not uniformly, but generally. The first logical subject of examination, therefore, is carnal intercourse with a female under the age of consent.

It has long been the rule in Missouri in prosecutions for statutory rape that the defendant can be convicted on the uncorroborated testimony of the prosecutrix,¹⁷⁷ but the appellate court will closely scrutinize the testimony upon which the conviction was obtained, and if it appears incredible and too unsubstantial, the judgment will be reversed.¹⁷⁸ Thus, when the prosecutrix's testimony is contradictory or unconvincing when applied to the admitted facts, she must be corroborated in order for the conviction to stand.¹⁷⁹ That the conviction may be had in the absence

177. *State v. Wilcox*, 111 Mo. 569, 20 S.W. 314, 33 Am. St. Rep. 551 (1892) (Intercourse with thirteen-year old daughter; held, defendant may be convicted on uncorroborated testimony of daughter where the reason given for failure to disclose the wrong immediately was fear of the father); *State v. Stackhouse*, 242 Mo. 444, 146 S.W. 1151 (1912) (Intercourse with ten-year old girl by door-to-door, soap salesman while child's parents were away); *State v. Hughes*, 258 Mo. 264, 167 S.W. 529 (1914) (Carnal knowledge of ten-year old girl); *State v. Gruber*, 285 S.W. 426 (Mo. 1926) (Carnal knowledge of fifteen-year old daughter when age of consent was sixteen); *State v. Ball*, 133 S.W.2d 414 (Mo. 1939) (Intercourse with girl fourteen years old, age of consent being sixteen); *State v. Burton*, 355 Mo. 792, 198 S.W.2d 19 (1946) (Same); *State v. Wood*, 355 Mo. 1008, 199 S.W.2d 396 (1947) (Intercourse with girl fifteen years old); *State v. Weekly*, 223 S.W.2d 494 (Mo. 1949) (Ten-year old girl).

178. *State v. Goodale*, 210 Mo. 275, 109 S.W. 9 (1908) (Supposed intercourse with niece fifteen years of age, evidence as to poor reputation of both prosecutrix and her mother for chastity being admitted, and physician testifying prosecutrix had had intercourse "more than once").

179. *State v. Tevis*, 234 Mo. 276, 136 S.W. 339 (1911) (Supposed intercourse with incorrigible daughter whose own emancipated older brother testified in father's be-

of corroborating testimony is particularly true when the defendant admits his presence and desires at the time and place charged, his testimony differing from that of the prosecutrix only as to consummation of the act.¹⁸⁰ The leading case involving absence of necessity of corroboration is that of *State v. King*,¹⁸¹ the unsavory facts dealing with a Negro porter in a private school for white children below high school age and his numerous and repeated acts of intercourse and sodomy with various female students under the statutory age of consent. It was held that corroboration is not essential to prove the act of intercourse unless the testimony of the prosecutrix is contradictory and conflicts with the physical facts, surrounding circumstances, and ordinary experience.

Since the statute fixes an arbitrary age of consent below which consent is not in issue, it follows that neither the prior bad reputation of the prosecutrix for chastity nor specific acts of immorality on her part may be shown as bearing on consent.¹⁸² Such bad reputation for chastity may be shown as affecting her credibility, but specific acts cannot be shown as making up the bad reputation.¹⁸³ The leading case of *State v. Loness*¹⁸⁴ spells out the rule graphically. In that case the prosecutrix was an illegitimate child aged fourteen who picked up and delivered laundry work which her parents did for others. She called at defendant's home for such work, the alleged act of intercourse then occurring. Defendant sought to show that prosecutrix had had intercourse with numerous other males at about the time in question. *Held*, in a prosecution for statutory rape, the credibility of the prosecutrix

half); *State v. Donnington*, 246 Mo. 343, 151 S.W. 975 (1912) (Defiling ward, prosecutrix's reputation for truth, veracity, and morality seriously impeached without rehabilitating testimony; held, corroboration essential).

180. *State v. Hammontree*, 177 S.W. 376 (Mo. 1915) (Intercourse with girl only twenty-eight days under the statutory age of consent).

181. 342 Mo. 975, 119 S.W.2d 277 (1938), noted in 7 U. KAN. CITY L. REV. 57 (1938).

182. *State v. Rogers*, 108 Mo. 202, 18 S.W. 976 (1892) (Defiling female servant under age stipulated by statute; specific acts excluded); *State v. Sibley*, note 66, *supra* (Defiling stepdaughter).

183. *State v. Duffey*, 128 Mo. 549, 31 S.W. 98 (1895) (Reputation admissible to affect credibility); *State v. Nibarger*, 255 Mo. 289, 164 S.W. 453 (1914) (Defiling young female residing at defendant's home, her unchaste character held admissible to discredit her testimony) *State v. Guye*, 299 Mo. 348, 252 S.W. 955 (1923) (Intercourse with underage female, nine acts occurring, after which defendant gave prosecutrix money and jewelry from his store; held, character of prosecutrix could not be attacked by showing specific acts of intercourse with others, either before or after the offense charged) *State v. Cooper*, notes 47, 50, and 58, *supra* (Intercourse between 43-year old farmer and underage neighbor girl; held, evidence of prior alleged assaults and familiarities on the part of the defendant was admissible to show disposition and inclination of prosecutrix and defendant to commit the act charged).

184. 238 S.W. 112 (Mo. 1922).

cannot be impeached by proof of specific acts of intercourse with other men, but can be impeached only by proof of her general reputation in the community for chastity and veracity. It follows that remarks by the uncle of the prosecutrix to the defendant that her character was bad, are inadmissible.¹⁸⁵

The next step in the gradation of the offense involves the "intermediate" age group, where prior chastity of the prosecutrix and her state of being unmarried at the time of the act are prime requisites of the statute. Thus, to impeach her testimony, it must be clearly shown that her bad character for chastity must be *before* the act charged.¹⁸⁶ Her bad reputation subsequent to the debauching is inadmissible.¹⁸⁷ An astounding conclusion reached in one early case¹⁸⁸ stated that evidence of the prior reputation of the prosecutrix for unchastity was unavailable, since the law presumed chastity until the contrary appeared, the statute requiring a chaste character rather than mere repute! This loose line of logic which was at total odds with the norms of common sense was directly overruled shortly thereafter in a case involving a defendant of the same name, but not the same person as in the earlier case,¹⁸⁹ and there is no doubt that such is the principle followed today.¹⁹⁰

Introduction of prior specific acts of immorality of the prosecutrix was formerly allowed as bearing on the issue of prior chastity,¹⁹¹ but such is no longer permissible. The authoritative case of *State v. Luckett*¹⁹² seems to furnish the basis for the modern rule, although being

185. *State v. Shearon*, 183 S.W. 293 (Mo. 1916).

186. *State v. Knock*, 142 Mo. 515, 44 S.W. 235 (1898) (Intercourse between uncle and niece, acts occurring while later was visiting at former's home; held, evidence against prosecutrix's lack of previous chaste character must relate to time before defendant debauched her).

187. *State v. Day*, note 23, *supra*.

188. *State v. Kelley*, 191 Mo. 680, 90 S.W. 834 (1905).

189. *State v. Kelly*, 245 Mo. 489, 150 S.W. 1057, 43 L.R.A. (N.S.) 476 (1912) (Held, it is error to charge that the law presumes that every woman is of chaste character until the contrary appears).

190. *State v. Volz*, 269 Mo. 194, 190 S.W. 307 (1916) (There is no presumption that the prosecutrix is chaste).

191. *State v. Weber*, 272 Mo. 475, 199 S.W. 147 (1917) (Prior intercourse between prosecutrix and other men held, admissible on the question of her previous chaste character); *State v. Cook*, 207 S.W. 831 (Mo. 1918) (Specified acts of prior intercourse held admissible to negative prosecutrix's character for chastity, such being required by statute to convict; *State v. Foster*, 225 S.W. 671 (Mo. 1920) (Defendant admitted several acts of intercourse with prosecutrix, but contended that those prior to the one complained of destroyed her chastity; held, they did, even though her general reputation was good, since character and reputation are not the same).

192. 246 S.W. 881 (Mo. 1922).

the *only* case examined which so held. Therein, defendant sought to show that prosecutrix had been intimate previously with several other boys, she admitting these acts shortly after the alleged act with defendant. *Held*, the reputation of the prosecutrix for virtue was an issue as affecting her credibility, but bad reputation in that respect could not be shown by proof of specific immoral acts. This works in both directions, however, and evidence of a defendant's prior intercourse with another girl on specified occasions is not admissible to show that he probably had intimacies with the prosecutrix.¹⁹³

Here, just as in prosecutions for intercourse with a female under the age of consent, corroboration of the prosecutrix is not necessary to sustain a conviction, unless her testimony is contradictory or unconvincing when applied to the admitted facts and ordinary experiences of mankind.¹⁹⁴

Before proceeding to a survey of one of the most heinous crimes of all—forcible rape—it might be worthy to note a criminal act which has happened more than infrequently, but which is one not often tried in the courts *per se* because of its close alliance with statutory rape and the greater severity of punishment of the defendant under the latter statute. That crime is incest. Our statute is as follows:¹⁹⁵

563.220. *Incest—felony.* Persons within the following degrees of consanguinity, to wit: parents and children, including grandparents and grandchildren of every degree, brothers and sisters of the half as well as of the whole blood, uncles and nieces, aunts and nephews, who shall intermarry with each other, or who shall commit adultery or fornication with each other, or who shall lewdly and lasciviously cohabit with each other, shall be adjudged guilty of incest, and be punished by imprisonment in the penitentiary not exceeding seven years.

Although the statute was originally enacted in 1835,¹⁹⁶ only three cases were discovered which were deemed important from a procedural point of view. The first of these, and probably the leading case on the subject, is that of *State v. Winingham*,¹⁹⁷ where an uncle was prosecuted for

193. *State v. Cox*, 263 S.W. 215 (Mo. 1924).

194. *State v. Day*, notes 23 and 187, *supra*; *State v. Tevis*, note 179, *supra*; *State v. Wade*, 306 Mo. 457, 268 S.W. 52 (1924).

195. MO. REV. STAT. (1949).

196. See 41 V.A.M.S. § 563.220 (1949) for history.

197. 124 Mo. 423, 27 S.W. 1107 (1894) (citing *State v. Stratman*, 100 Mo. 531, 13 S.W. 814 (1890), as authority for the holding, but the *Stratman* case was a prosecution for defiling a ward rather than for incest, the exception there dealing with instructions rather than an exception to the exclusion of evidence).

having had intercourse with his niece, defendant complaining of the exclusion of evidence tending to show that the prosecutrix had engaged in unlawful sexual relations with other young men. *Held*, since proof that the female was guilty of improper relations with other men is no defense to the charge of incest, *even if she is a prostitute*, such evidence is properly excluded. (Italics supplied) The other two cases¹⁹⁸ both deal with conviction on the uncorroborated testimony of the prosecutrix, holding, like statutory rape prosecutions, that such conviction will be sustained only when the testimony of the female agrees with surrounding circumstances, in the light of ordinary experience.

Forcible rape, like murder and larceny, is probably one of the oldest crimes known to man. Even more so than its ominous counterparts, its evidence is often the most nebulous, for most such crimes have only two eyewitnesses, the prosecutrix and he who perpetrated the act, be he defendant or otherwise. Though jokesters term it "seduction without salesmanship", it is far from a joking matter in the eyes of the law. It is submitted at the outset that its penalties should be more severe than they are, but also that the proof of the act alleged should be subjected to stricter surveillance by the courts. With the upsurge of public attention to matters of treatment of sex criminals and the wide publicity given to scientific evidence in recent years, it is further submitted that proof of reliability of scientific testimony is more evident with the passage of time, and that courts should, properly, allow it more credence.

There is a rule of considerably ancient vintage that a conviction of forcible rape may be sustained on the uncorroborated testimony of the prosecutrix,¹⁹⁹ unless her testimony is contradictory and in conflict with the physical facts, surrounding circumstances, and ordinary experience.²⁰⁰ The leading modern case on the subject, another of Ellison's

198. *State v. Goodale*, note 178, *supra*; *State v. Tevis*, notes 179 and 194, *supra*.

199. *State v. Dusenberry*, 112 Mo. 277, 20 S.W. 461 (1892) (Intercourse with girl defendant met on train, luring her into saloon where he worked, on pretext of giving aid in finding directions in city); *State v. Marcks*, 140 Mo. 656, 41 S.W. 973 (1897), dissenting opinion of Sherwood, J., in 43 S.W. 1095 (1897) (Intercourse with wife's younger sister; strong dissent); *State v. Welch*, 191 Mo. 179, 89 S.W. 945 (1905) (Intercourse with woman who was former employer, defendant commencing act while prosecutrix was asleep); *State v. Dilts*, 191 Mo. 665, 90 S.W. 782 (1905) (Rape of servant girl during buggy ride).

200. *State v. Roddy*, 171 S.W.2d 713 (Mo. 1943) (Rape of white woman by Negro accomplished by holding a knife at prosecutrix's throat; held, corroboration unnecessary); *State v. Burton*, 355 Mo. 467, 196 S.W.2d 621 (1946) (Alleged rapes by several different boys during automobile ride, prosecutrix having numerous opportunities to get out of the car in apparent safety; held, corroboration necessary).

legal gems, is that of *State v. Thomas*,²⁰¹ wherein defendant was convicted of assault with intent to rape his neighbor's wife, who was the mother of six children, and with whom the defendant had been infatuated for some time. He had given her several gifts and had designated her the beneficiary in one of his life insurance policies. His defense was consent, explaining that prosecutrix had become angered at something he had done. There was evidence that they had been engaging in illicit relations for two years, and defendant complained of the lack of corroboration of her testimony. In Ellison's carefully reasoned, intelligent opinion, he pointed out that decisions involving the prima facie case on no corroboration were in statutory rape cases, then *held*, although a prima facie case of rape or attempted rape can be made on the uncorroborated testimony of the prosecutrix, where she is a mature woman and the case is weak, her testimony should be corroborated. Thus, as it should be, each case is to be taken on its merits, insofar as the question of corroboration is concerned.

It can almost be viewed as elementary to note that the bad character of prosecutrix's parents is inadmissible to impeach her as a witness in a rape case.²⁰² Her prior reputation for chastity, and specific acts of immorality, however, both prior and subsequent to the act charged, constitute another matter altogether. Only one major case was discovered which had a bearing on the admissibility of subsequent acts, that being *State v. Patrick*,²⁰³ where Sherwood's majority opinion (with a vigorous dissent by Thomas, J.) *held* that continued friendly intercourse between defendant and prosecutrix after the alleged rape was admissible to impeach the prosecutrix. Whether this rule is still in force is problematical, but, based on common experiences of an ordinary person, it certainly should be, if on no other reason than the agency doctrine of ratification, a form of "negative reformation" of the prosecutrix. How can she object to the first act and consent to subsequent ones with the same party, then complain of the first?

As to the prior reputation of the prosecutrix for chastity, and as to admissibility of specific immoral acts on her part, the courts have seenawed without reaching an unequivocal conclusion, generally excluding

201. 351 Mo. 804, 174 S.W.2d 337 (1943).

202. *State v. Anderson*, note 24, *supra*.

203. 107 Mo. 147, 17 S.W. 666 (1891). This was the classic case where corroboration was required because prosecutrix and defendant met on "oath against oath", this aspect since having been overruled.

them.²⁰⁴ The better line of reasoning seems to be that adopted by Ellison, J., in *State v. Daugherty*,²⁰⁵ where the defendant was convicted of forcibly raping a nineteen-year old girl whom he was taking home from church one night. His defense was consent, and he was allowed to introduce testimony of the prosecutrix's cousin as to certain lewd acts of the prosecutrix, including an act of intercourse with one M. The specific acts were allowed to stand on appeal, but rehabilitating testimony showing the prosecutrix's good reputation for morality and chastity was also allowed, with defendant's exception on that point being overruled. This rule allows the jury to see the prosecutrix as she really is: if she has been chaste, with but one or two deviations from the straight-and-narrow, she has nothing to fear from such isolated instances, for rehabilitating testimony is then properly admissible in refutation. On the other hand, if she has been promiscuous with many, the jury should know her reputation, but testimony as to specific acts of intercourse, as bearing on the issue of consent, should be confined to those engaged in with the defendant. Relations with others, while affecting her general reputation and capacity to consent, do not prove that she willingly indulged in intimacies with the defendant, but acts with him do.

Abduction for the purpose of concubinage, a statute long on the books, is probably the most unfamiliar of all the criminal statutes, due to its rarely ever confronting the courts. The statute now in vogue²⁰⁰ provides, in brief, that one who takes a female under eighteen years from the care of her parent or guardian, either for the purpose of prostitution or concubinage, and any parent or guardian consenting to such act, may be imprisoned for a term of up to five years in the penitentiary, upon conviction. In almost 120 years the statute has been before the Supreme

204. *State v. White*, note 78, *supra* (Specific acts of lewdness excluded, but general reputation admitted); *State v. Osborne*, 246 S.W. 378 (Mo. 1922) (Specific acts excluded as bearing on consent); *State v. Hewitt*, 259 S.W. 773 (1924) (Reputation of immorality, admitted, but specific acts excluded); *State v. Taylor*, note 47, *supra* (Reputation admitted on issue of consent, but specific acts excluded); *State v. Wilkins*, 100 S.W.2d 889 (Mo. 1936) (Enraging facts; held, prosecutrix may be asked questions concerning immoral conduct on her part, but the examiner is bound by her answers); *State v. Pyle*, 343 Mo. 376, 123 S.W.2d 166 (1938) (Particularly inflammatory facts involved Negro forcing white girl into his car at 1:30 A.M. as she was returning home on foot from visit to ill friend; held, specific acts of misconduct of prosecutrix offered to impeach her were properly excluded).

205. 126 S.W.2d 237 (Mo. 1939). To the same effect was *State v. Lovitt*, 243 Mo. 510, 147 S.W. 484 (1912) (Assault with intent to rape, the specific immoral acts of prosecutrix being admitted as bearing on consent rather than her impeachment; held, both this and rehabilitating testimony were properly admitted).

206. MO. REV. STAT. § 559.290 (1949).

Court only four times,²⁰⁷ the last having been in 1905. Due to the more than adequate coverage of the subject matter by the statutory rape laws and other overriding federal and state statutes, it is submitted that this venerable statute be retired to its niche in history, for few girls today will engage in either prostitution or concubinage without pre-indoctrination and a survey of the assets and liabilities of their acts.

Seduction under promise of marriage, a statute resorted to only when the marriage allegedly promised does not follow the intercourse, and in an overwhelming majority of cases only when pregnancy results from the intercourse, comprises a long and verbose law.²⁰⁸ In brief, it is this: any person who seduces or debauches a female of good repute who is under twenty-one years of age and unmarried, shall, on conviction, be imprisoned for from two to five years in the penitentiary, or fined up to \$1,000 and imprisoned in the county jail not more than one year; but if he marries the prosecutrix before the jury is sworn, the prosecution is thereby barred. A mere offer to marry is not enough.

It is apparent from the beginning that the statute requires previous good repute of the prosecutrix, which means prior chastity, and which must be proved. This point was decided long ago in *State v. Hill*,²⁰⁹ where the seduction followed an oyster dinner at the home of the prosecutrix, defendant complaining that the state was permitted to prove the prosecutrix's good repute at the outset. *Held*, the state may prove at the outset the previous good repute of the prosecutrix, since her previous chastity is directly in issue. The "may" has since been changed to "must"

207. *State v. Gibson*, 111 Mo. 92, 19 S.W. 980 (1892) (Prosecution of father and two sons for abducting fifteen-year old girl for concubinage; held, her previous unchastity is inadmissible, since it does not affect the guilt of the abductor); *State v. Johnson*, 115 Mo. 480, 22 S.W. 463 (1893) (Prosecutrix and defendant had taken numerous trips as man and wife, he abandoning her on trip to Canada; held, it is no defense to an indictment for purpose of concubinage that the prosecutrix was previously unchaste, and specific acts of immorality on her part are inadmissible); *State v. Bobbst*, 131 Mo. 328, 32 S.W. 1149 (1895) (Prosecutrix had willingly accompanied defendant on trip to Oklahoma, several acts of intercourse occurring; held, one may be convicted of abduction for the purpose of concubinage though the prosecutrix is previously unchaste, and evidence of specific acts of immorality on her part is inadmissible); *State v. Jones*, 191 Mo. 653, 90 S.W. 465 (1905) (Prosecution of married cousin living away from wife for taking sixteen-year old girl on trip to Iowa with him where they lived as man and wife; held, where witnesses testified to the promiscuous association of prosecutrix with other man than the defendant, rehabilitation testimony as to her good reputation was properly admitted).

208. Mo. Rev. Stat. § 559.310 (1949).

209. 91 Mo. 423, 4 S.W. 121 (1887).

in prosecutions of this type.²¹⁰ Since the prior chastity of the prosecutrix is definitely an issue in the case, negative evidence of bad character by witness' never having heard anything bad against her has been held properly admitted, since a witness may base his knowledge on the absence of discussion of character.²¹¹

As to the specific prior acts of immorality of the prosecutrix, a controversial early case²¹² laid down the first cardinal procedural principles for seduction prosecutions: (1) evidence of specific acts of lewdness of the prosecutrix with others than defendant prior to the alleged seduction is inadmissible; (2) evidence of acts of illicit intercourse of the prosecutrix subsequent to the alleged seduction is inadmissible; (3) evidence tending to show that prosecutrix and defendant had sexual intercourse with each other prior to the alleged promise is admissible to show that the seduction was not accomplished by that promise. The first of these points was expressly overruled by Sherwood's able opinion in *State v. Patterson*,²¹³ where it was *held*, it is competent for the defendant to show that prior to the time of the alleged seduction the prosecutrix was guilty of acts of lewdness and unchastity with other men, for legislative protection was not meant for those who had nothing left for the law to guard. This thought was reiterated later in *State v. Long*,²¹⁴ where the prosecutrix testified she was chaste before she knew defendant. *Held*, it was proper to permit him to show that she had been pregnant before she knew him, and evidence showing she had been sexually intimate with others prior to the commission of the alleged act, with the issue of her reformation being one for the jury. The only other case found which dealt with the problem of prior acts of immorality of the prosecutrix with men other than the defendant upheld the principle, but in an anomalous manner.²¹⁵

210. *State v. Primm*, 98 Mo. 368, 11 S.W. 732 (1889) (Very unsavory facts involving prior lewdness of prosecutrix, including one witness' husband offering prosecutrix money to gratify him, and, receiving no rebuke, asked her why she did not resort to prostitution for a living, she replying that she was "not ready yet"; held, in seduction prosecution, the prosecutrix's good repute at the time of the alleged seduction must be proved to sustain a conviction); *State v. McCaskey*, 104 Mo. 644, 16 S.W. 511 (1891) (Though the law presumes that every woman is chaste and of good repute, it also presumes everyone innocent of crime until proven guilty, and in prosecutions for seduction, the burden is on the state to allege and prove in the first instance that the woman is of good repute).

211. *State v. Brandenburg*, note 23, *supra*.

212. *State v. Brassfield*, 881 Mo. 151, 51 Am. Rep. 234 (1883).

213. 88 Mo. 83, 57 Am. Rep. 374 (1885).

214. 257 Mo. 199, 165 S.W. 748 (1914).

215. *State v. Nanna*, 322 Mo. 1180, 18 S.W.2d 67 (1929) (Seduction of school teach-

Can prior acts of immorality engaged in by the prosecutrix *with the defendant* be shown to refute her claim of chastity and thereby satisfy the requirement of the statute? *State v. McMahon*²¹⁶ says they can, and no subsequent authority to the contrary was discovered. In that case the prosecutrix resided at defendant's home, doing domestic work in return for room, board, and schooling. Defendant's wife was an invalid, and acts of intercourse between defendant and prosecutrix began in 1904, when she was fourteen years old, continuing until she left his home in 1907. This prosecution was begun in 1909, with defendant complaining the statute of limitations applies. *Held*, the offense of carnal knowledge of a female of previously chaste character is complete when the first act of sexual intercourse is committed, and if thereafter the act is repeated between the same parties, the female cannot be considered of previous chaste character as to the subsequent acts for the purpose of bringing the case within the statute of limitations.

Reformation of a previously unchaste prosecutrix which occurs before the time of the alleged seduction is, of course, a matter for the jury to determine whether it has in fact occurred, but evidence of reformation is admissible as a sort of pseudo-rehabilitation. In *State v. Sharp*,²¹⁷ the defendant was convicted despite his proof that prosecutrix had engaged in intercourse with three other men prior to the act for which he was prosecuted. *Held*, a conviction may be had notwithstanding such prior relations if the prosecutrix is "of good reputation as to chastity" at the time of the seduction, since the statute should not be restricted to totally virtuous females, but should always allow room for reformation. This is apparently the rule today.

The sex of the complainant in sodomy cases is, for the most part, the same as that of the defendant, except where bestiality and necrophilism are involved. Few fellatio cases²¹⁸ and but one cunnilingus case²¹⁹ have

er who commenced prosecution upon discovery of pregnancy, defendant refusing to marry her, and his offer to prove her prior acts of immorality being excluded; held, specific acts of immorality cannot be shown for the purpose of attacking the reputation of the prosecutrix in a seduction prosecution, but under the statute are admissible to prove her chaste character at the time of the prosecution, since chastity is required by the statute).

216. 234 Mo. 611, 137 S.W. 872 (1911).

217. 132 Mo. 165, 33 S.W. 795 (1896). To the same effect is *State v. Dent*, 170 Mo. 398, 70 S.W. 881 (1902), holding that it is not error to instruct with respect to reformation prior to the alleged seduction.

218. See collection in 41 V.A.M.S. § 563.230, note 2 (1949).

219. *State v. Wellman*, notes 47 and 50, *supra*.

confronted the Missouri Supreme Court. The other perversions have, fortunately, plagued the courts but little. Only one recent major case²²⁰ has dealt with the issue of corroboration, the holding there being that it was unnecessary to sustain a conviction, since the complainant had not consented to the act (thereby not being an accomplice and needing corroboration), and his testimony was not so unconvincing and contradictory as to require corroboration. If there is consent to the abominable and detestable crime against nature, the complainant, of course, becomes an accomplice, and corroboration is necessary to sustain a conviction. No cases have involved the issue of male chastity in such cases, and none should, for it is too far afield to be relevant.

VIII. MEMBERSHIP IN SUBVERSIVE POLITICAL PARTY

The problem of impeaching a witness by showing his membership in a subversive political party has not yet arisen in Missouri. In fact, only two major cases have appeared in the nation concerning it, these being diametrically opposite in their holdings.

Fawick Airflex Co., Inc. v. United Electrical, Radio & Machine Workers of America, Local 735, C. I. O. an Ohio case,²²¹ was a suit for injunctive relief to restrain picketing by limiting the number of pickets to not more than two at three or fewer designated places around plaintiff's plant. Defendant violated the temporary restraining order, and one of its leaders, defendant K., was adjudged in contempt of court for having led various groups in repeated acts of violence in violation of the order. Plaintiff was permitted to ask defendant K. whether he was a member of the Communist party, seeking to impeach him by virtue (?) of such membership, which he now cites as error. *Held*, cross-examination of a witness as to his membership in the Communist party is competent where there is some background for it, to test the credibility of the witness. In a forward-thinking, brilliant opinion, Skeel, P. J., took judicial notice of the tenets of Communism:²²²

Gradually the fundamental principles of the Communist

220. *State v. Wilson*, note 32, *supra*.

221. 92 N.E.2d 436 (Ohio App. 1950), *appeal dismissed*, 154 Ohio St. 106, 93 N.E.2d 409 (1950), noted in 20 U. CIN. L. REV. 294 (1951), 26 NOTRE DAME LAW 130 (1950), and 4 VAND. L. REV. 916 (1951).

222. *Id.*, 445.

Party have become matters of public knowledge. Their social and political theories are vastly different than those understood and supported by the loyal citizens of our democracy. Our fundamental beliefs are held at naught and have no binding effect in directing their social relations. It has been demonstrated times without number in recent years in trials and hearings before constituted public committees and bodies the fact that a member of the Communist Party is not bound by his oath under any circumstances. They feel no binding force to the sanctity of an oath. Judges and courts will not shut their minds to truths that others can see and understand. It therefore is clearly demonstrated that the question of membership in the Communist Party is competent where there is some background for it to test the credibility of a witness.

*Jones v. Commonwealth*²²³ involved a prosecution for violation of a metropolitan regulation prohibiting the display of signs or other advertising at public beaches. Defendant and two others, while in a party of approximately twenty persons at a public beach, erected certain signs advocating the outlawing of the atomic bomb and publicizing the "Young Progressives of America", a group of doubtful loyalty to the United States. When defendant concluded his testimony the court was of the opinion that he had testified falsely and, to test his veracity, asked him if the "Young Progressives" was not listed as a Communist-front organization, to which defendant replied negatively. He thereafter refused to answer the court's question as to whether or not he was a member of the Communist party, on the ground of self-incrimination, and was adjudged in summary contempt for such refusal. *Held*, a witness cannot be asked on cross-examination, in order to affect his credibility, about his part in transactions irrelevant to the issue on trial, defendant's political beliefs not being the proper subject of inquiry for purposes of impeachment.

The Smith Act²²⁴ establishes penalties of up to ten years' imprisonment and/or \$10,000 in fines for all persons who teach, organize, print, etc. matters, and for parties, advocating overthrow of any government in the United States by force or violence. The crime is spelled out clearly, and any person may exercise his constitutional privilege against self-incrimination. But does this prevent the question as to membership in the Communist party being asked a witness in any trial? If Communism

223. 99 N.E.2d 456 (Mass. 1951).

224. Laws, 1948, c. 645, 62 STAT. 808, 18 U.S.C. 2385 (Supp. II 1949).

is irrelevant, then so also is the truth, for the world still awaits a truthful Communist: the daily newspapers vouch for that. Why should the chancre of Communism be allowed to spread by feeding it more tissues? It is submitted here and now that the Ohio court had the right approach. Privilege against self-incrimination refers to crimes against the person, against property, and offenses against morals, not against our very form of government itself. The "political beliefs" to which the Massachusetts court naively referred are a specter lurking behind our very society and all the things we hold sacred. Communism consists of more than political beliefs, as a quick reference to Karl Marx's *Communist Manifesto* itself will reveal. It is a religion and a disease, ignoring both the sanctity of a courtroom oath and the fundamental principles of any economic system alien to it. When truth means nothing to a Communist he should not be allowed to hide behind the very thing he despises most: our Constitution.

IX. REHABILITATION

This topic, from the name given it, would likely sound more at home in a medical or psychological journal than as a legal term, but it is probably as good a name as any for the process of recrediting a discredited witness. The main question with which we are concerned, however, is not so much one of definition as it is one of use. Of what does impeachment consist which will properly establish the prerequisites for allowance of rehabilitation? More particularly, at what point does the assailing of character reach the saturation point so as to entitle the impeached party to contradict such detrimental testimony? The latter is the primary concern here.

The Missouri courts have concentrated rehabilitation, insofar as character is concerned, into three simple stages: (1) mere contradiction of the witness does not impeach his character so as to entitle him to produce rehabilitating evidence as to good character; (2) nor does charging him in the petition with fraud or other acts bearing on character; but (3) whenever a witness' character for truth is assailed in any way, it is competent to introduce rehabilitating evidence.

It is nearly a kindergarten doctrine that mere contradiction is not impeachment of character, but it must be remembered that in the days of dueling even less led to bloodshed and homicide. That theorem, however, was not fashioned in Missouri in the days of chivalry, but in the

much more austere post-Civil War years. *Miller v. St. Louis Railroad*²²⁵ appears to have been the starter, and was totally devoid of both glamor and logic. Plaintiff was a streetcar passenger whose arm was out of the window at the moment the streetcar on which he was riding brushed an oncoming streetcar. Defendant had never attacked plaintiff's character except to show prior inconsistent statements, yet the lower court thereafter allowed him to show his good character. *Held*, incongruously, where the character of a witness for truth is indirectly attacked on cross-examination, and evidence of contradictory statements made by him, it is competent for the party calling him to give evidence of his general good character. The firemen were somewhat slow in answering this alarm, making only a halfhearted effort at first²²⁶ before turning on the full hose. Strangely, a judge named Ellison was not afraid to sound the siren in *Alkire Grocer Co. v. Tagart*,²²⁷ which was an action to collect a debt (rather than on a fire insurance policy), defendant's supposed "receipts" being termed forgeries by plaintiff. *Held*, before a party to a suit can introduce evidence of his good character, his character must be attacked as a witness; and if such attack arises as an incident out of the issues of the case, it affords no ground for corroboration of the party by testimony of his good character for truth and veracity. The fire engine dropped back in the same old rut, however, just a few years later,²²⁸ but was finally pulled out for good by the Supreme Court of Missouri in the first criminal case specifically involving the element at odds, this being *State v. Fogg*,²²⁹ a prosecution for seduction where defendant's testimony had been contradicted, but he had been refused the chance to prove his good reputation for truth and veracity. *Held* (clearly, at last), the mere fact that there is a conflict of testimony is not such an attack

225. 5 Mo. App. 471 (1878).

226. *Fulkerson v. Murdock*, 53 Mo. App. 151 (1893), affirmed 123 Mo. 292, 27 S.W. 555 (1894) (Action for slanderous remarks as to theft of promissory notes, defendant merely denying the charges, and plaintiff being allowed to show his good general reputation for truth and honesty; held, the mere contradiction of plaintiff's testimony did not justify the introduction of proof by him of his general reputation for veracity or honesty, when the matter shown in contradiction was in the nature of independent and not of impeaching evidence).

227. 78 Mo. App. 166 (1899).

228. *Browning v. Chicago, Rock Island & Pacific Ry.*, 118 Mo. App. 449, 94 S.W. 315 (1906) (Action for personal injuries by employee hurt while tightening track bolts, because of foreman's negligence, plaintiff being allowed to introduce evidence of his good character after contradiction of his testimony; held, contradictory statements properly entitle the adversary to give evidence of his good character and reputation for truth).

229. 206 Mo. 696, 105 S.W. 618 (1907).

on a party's reputation for truth and veracity as will admit testimony in his behalf as to his reputation, where it has not been otherwise assailed. This finally suffocated the embers of an illogical rule, for it has been upheld and quoted in both civil and criminal cases ever since, which expressly overruled the early cases.²³⁰

The second stage of rehabilitation, namely that merely charging a party in the petition with fraudulent dealing does not justify his offering evidence as to his good character, is an old rule first established in *Dudley v. McCluer*,²³¹ and still holds good through an unbroken chain of cases.²³² It is axiomatic that if such a charge in the petition does not allow the defendant to introduce character evidence that if the answer alleges fraudulent dealings on the part of the plaintiff, he is not thereby entitled to show evidence of his good character. This is the Missouri rule.²³³

230. *Milan Bank v. Richmond*, 235 Mo. 532, 139 S.W. 352 (1911) (Action on promissory note, defense alleging fraud of plaintiff's agent and contradicting his testimony; held, a mere conflict in the testimony of a witness does not warrant the admission of general evidence of good reputation); *Orris v. Chicago, Rock Island & Pacific Ry.*, 279 Mo. 1, 214 S.W. 124 (1919) (Action for personal injuries by railroad fireman who lost an eye when hit by escaped burning cinder, defendant subjecting him to a rigid cross-examination but not impeaching his character; held, neither proof of mere contradictory statements nor a rigid cross-examination of the party will authorize the introduction of evidence as to his general reputation for truth and veracity, such things going to the credit of his testimony rather than to his reputation for truth and veracity; expressly overrules several early cases); *State v. Ritter*, 288 Mo. 381, 231 S.W. 606 (1921) (Arson arranged by insurance claim adjuster and property owner, with insurance proceeds to be split, state had inquired into standing of defendant's witness without directly assailing his character; held, where there was no direct attack, the mere fact that the standing of a witness has been inquired into on cross-examination does not warrant admission on the part of the party offering him of independent evidence as to the witness' good character for truth and veracity); *Humphries v. Shipp*, 238 Mo. App. 985, 194 S.W.2d 693 (1946) (Conversion of lumber, with counterclaim for amount due on account, plaintiff exhibiting check and receipt for payment of account, which defendant claims were forgeries; held, when one party's evidence sharply contradicts that of the other and merely tends to disprove the other's testimony, it is not an attack on reputation, and the other party may not show his good reputation as an honest, upright citizen and his good general reputation for truth and veracity merely because of the contradiction).

231. 65 Mo. 241, 27 Am. Rep. 273 (1877) (Action on promissory note, the petition alleging that defendant had fraudulently caused plaintiff to surrender it; held, not ground for introduction of evidence as to defendant's good character).

232. *Carson v. Smith*, 133 Mo. 606, 34 S.W. 855 (1896) (Conversion of stock of goods; held, error to show the positions of trust plaintiff held in the county merely because of defendant's contention that the sale to plaintiff's vendor was fraudulent); *Thomas v. Thomas*, 186 S.W. 993 (Mo. 1916) (Contest of will, petition alleging that proponents procured will by undue influence and fraud; held, proponent's character was not put in issue so as to render admissible evidence of her reputation for truth and veracity).

233. *Gordon v. Miller*, 111 Mo. App. 342, 85 S.W. 943, 4 Ann. Cas. 681 (1905) (Conversion of goods, defendant's answer alleging plaintiff fraudulently converted

The final stage is that whenever the character of a witness is assailed in any way, it is competent to introduce rehabilitating evidence. It is clear that the witness' character must be attacked before he can introduce evidence of his good character, and this is true in both civil and criminal cases.²³⁴ Mere contradiction of one's testimony²³⁵ or showing of prior inconsistent statements²³⁶ were formerly held to constitute sufficient attacks on character so as to entitle the party so attacked to introduce evidence of his good character, but this fallacious line of reasoning has been expressly overruled.²³⁷ The same overriding authority rejected the former rule that the nature of a civil action²³⁸ or the showing that the adverse party had been convicted of violating a peace disturbance ordinance,²³⁹ or the remarks of the court justifies the introduction of such evidence.²⁴⁰

\$1,000 belonging to a firm of which he was a member; held, plaintiff's character was not thereby put in issue so as to entitle him to introduce evidence of his good character); *Milan Bank v. Richmond*, note 230, *supra*; *Kelly v. American Central Insurance Co.*, 192 Mo. App. 20, 178 S.W. 282 (1915) (Action on fire insurance policy, defendant's answer alleging that plaintiff had employed one H to burn his saloon and had sworn falsely concerning the extent of loss under the policy; held, this did not entitle plaintiff to show evidence of his good character).

234. *State v. Cooper*, 71 Mo. 436 (1880) (Murder); *State v. Thomas*, 78 Mo. 327 (1883) (Murder; rule particularly true where testimony is very conflicting); *Walker v. Phoenix Insurance Co.*, 62 Mo. App. 209 (1895) (Action on fire insurance policy, reputation of defendant's agent held to have been attacked on cross-examination by showing his prior inconsistent statements, so as to entitle defendant to give general evidence to support his good character; this is not true today, however); *State v. Weisman*, note 155, *supra* (General attack or specific acts sufficient to sustain rehabilitation); *State v. Reed*, note 23, *supra*; *State v. Maggard*, 250 Mo. 335, 157 S.W. 354 (1913) (Grand larceny: prior conviction of crime constitutes sufficient attack to warrant evidence of good character); *Gourley v. Callahan*, 190 Mo. App. 666, 176 S.W. 239 (1915) (Civil action for assault, defendant being questioned as to prior misconduct with another girl; held, in a civil suit, where the character of the party is not in question by the nature of the proceedings, if the adverse party assails it, the party so attacked may introduce character witnesses to sustain his good repute; but this reasoning on the particular facts has now been overruled).

235. *Berryman v. Cox*, 73 Mo. App. 67 (1898) (Civil action for assault and battery).

236. *Walker v. Phoenix Insurance Co.*, note 234, *supra*.

237. *Orris v. Chicago, Rock Island & Pacific Ry.*, note 230, *supra*.

238. *Black v. Epstein*, 221 Mo. 286, 120 S.W. 754 (1909) (Suit to set aside conveyance as fraudulent against creditors held, evidence of good character is to be considered in assessing damages).

239. *Ross v. Grand Pants Co.*, 170 Mo. App. 291, 156 S.W. 92 (1913) (Action for wrongful discharge from employment brought by employee who was discharged from his job prior to the expiration of his contract because of his insolence to defendant's president held, violation of ordinance was sufficient attack to warrant evidence of good reputation).

240. *Landers v. Quincy, Omaha & Kansas City R.R.*, 134 Mo. App. 80, 114 S.W. 543 (1908) (Action for personal injuries brought by railroad employee for injuries suffered in derailment of hand car, defendant objecting to plaintiff's interrupting witness' answer with another question, and court stating that it did not care for defendant's appeals).

What, then, *does* justify the admission of rehabilitating character evidence? The following are examples of frontal assaults on character which have entitled the impeached party to counteract: statement by one witness that he discharged another witness from his employ for stealing;²⁴¹ evidence of the general reputation for immorality of the prosecutrix in sex cases;²⁴² evidence of specific acts of immorality committed by the prosecutrix in sex cases;²⁴³ statements that impeached witness was a gambler;²⁴⁴ charge that witness had kept a house of ill repute;²⁴⁵ showing that witness had been convicted of crime;²⁴⁶ and charge that witness had connived at crime for which party impeaching him was being tried.²⁴⁷ Similarly, when one is accused of murder, and the dying declaration of the deceased is admitted, with defendant impeaching it by showing that deceased has previously criminally assaulted defendant's concubine, such entitled the state to show evidence of the good character of the deceased.²⁴⁸ It almost goes without saying that a direct attack on reputation entitles the impeached party to counter-balance the scales: a showing that one's reputation for truth and veracity is bad justifies his attempting to prove it is good. This can also be accomplished indirectly by impeaching the impeaching witness, as Wigmore²⁴⁹ has ably pointed out. Proof of one's good reputation for truth and veracity is the only way to rehabilitate as to character *per se*, specific acts of truthful-

241. *State v. Speritus*, 191 Mo. 24, 90 S.W. 459 (1905) (Burglary and larceny, defendant impeaching state's witness by the charge).

242. *State v. Jones*, note 207, *supra*; *State v. Hewitt*, note 204, *supra*.

243. *State v. Lovitt*, note 205, *supra*; *State v. Cook*, note 191, *supra*; *State v. Daugherty*, note 205, *supra*.

244. *Summers v. Keller*, 152 Mo. App. 626, 133 S.W. 1180 (1911) (Conversion of deposit certificates caused by defendant's plying plaintiff with liquor, then inducing him to enter "fixed" poker game; held, defendant could show plaintiff was a gambler, had been prosecuted, and had made contradictory statements out of court).

245. *State v. Ritter*, note 230, *supra* (State could show that its witness so impeached did not bear that reputation, regardless of the propriety of defendant's inquiries).

246. *State v. Pleake*, 290 S.W. 82 (Mo. App. 1927) (Illegal possession of intoxicating liquor, defendant showing that deputy sheriff testifying against him had once been convicted of a crime); *State v. Richards*, note 17, *supra* (Witness had once been convicted of illegally selling a pint of whiskey).

247. *State v. Craft*, 338 Mo. 831, 92 S.W.2d 626 (1936) (Robbery of messenger of fiscal agency, defendant seeking to prove that robbery was merely a pretense, being accomplished with connivance of messenger, who was state's witness).

248. *State v. Dibley*, 242 Mo. 461, 147 S.W. 111 (1912) (Deceased, one Ketchell, was a widely acclaimed professional boxer who had taken a position as ranch foreman for one Dickerson; he was shot in the back at the breakfast table on the day following the alleged forcible intercourse with the woman, who, with defendant, were employed on the ranch).

249. 4 WIGMORE, *op. cit.*, note 168, *supra*, § 1111; see also §§ 1100, 1104, 1105, 1106, 1107, 1112, 1116, and 1117. On the subject of rehabilitation generally, see notes, 11 Am. Dec. 757; 82 Am. St. Rep. 25, 63; 12 L.R.A. (N.S.) 364; and annotations in 15 A.L.R. 1062, 33 A.L.R. 1212, 78 A.L.R. 638, and 12 A.L.R.2d 364.

ness, trustworthiness, benevolence, and religion being collateral and not based on community opinion.

X. SOME RECENT CASES

Are our courts straying once again from the accepted principles? Two recent cases indicate that such a possibility is extremely apparent. In *Gray v. St. Louis-San Francisco R. Co.*,²⁵⁰ decided late in 1952, a trespasser on one of defendant's passenger trains became engaged in a controversy with defendant's brakeman as to the fare, which resulted in plaintiff's falling or being pushed from the fast-moving train. On direct examination plaintiff admitted he had been in "scrapes" for fighting, although the purpose of the question was not clear. On cross-examination defendant was permitted to inquire as to his previous alleged arrests and convictions in the police court, ostensibly to show that he had been involved in more "scrapes" than he admitted, thus to impeach his credibility as a witness. The court, while allowing the questions as to specific arrests, seemed to theorize that plaintiff was being impeached as a *party*, not as a witness.²⁵¹ Is character ever an issue in a civil action except when made so by the proceedings, such as fraud, libel, slander, etc.? Could plaintiff have impeached defendant corporation *as a party* by showing that it had been in trusteeship previously? Was the questioning allowed relevant? What did plaintiff's prior "scrapes", whether one, one hundred, or one thousand, have to do with his truth-telling qualities in the case at bar? It is true that a witness can be asked irrelevant questions, regardless of the disgrace to him of the answers (within the trial court's discretion, of course), the examiner being bound by his answer. Such, undoubtedly, is the rule.²⁵² Is the rule a wise one, in view of our adoption of the truth-veracity rule? Should not questions which are asked witnesses in any legal proceeding be confined to (1) relevancy to the issues on trial, or (2) those having a direct bearing on the capacity of the witness for telling the truth? It is submitted that, having adopted the truth-veracity rule as regards the character of a witness, we should go all the way with it.

Should the court have permitted the cross-examination as to mere arrests? It is submitted that this was error. The settled rule is that

250. 254 S.W.2d 577 (1952) (Notes 95 and 152, *supra*).

251. *Loc. cit.*, 582.

252. Notes 23-37, incl., *supra*.

neither arrests, trouble with the police, or even mere police surveillance are admissible to impeach a witness.²⁵³ Are we to turn our backs on a rule that has been supposedly settled for half a century?

The court attempts to distinguish three prior cases, *State v. Menz*,²⁵⁴ *Meredith v. Whillock*,²⁵⁵ and *Stokes v. Wabash R. Co.*,²⁵⁶ but fails to do so on any. The first was a prosecution for murder, defendant seeking to cross-examine the sheriff as to the latter's prior commission of certain crimes. The court rejected anything less than the showing of a conviction, for impeachment purposes. That was in 1937. The Meredith case, decided in 1913 by the Springfield Court of Appeals, was a civil action for assault and battery, with the court excluding questioning as to the witness' pleading guilty to a city ordinance prohibiting fighting. The Stokes case, decided in 1946, involved an action by a pedestrian for personal injuries incurred when he was struck by one of defendant's trains at a street crossing. The court held that defendant's attempt to show plaintiff's having been arrested and convicted in police court for violation of a city ordinance was properly excluded. It is not apparent from the record in the case under review what modern authority may be cited to show the basis for allowing questions as to mere arrests being admissible to impeach a witness. It is submitted that the learned court was in error in its decision on this important point of procedure, for, as indicated, the overwhelming weight of authority in Missouri is contrary.

Anderson v. Woodward Implement Co. et al, decided in March, 1953,²⁵⁷ involves more than casually the point of impeachment of a witness by character evidence. The plaintiff was a boy six years of age who resided with his parents on a farm adjacent to that of his grandfather, the impeached witness. An employee of defendant was unloading certain farm machinery on the farm when the accident occurred, it consisting of the child's hands being caught in a cable and hook being wound on the truck's winch during the unloading process. The action for personal injuries followed, the trial court permitting defendant to cross-examine plaintiff's grandfather concerning ten or more lawsuits to which the witness had been a party. He admitted being a party to only one, and

253. Notes 149-154, incl., *supra*.

254. Note 155, *supra*.

255. Note 144, *supra*.

256. Note 143, *supra*.

257. 256 S.W.2d 819 (1953).

defendant then produced exhibits to prove that witness had been in ten, which he then admitted. Defendant's offer to explain the subject matter of the actions was excluded. *Held*, in a personal injury action, the court did not abuse its discretion in permitting cross-examination of a witness as to whether he had been a party to other lawsuits where such cross-examination reflected directly upon his credibility and shed light on whether he was worthy of belief. Is that not going far afield and leaning over backwards to permit the utmost of impeachment? What possible ground of relevancy was there whether the witness had been a party to a hundred lawsuits when the principal inquiry is whether he is telling the truth *as a witness* in this one? Of course, the elements of interest and bias, not within the scope of this analysis, enter the picture and must be weighed when balancing the total scales, but credibility has directly to do with veracity, and veracity with character.

The whole thing this decision seemed to have been driving at, without saying so directly, was the credo that, within the trial court's discretion, the witness can be asked anything irrelevant, regardless of how disgraceful the answer would be to him. That has been critically scrutinized for sound logic in the light of the truth-veracity rule, with none being discerned.²⁵⁸ And here the examiner was not even bound by the witness' answer, but was allowed to prove specific acts, purportedly as contradiction material only! Although the ultimate result herein was to discredit the witness by showing he had testified falsely as to the number of lawsuits in which he had been a party-litigant, what further result did that accomplish? Though the truth was arrived at here, the policy of allowing questioning as to prior lawsuits is not one to be encouraged, regardless of the purpose. If the prior lawsuits were unfounded, an action for malicious prosecution or abuse of process will speedily terminate their lifespan. On the other hand, a party may have many legitimate causes of action during his days on earth (as any law student who ever took a final examination can thoroughly vouch for, by his experience with multiplicity of causes in examination questions). It is conceivable that he should not have them thrust before him when he subsequently appears as a witness, for the adversary gains an undeserved advantage—though unwitting it may be—in the eyes of the jury merely because that body looks upon him as a chronic litigant without knowing whether he won

258. Note 252, *supra*.

or lost or was justified in being a party. Engaging in lawsuits has not been conceived to be immoral until now.

By allowing evidence of one's having been a party to such prior litigation to be admitted, we stray farther away from the truth-veracity fold, both on matters of relevancy and policy. This is shown by *Hungate v. Hudson*,²⁵⁹ the authority cited for the holding in the principal case. It was an action for personal injuries by an automobile driver who was stopped at a railroad crossing to await the passage of a freight train, his car being plowed into from behind by the defendant. Plaintiff was a resident of Illinois, and was asked on cross-examination why he did not bring the action there, where he was known. This thinly veiled inference was detected by the Supreme Court, which decided that it was an abuse of discretion to permit the question's being asked. *Held*, although it is proper to identify the witness and to inquire into his residence, antecedents, social connection, and occupation, and he *may be asked questions, the answers to which tend to degrade him or reflect on his credibility*, if cross-examination questions are wholly immaterial and can have no effect other than their general tendency to prejudice the jury against the witness or party, they are improper. (Italics supplied). In the principal case was there materiality? It is submitted there was none, and if the true rule of the *Hungate* case had been adopted here, the questions would have constituted reversible error. Again it may be said: we have adopted the truth-veracity rule: let us go all the way with it.

XI. THE PROPOSED MISSOURI EVIDENCE CODE

Where does the proposed Missouri Evidence Code fit into the picture?²⁶⁰ The changes which its section 5.10 would make are, in essence, three: (1) before a defendant could be impeached as a witness, he must first offer evidence of his reputation for truth and veracity; (2) only convictions of crimes involving untruthfulness or false statements could be shown to impeach any witness; and (3) within the trial court's discretion, a party cross-examining a witness other than a defendant in a criminal prosecution would not be bound by the witness' answer to irrelevant questions, but may offer extrinsic evidence to disprove such answer.

259. Note 36, *supra*.

260. See the brief, but thorough analysis by Nelkin in note, *Impeachment and Rehabilitation*, 14 Mo. L. REV. 291 (1949).

It is submitted that only the second of the proposed changes is worthy of adoption, although they constitute a direct attempt to install Rule 106 of the American Law Institute's *Model Code of Evidence*. But is Rule 106 totally good? The argument has been made repeatedly by a myriad of sources too numerous to list that when a defendant appears as a witness and is impeached *as a witness*, he is, unwittingly, correspondingly impeached *as a defendant* by the jury. However, if we limit the amount of his impeachment to matters bearing solely on relevancy to the matters in issue and to factors bearing on his capacity, why must he then be given the double advantage of being required to offer his good reputation for truth and veracity before it can be impeached, particularly when the ancient maxim presumes that the witness is telling the truth *until* he is impeached? Let us, hypothetically, take the case of a hardened criminal who is being tried for murder in the first degree, with all the evidence circumstantial. There are no witnesses to dispute his truth-telling as to the facts to be decided. How is he to be convicted in the minds of the jury "beyond any reasonable doubt" when he introduces a plausible alibi? He knows he committed the act, the police know it, the newspapers know it, and their readers know it. How can the jury know it when the defendant, testifying calmly, coldly, and smugly, knows his character for truth will never enter the picture unless he chooses to do so? Will he? The odds are very limited that he will.

On the other hand, let us hypothetically take an innocent man, the victim of circumstantial evidence and perhaps a nosy, "do-good" neighbor or two as well. Would he be hurt if the first proposed change were not adopted? The circumstances are the same as before, except for the addition of a witness against him. The law presumes him, just as his hardened counterpart, to speak the truth until the opposite is shown. If the state chooses to attack his reputation, it is confined to qualities bearing on truth and veracity. If the defendant's reputation is good, he has little to fear. If not, he can still impeach an impeaching witness. The impeaching witness is subject to cross-examination, too, and his sources of information regarding "community opinion" can be carefully and appraisingly scrutinized.

Other examples are not hard to perceive. It is submitted, therefore, that the first proposed change be disregarded on the ground it would give more help to habitual criminals than to innocent men. Although many a person has been convicted of crimes on circumstantial evidence

loosely connected, few have entered prison because they were not afforded the opportunity to exclude all references to their collective character for truth and veracity if they chose to do so.

The second proposal is much more adaptable where character evidence is concerned, and is squarely in line with the thought that, once having adopted the truth-veracity rule, we should go all the way with it. The first change goes too far, by overriding a fundamental legal maxim that a witness is presumed to tell the truth until otherwise shown, and by giving a defendant an aura of holiness as a witness. The second, on the other hand, confines the past shortcomings of morality and the natural law to truth alone. Let us once again take the case of the gunman being tried for murder. The state, under our existing law, properly introduces his conviction a few years ago for murder. He cannot impeach the judgment of conviction by explaining extenuating circumstances or by showing a pardon. Does the jury in its twelve-fold mind automatically convict him of the present crime when the conviction of a similar or related previous crime is shown? It does.

Once again let us take the innocent man, being tried this time for seduction under promise of marriage. The state wishes to impeach him as a witness, so it introduces his record of conviction of stealing watermelons when he was a fourteen-year old boy.²⁶¹ Can it do so? It formerly could, before the juvenile delinquency statute and still can if he is an adult, on the ground of petit larceny. Would that influence the jury? It very conceivably could by giving them the opinion he was a "criminal" and likely to violate other laws.

The third proposed change goes entirely too far beyond the boundary line of relevancy. Rule 106 of the *Model Code* reads in part: ". . . for the purpose of impairing or supporting the credibility of a witness, any party . . . may examine him and introduce extrinsic evidence concerning *any conduct by him* and any *other* matter relevant upon the issue of his credibility as a witness. . . ." (Italics supplies). The proposed change goes too far by leaving "collateral matters" to the discretion of the trial court. As pointed out in the critique of the two recent Missouri cases, we should be concerned with relevancy and with capacity for truth-telling, and nothing else! Have not irrelevant questions, "no matter how disgraceful the answer", led us too far astray already? As an

261. See this in reality in *State v. Stokes*, notes 124 and 135, *supra*.

example, what utility is afforded the jury in a personal injury action against a municipality for a fall because of a defective sidewalk, when, to impeach a female witness, it is shown that she has none too good a reputation for chastity? Does that indicate she is not likely to be telling the truth as a witness in an action where chastity is totally unconcerned? Let us, for an instant, presume that the third proposed change is adopted, with the examiner not being bound by her answer. He could then bring in several males who had been her erstwhile bed partners and show by extrinsic evidence that "on or about the — day of ———, 19——" she stayed with X. at the Cozy Courts overnight, that the following night she reposed at the Homey Hovels with Y., and the ensuing weekend she spent with Z. at the Paradise Palaces. The jury, it is true, would then believe her to be a loose woman, but would anything at any time along the way have spotlighted a means of knowing whether she were telling the truth? The answer is obvious. So is the departure from the true intent of Rule 106. Hence, it is concluded here that the third proposed change, as advocated by the Missouri Evidence Code, should not be adopted without amendment to preclude all questions not relevant either to the matters in issue or to qualities and conduct having a direct bearing on capacity for veracity. Once again, the truth-veracity rule should be a totality or a nullity.

XII. THE FUTURE OF CHARACTER EVIDENCE

We have come a long way chronologically since the first case involving character evidence was decided in Missouri,²⁶² but there is still a long road ahead to theoretical idealism. Too much is being gradually dumped downstairs under the guise of matters within the trial court's discretion; there has been entirely too much vacillation and not enough vaccination in our past history of rules of procedure concerning character evidence. Let us now attempt inoculation without further detailed references.

First, the rule that opinion of a witness as to his reputation for truth and veracity: is the requirement that the testimony of a witness be confined to general community opinion a proper one, complete within itself? Is it not a matter of common knowledge that any impeaching

262. *Ward v. State*, note 33, *supra*.

witness testifies at least in part from malice directed at the party impeached? Instead of these questions:

- (1) Are you acquainted with the general reputation of witness A. for truth and veracity in the community in which he resides?
- (2) What is that reputation?

should not these be asked in order to give the jury a full picture of the testimony of the impeaching witness?:

- (1) Are you personally acquainted with witness A.?
- (2) How long has such acquaintance lasted?
- (3) Are you acquainted with his reputation for truth and veracity in the community in which he lives?
- (4) What is that reputation?
- (5) In what community do you live?
- (6) What is your *personal* opinion of the capacity of witness A. for truth and veracity?

Would it be so terrible to admit the personal opinion? After all, when an impeaching witness states the "community opinion" of the person impeached, does he not offer the brand that fits his own particular tastes? Though it is true that the sources of his knowledge can be inquired into to determine his credibility, is it not just as apropos to show that he agrees with the "community opinion" and has probably been instrumental in forming it? Does this not bear definitely on his credibility, thereby entitling the jury to discount the proper allowance of bias which is certain to have diffused itself into his testimony? In addition, the personal opinion is confined within the narrow boundaries of the truth-veracity rule.

Another element which should be allowed is to indicate the extent of acquaintance of the witnesses, impeaching and impeached, thereby affording still further equity. This step will aid in forestalling "hatchet men" investigations, for, when the jury is allowed to see that the impeaching witness knows the impeached person slightly or not at all, its determination of allowable credibility will discount for such degree of lack of knowledge and force the witness, if not acquainted, to show the reliability of his investigation.

The present policy of allowing a witness to be asked any question, "however irrelevant, or however disgraceful the answer may be to him" has been sniped at quite thoroughly *supra* and is worthy of note

here only in passing. Once more, it is submitted that questions be confined to matters relevant to the issues or to matters directly affiliated with the capacity of the witness for truth and veracity.

The rule prohibiting asking the impeaching witness whether he would believe the impeached witness were the latter under oath should stand if the personal opinion of the former as to the latter's capacity for veracity is admitted, for such personal opinion constitutes the same equivalent as the question as to belief under oath.

Indubitably one of the rankest forms of hearsay imaginable which has been admitted over and over again in our Missouri courts is the question asked the character witnesses of a defendant in a criminal prosecution as to whether they had ever heard *rumors* of his prior particular acts of misconduct, particularly where such acts have involved criminal conduct, arrests, indictments or informations, and convictions. Although the defendant, when appearing as a witness, cannot be cross-examined as to anything in the nature of a prior arrest, indictment, or information which may have actually happened, yet his character witness may be asked whether he has merely heard rumors about the same thing. This anomaly purportedly tests the sources of information of the witness so as to show their reliability or lack of it, but does it not actually impeach the defendant *as a defendant* by use of hearsay methods at the same time? Mere rumors should not be admissible in impeaching evidence, due both to the absence of reliability and to the inherent unfairness involved. Permitting them in the manner here in issue accomplishes indirectly what cannot be done directly. Does it not also strain almost to the breaking point the axiom that one has the right to confront his accusers? Does cross-examination to shake the rumors efface their damaging probabilities when once admitted for the jury to hear, with the possible effect of convicting the defendant on rumors alone? Hardly. It is submitted once again that the entire policy behind this form of testimony is erroneous.

Both elements in convictions of crime which deserve a measure of criticism have come in previously for comparatively thorough assaults as to policy and will be reiterated here only as point summations: prior convictions which should be admissible to impeach should be limited to those bearing on truth and veracity, and a convicted party should be allowed to explain extenuating circumstances in the prior conviction

and to show a pardon, subject, of course, to the discretion of the trial court in not permitting confusion of the issues.

The field which needs the most thorough overhauling, both from the point of view of statutes and also from that of case interpretation is that of the sex cases. The penalties need to be made more severe, so as to discourage commission of the crimes. Correspondingly, considerably more leeway should be allowed in impeachment of the prosecutrix, so as to eliminate any vestige of doubt as to the truth of her testimony, and thereby cease the practice of crucifying one man for having been intimate with her while allowing others who have been equally guilty of the same thing to go free and even to testify for her.

Initially, our statute governing intercourse with females under a stipulated age is in need of total revision. As was shown previously, the anomaly of the age of twelve being the age of consent half a century ago, and the age of sixteen being the age of consent in today's age of high living and loose morals, makes one wonder whether time is going forward or backward. Are the "Victorian" girls of today any more moral than their mothers and grandmothers were in their day? The facts of history point the other way. Sex, the topic formerly confined to dormitory rooms behind closed doors, smoking cars on railroads, and saloons where there were "main entrances" and "family entrances", is now freely discussed; and sex education classes in high schools are rapidly becoming the rule rather than the exception. The enlightening Kinsey Reports furnish not-so-startling proof that female experiments with intercourse prior to matrimony have greatly increased since the end of World War I. As a natural result, some of this takes place at a much earlier age than formerly. With the girls knowing more at a younger age, the temptation to test the theory in practice is all too apparent. Should we, then, cling to an archaic law merely because it is moral and time-honored, when the evidence of which even an imprudent man can take his form of "judicial notice", clearly tells us that a change is in order? It is hereby proposed that the statutory age of consent be lowered to fourteen and that the "intermediate age statute" (requiring prior chastity of females between sixteen and eighteen, at the present) be abolished altogether. We are living in the mid-twentieth century, and our laws should reflect life as it is today, not as it was two, three, or four decades ago or more.

The penalty for the crime of statutory rape now ranges from two years' imprisonment to death. To avoid any rash of violations which

might result from lowering of the age of consent, as well as to discourage future offenses of this type, it is submitted that the minimum penalty should be doubled: a minimum of four years' imprisonment, with the maximum being changed to life imprisonment. Such a penalty should adequately fit the crime, it is believed.

To avoid many of the evils which have crept into the procedural aspects of statutory rape, it is proposed that the rule prohibiting the showing of specific acts of immorality of the prosecutrix be scrapped, and that both such acts and her general reputation for chastity be admitted, both as bearing on the issue of consent and to impeach her credibility. Under the law as it is today, a common prostitute (or her sister under the skin who is interested in "love" rather than money) who is under the age of consent cannot *legally* consent! Is this a principle of justice? The virtuous girl has nothing to fear by such a change in legal concept, but the avenging hussy must look to her tainted laurels. Would "unfair surprise" result? Is it not true that in any sex case the chastity (or lack of it) of the prosecutrix is either directly or indirectly in issue? And does it not have a more or less direct bearing on her capacity for truth and veracity in the charge being tried? The scope is limited, and the charge is easy to make, difficult to prove, and as equally if not more difficult to disprove. Any person accused of crime is supposedly innocent until proven guilty, but the very nature of the charge itself makes a defendant, particularly if he is a mature man, at least quasi guilty in the eyes of the average layman who constitutes the jury. As such, he should be allowed the maximum quantum of opportunity to disavow the charge. If he—or others—has previously indulged in intercourse with the prosecutrix, it is axiomatic that she would be more likely to "consent" subsequently. And if, by proof of such past relations, it can be shown that she is capable of *physical* consent, is it not a travesty upon the sense of fairness to say that she cannot *legally* consent? A fallen woman or a loose and immoral one is just as morally bad a woman if she is thirteen years of age as she is if she admits to being thirty or forty years old. Should the law protect the totally immoral by a concept derived in the musty era of a century ago? We have eliminated at least partially the designs of predatory women by outlawing the common law marriage. Can we not go one step farther along the way and remove the protecting cloak of jurisprudence from the immoral underage girl and allow her to be trapped in her own web?

Suppose the errant female has strayed but once or twice from the

path of virtue. This does not necessarily make her a harlot, but if these acts were engaged in with the defendant it causes at least an upraised eyebrow when she seeks the shelter of the law in prosecuting him for statutory rape. Of course, if the acts were engaged in with persons other than the defendant, it would not show that she consented to the act with him, but it *would* show that she would be more predisposed to do so than if she had remained a virgin. Such would be for the jury to determine—has she become a loose woman so as to be capable of consent notwithstanding her youthful years? Instructions, of course, properly phrased, could guide the jury in its estimation. It is still the rule that a conviction on the uncorroborated testimony of the prosecutrix will be sustained if such testimony is plausible, not in conflict with the surrounding circumstances, in keeping with the ordinary experiences of mankind. This being true, a defendant should be allowed to show physical consent as a good defense if the prosecutrix were previously of such an unchaste character as to stamp her a loose woman. Considerable discretion, of a certainty, would be possessed by the trial court, since arbitrary rules as to the number of prior acts would be, at best, purely arbitrary. Two previous acts might easily make a nymphomaniac an immoral girl, while double or treble the number might still cause a girl of ordinary sexual capacities to remain moral. The individual facts should govern.

An amended statute might read as follows:

Statutory rape, punishment. Any male person who shall be convicted of carnally and unlawfully engaging in sexual intercourse with any female child under the age of fourteen years who is not proved to be of previous immoral and unchaste character, shall be punished by imprisonment in the penitentiary for the remainder of his natural life or for not less than four years, in the discretion of the jury.

This would leave the burden of proof as to his guilt of the charge in the state, but would correspondingly place upon the defendant the burden of proving the prosecutrix to be an immoral girl.

The statute and procedural rules governing forcible rape should be amended, but not necessarily correspondingly. Some real teeth should be put in the punishment by revising the minimum prison term upward from four to ten years, retaining the maximum as the death sentence. Evidence of the general reputation of the prosecutrix for chastity should be admitted to impeach her, but specific acts, both prior and subsequent,

should be excluded if they are with persons other than the defendant, as bearing on the issue of consent. Here is the great distinction between statutory and forcible rape other than the "age of consent theory"; was there consent, or was the act forcible? Prior relations with the defendant would imply consent at the time of the act complained of, while subsequent intimacies with him would tend to show ratification and nullity of absence of consent. Where force enters the picture, even the loosest and most immoral of women is entitled to at least a semblance of legal protection. Although individual acts of intercourse with others would indicate a greater aptness to consent to relations with men in general, they do not show a predisposition to consent to intercourse with the defendant. Let us suppose, momentarily, that a married woman had indulged in the boudoir pastime with her husband prior to her marriage. That does not show she would be likely to consent to relations with an unkempt vagrant who breaks into her home while her husband is away. If a woman is little or nothing more than a common prostitute, this will inevitably manifest itself in her reputation, and since such should be allowable, the jury can readily ascertain whether she was actually wronged or merely was defrauded of consideration for her services.

By eliminating the age factor, as regards force, any possible loophole in the statutory rape law would be closed. Hence, a projected statute to cover the revised thinking might read as follows:

Forcible rape, punishment. Any male person who shall forcibly have sexual intercourse with any human female shall suffer death, or be punished by imprisonment in the penitentiary for not less than ten years; provided that the general reputation for chastity of such female in the community in which she resides, shall be considered by the jury in its discretion in recommending clemency.

As previously indicated, the seldom-employed statute making abduction for the purpose of prostitution or concubinage should be erased from the statute books. Incest, also employed seldom, should however, be considered more carefully. The punishment for it, it is believed, now fits the crime adequately. However, proof on uncorroborated testimony should never be allowed in cases of this type. It would be very simple for an errant daughter or niece to take unjustifiable revenge on a father or uncle in the event she became enraged at him and could invent a plausible story. The charge itself renders the defendant at a double dis-

advantage at the outset. Few cases are discoverable in any jurisdiction where the prosecutrix was a mature woman at the time of the offense, hence the analogy of this offense to statutory rape is customarily distinguishable only on the degree of relationship by consanguinity or affinity of prosecutrix and defendant. This should be all the more reason for the requirement of corroboration, but should exclude prior sexual relations between prosecutrix and defendant, because of the possibilities of coercion and/or undue influence. From the point of view of eugenics, sexual relations between near relatives are absolutely undesirable. Therefore, it is submitted that the statute governing incest be allowed to remain as is, with but one amendment: the requirement of corroboration of the prosecutrix's testimony before a conviction could be sustained.

The only remaining major sex offense wherein character of the prosecutrix is involved is seduction under promise of marriage. The statute and penalties are believed to be appropriate generally, but are the procedural rules? Should reformation be allowed at all? The cases analyzed *supra* reflected almost universally that the only time the female preferred charges was when she became pregnant. Surely, if fewer cases reaching the Supreme Court than the number of years the statute has been in force can be taken at face value (and in practically all a pregnancy was involved), nowhere near the number of actual offenses which *could* be prosecuted ever reach the courts at all. What we have is this: the girl indulges in relations with A. in 1950 without pregnancy. In 1951 she does likewise with B. In 1952 she abstains completely. In 1953 she supposedly falls in love with C., who seduces her under a presumed promise of marriage. His fortune is such that she is impregnated, after which he stops seeing her and refuses to marry her thereafter. The prosecution commences, and she is permitted to show that she has "reformed" since her acts with A. and B., who might also have promised marriage in return for gratification. Should reformation of the prosecutrix be admissible, so as to show the jury that she might have done wrong things with other men but was pure when she engaged in the same thing with the defendant on his promise of marriage? It is submitted that such procedure is improper, for it violates not only the conception of the common man as to "good repute" and also all the elementary principles of sexual psychology. The wording in the existing statute reading "unmarried female of good repute" should be amended to read "unmarried female enjoying a reputation of previous chastity"; all specific acts of immorality with any and all persons should, consequently, be admitted

to discredit such reputation. Why should the luckier males escape punishment and even censure when he of less good fortune spends two or more years in the penitentiary for a similar act? It defies all reasoning based on common sense.

One further point of common sense in the morals cases deals with the statute making a person who receives any of the earnings of a prostitute without giving consideration therefor, guilty of a felony. In the light of all everyday reason, should this be so? Prostitution, often referred to as the "oldest profession", has been fought since Biblical days, but it, like the bad penny, persistently turns up every day in practically any city of any size. Probably more "morality drives" have been instituted against it than any other vice known to man, yet driving out its practitioners from their abodes known to all has only resulted in herding them into locations known at first only to a few, then later to more, then finally to all. It is equally common knowledge that prostitution flourishes best—but not only—through contact agents. It is against them that the statute is directed. Would it encourage the spread of prostitution if such an offense were made a misdemeanor instead of a felony? Hardly so, when the basic nutrient furnishing the income for such felons has gone on for thousands of years, both with and without them? Why fight reality? Why punish the one who is caught (usually because of malice of the prostitute herself) and let the thousands who are not apprehended go free? It is submitted that this offense should be made a misdemeanor, or that prostitution itself should be made a felony, with equal punishment for those violating the two laws.

Undoubtedly the most ignored—but extremely valuable—tool which could be utilized in the various sex offenses, to determine the character of both prosecutrix and accused, is scientific evidence. An excellent analysis of the desirable aspects of this novation in evidence²⁶³ points out that, while the present rules throughout the nation are, for the most part, satisfactory in ordinary cases, they are far from adequate where the female has perverted sexual characteristics. When that is true, her capacity for veracity becomes impaired and possibly even nonexistent. The moralists deplore the writings of the psychologists who are masters in the field—Havelock Ellis, Kraft-Ebbing, and Freud—but these masters'

263. Machtinger, *Psychiatric Testimony for the Impeachment of Witnesses in Sex Cases*, 39 J. CRIM. L. 750 (1949). As to the lie detector, see Jaudes, *Legal Use of the Lie Detector*, 1 St. Louis U. L. J. 299 (1951).

theories are becoming more and more proved in fact rather than obliterated as time passes. Since corroboration is not required when the prosecutrix tells a comparatively lucid and logical story, scientific evidence should always be admissible to impeach her when she is one of those females departing from established sexual norms. Nymphomania and mythomania are by no means rarities, and, correspondingly, neither is satyriasis, although the latter, from common knowledge, decreases with the age of the subject. What about the expert himself, if his testimony is admitted? Can he be impeached as any other witness? The best authority says he cannot, for "after a witness has been properly permitted to testify as an expert, further cross-examination as to his qualifications goes only to the weight of his testimony."²⁶⁴ Irrelevant questions, thus, should be excluded in his case.

Whither, then, the future of character evidence? A comprehensive study a decade ago²⁶⁵ pointed out three trends which are all heartily espoused herein: (1) universal adoption of the truth-veracity rule, (2) the desirability of allowing personal opinion as well as community opinion to prove character, and (3) the desirability of confining proof of conviction of crimes to be limited to crimes involving dishonesty and false statements. A final glance in retrospect reveals to us that Missouri has gone one-third of the way plus one step. Must we await the birth of another Ellison to carry us the rest of the way and more—to make us a trail-blazer instead of a rearguard? Shall we await the twenty-first century to see the completeness of the light of day?

This study ends as it began: character evidence is still a virgin problem in Missouri. It is like a sleek limousine awaiting a driver. There are many makes of automobiles—and many who have drivers' licenses. All that is needed now is an ignition key and some gasoline.

264. ROGERS, *THE LAW OF EXPERT TESTIMONY* § 62 (3d ed. 1941).

265. Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166 (1940).