Credibility Impeachment by Prior Conviction

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Comments

CREDIBILITY IMPEACHMENT BY PRIOR CONVICTION

The adversary system of adjudication is one of the major cornerstones of the Anglo-American system of justice. One of the most striking characteristics of this adversary system is the right of counsel to impeach the credibility of the opponent's witnesses. The purpose of this is to suggest to the trier of fact that the witness's testimony is not worthy of belief. Exposing a witness's prior convictions of offenses against society is one of the most commonly used methods of impeachment. Such a practice is specifically authorized in Missouri by a statute which provides:

Any person who has been convicted of a criminal offense is, notwithstanding, a competent witness; but the conviction may be proved to affect his credibility, either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer.

This method of credibility impeachment is available against any witness, including a criminal defendant testifying in his own behalf. Three recent Missouri Supreme Court decisions reviewed the statute and the practice of impeachment by prior convictions as applied to criminal defendants. This comment analyzes the impact of the new decisions and describes the current state of Missouri's limitations on the practice, compares approaches of other jurisdictions, outlines unresolved constitutional issues lurking in the background, and discusses the merits of the practice in light of its underlying policy considerations.

I. Character Evidence: Framework of Impeachment By Prior Convictions

To properly discuss the use of criminal convictions for impeachment purposes, it is necessary to review their use as substantive evidence of the defendant's guilt in a criminal case. Evidence of prior convictions is a type of character evidence, which is a category of circumstantial evidence de-

2. § 491.050, RSMo 1969.
3. State v. Clinton, 67 Mo. 380 (1878), overruled on other grounds, State v. Williams, 337 Mo. 884, 87 S.W.2d 175 (1935).
4. State v. Morris, 460 S.W.2d 624 (Mo. 1970); State v. Frey, 459 S.W.2d 359 (Mo. 1970); and State v. Scott, 459 S.W.2d 321 (Mo. 1970).
5. Evidence as to what one's character is or was when such is one of the ultimate issues in the case is also referred to as character evidence and should be distinguished from that discussed in the text. Examples of this other use of character evidence include proving the truth of an allegation of bad character in a libel action, determining the "prior chaste character" of the prosecutrix where such is an element of statutory rape, and imposing primary negligence on an employer for entrusting duties to an incompetent or unreliable employee. See C. McCormick, supra note 1, §§ 153-54; 1 J. Wigmore, Evidence §§ 70-81 (3d ed. 1940).
signed to prove what one's acts or intent probably were. The trier of fact reasons from good or bad character to a general disposition to act or not to act in a certain manner, and to an inference that the person either did or did not in fact act in that manner. This reasoning suggests, as do some commentators, that evidence of the actor's character will always be relevant to prove or disprove his alleged acts. Nevertheless, the general rule of the courts is to exclude character evidence as proof of conduct or intent. The reason for the general exclusion of such otherwise relevant evidence is that "generally it comes with too much dangerous baggage of prejudice, distraction from the issues, time-consumption and hazard of surprise." The dangers of prejudice are especially acute when character evidence is sought to be introduced against a criminal defendant. Courts have long prevented the prosecution from introducing evidence of the bad character of the accused, unless and until the defendant first gives evidence of his good character.

In the area of character evidence involving prior crimes, however, several major exceptions (in addition to impeachment) have been grafted onto the general rule excluding character evidence. Basically these exceptions provide for the admission of character evidence if it is substantially relevant for some purpose other than to show a probability that the accused committed the crime with which he is charged by reasoning through his being a man of criminal character. The courts usually require a close relationship of some sort between the prior offense and the offense charged. Purposes forming the basis for such an exception tend to fall in the following non-exhaustive categories:

(1) Res gestae. A defendant's other crimes are admissible to the extent that they complete the story of the crime on trial by showing its immediate context. For example, in a trial for robbery, the Missouri Supreme Court


7. E.g., C. McCormick, supra note 1, § 155.


9. C. McCormick, supra note 1, § 155. See also 1 J. Wigmore, supra note 5, § 57. This was the rationale employed by the Missouri Supreme Court in State v. Hayes, 356 Mo. 1038, 204 S.W.2d 723 (1947).

10. See State v. Withers, 347 S.W.2d 146, 150 (Mo. 1961); State v. Hampton, 275 S.W.2d 356 (Mo. En Banc 1955); State v. Hayes, 356 Mo. 1038, 204 S.W.2d 723 (1947); State v. Willard, 346 Mo. 773, 142 S.W.2d 1046 (1940); State v. Robinson, 344 Mo. 1094, 130 S.W.2d 530 (1939); State v. Pinkston, 336 Mo. 614, 79 S.W.2d 1046 (1935); State v. Bugg, 316 Mo. 581, 292 S.W. 49 (1927); State v. Baird, 271 Mo. 9, 195 S.W. 1010 (1917); State v. Wellman, 253 Mo. 302, 161 S.W. 795 (1913); State v. Shipley, 174 Mo. 512, 74 S.W. 612 (1903); State v. Martin, 74 Mo. 547 (1881); State v. Creson, 38 Mo. 372 (1866). See also C. McCormick, supra note 1, § 157; 1 J. Wigmore, supra note 5, §§ 55, 57; Hunvald, Criminal Law in Missouri: Evidence of Other Crimes, 27 Mo. L. Rev. 544, 545 (1962).


13. The organization of C. McCormick, supra note 1, § 157 is borrowed.

has upheld the admission of evidence that the accused robbed other persons at the same time. The court has allowed evidence in a rape prosecution of a subsequent rape of the prosecutrix and a rape of her sister, when all three attacks occurred consecutively and as part of the same occurrence. Admitting evidence of an act of sodomy by the accused upon the prosecutrix immediately after the robbery with which he was charged has also been upheld.

The court expanded the scope of the *res gestae* exception in *State v. Adamson*. The defendants were on trial for forgery of checks. The prosecution was allowed to show that the defendants had illegally printed the checks, an act committed some time prior to the actual writing of the checks and therefore arguably not part of the "immediate" context of the crime. The court reasoned that such other illegal acts should be admitted when it is impossible to show the elements of the crime charged without showing their prior events. "The State is not to be penalized if parties so entangle their illegal affairs that one offense cannot be proved without also proving others."

(2) Motive. Evidence of other crimes is admissible to show the motive of the accused to commit the crime charged. Accordingly Missouri has allowed evidence in a murder prosecution of defendant's relationship with a married woman to show why the defendant followed her home and fought with the deceased, a friend of the woman's husband. In a prosecution for homicide in the perpetration of arson, the court approved of the admission at trial of evidence of defendant's conviction for non-support for the purposes of proving that the defendant wanted it to appear that he died in a fire. Most recently, in a trial for assaulting policemen with intent to kill, the court approved of admitting evidence of defendant's narcotics sales to prove that he shot at the officers while attempting to avoid arrest for the latter offense.

(3) Intent. Whenever either the general or specific *mens rea* is an essential element of the crime charged, such intent may be shown by evidence of other crimes committed at or about the time of the commission of the offense charged. For example, for the purpose of proving intent to defraud, the court approved the admission into evidence in a prosecution for forgery that defendant uttered another check on the same day. In *State v. Varner*, the court properly admitted evidence of another murder to establish deliberation, where the bodies were found 40 feet apart. However,
the commission of other criminal acts of the same kind are not admissible to prove intent where the criminal intent is presumed from the act itself. Thus, the court has found error in the admission of evidence of a car theft in a prosecution for another car theft.

28. State v. Barker, 249 S.W. 75 (Mo. 1923); State v. Patterson, 271 Mo. 99, 110, 196 S.W. 3, 6 (1917) (dictum).
29. State v. Barker, 249 S.W. 75, 77 (Mo. 1923).
33. State v. Hunt, 280 S.W.2d 37 (Mo. 1955).
35. 29 Am. Jur.2d Evidence § 326 (1967). For two recent applications of this rule, see State v. Smith, 431 S.W.2d 74 (Mo. 1968), and State v. Burnett, 429 S.W.2d 239 (Mo. 1968).
36. State v. Mandell, 353 Mo. 502, 185 S.W.2d 59 (1944).
37. State v. Scown, 312 S.W.2d 782 (Mo. 1958).
38. 224 S.W.2d 746 (Mo. En Banc 1959).
39. Id. at 753.
40. C. McCormick, supra note 1, § 157.
41. See text accompanying notes 35-39 supra.
Evidence of prior sex offenses against the same prosecutrix are admissible to show a passion or propensity for illicit sexual relations with that prosecutrix. However, unlike the majority of jurisdictions, Missouri courts restrict this exception to sexual acts committed prior to the offense charged.

Identity. Evidence of other crimes is admissible if relevant and absolutely necessary to prove the identity of the accused. One Missouri case suggests that proof of such other crime must naturally tend to show that the accused is the one who committed the offense on charge. Admissible details and circumstances of the other offense are limited to those which are both relevant and necessary to establishing identity. Once identity is established by other evidence, other crimes are not admissible under this theory. Professor McCormick suggests that this ground is best advanced when accompanied by another theory for admission.

Conduct evidencing a weak cause. Evidence of criminal acts of the accused are admissible if they constitute admissions by conduct, and are intended to avoid punishment for the crime on charge. In State v. Aitkens the defendant was charged with killing a 14-month-old infant by suffocation. The court approved of the admission into evidence of defendant's confession, which included a statement that she had mutilated the corpse with a knife to make it appear that the child had been the victim of a criminal attack. Responding to defendant's claim that this part of the confession was erroneously admitted because it proved a separate crime,

42. State v. Tyler, 306 S.W.2d 452 (Mo. 1957); State v. Hersh, 296 S.W. 433 (Mo. 1927); State v. Cason, 252 S.W. 688, 690 (Mo. 1923); State v. Sechrist, 226 Mo. 574, 126 S.W. 400 (1910); C. McCormick, supra note 1, § 157.


44. State v. Amende, 338 Mo. 717, 92 S.W.2d 106 (1936); State v. Guye, 299 Mo. 348, 252 S.W. 955 (1923); State v. Arnold, 267 Mo. 33, 183 S.W. 289 (1916); State v. Palmberg, 199 Mo. 233, 97 S.W. 566 (1905). See State v. Taylor, 324 S.W.2d 643 (Mo. 1959).

45. State v. Thompson, 280 S.W.2d 838, 842 (Mo. 1955) (dictum).

46. State v. Griffin, 336 S.W.2d 364 (Mo. 1960).

47. State v. Reese, 364 Mo. 1221, 274 S.W.2d 304 (En Banc 1954).


49. Id.

50. Id. at 752, 179 S.W.2d at 87.
the court said that the proof was admissible "as tending to establish her identity, guilty knowledge, and absence of mistake or accident, on the same theory as if she had fled or attempted to conceal or destroy the corpse."

II. HISTORY OF IMPEACHMENT BY PRIOR CONVICTIONS

The intricacies of impeachment by prior convictions posed few problems at common law. No prejudice to the accused was possible, because the party on trial was himself deemed incompetent and consequently could never occupy the role of witness. The defendant's character itself could not be attacked unless and until the defense offered evidence of his good character. Moreover, conviction of an "infamous crime" (i.e., treason, any other felony, or any misdemeanor involving dishonesty or obstruction of justice) rendered a person incompetent as a witness. Little is written about impeachment at common law by convictions for other than "infamous crimes." Missouri's earliest reported decision involving impeachment by prior conviction was *Deer v. State*, in which the defendants were allowed to show at trial that a prosecution witness had been convicted of keeping a house of prostitution.

Statutory reform of the old common-law rules of incompetency brought with it the legal problems relating to impeachment which must be dealt with today. The first step in Missouri was the general assembly's abolition of the interest disqualification in 1877. This statute allowed the accused to testify as a witness in his own behalf and provided that his self-interest could "be shown for the purpose of affecting his or her credibility." The following year the supreme court significantly expanded the impeachability of criminal defendants in its landmark decision *State v. Clinton*. The

53. *Id.* at 756, 179 S.W.2d at 90 (emphasis added). See also *People v. Spaulding*, 309 Ill. 292, 141 N.E. 196 (1923).

54. For a more exhaustive treatment of Missouri's history of impeachment, see *Bishop, Impeachment and Rehabilitation of Witness By Character Evidence in Missouri* (pts. 1 & 2), 20 Mo. L. REV. 142, 278 (1955).


57. C. *McCormick, supra* note 55, §§ 43, 64; 2 *J. Wigmore, supra* note 55, § 520.

58. 14 Mo. 348 (1851).

59. The supreme court upheld the trial court's rejection of the record of the conviction after the fact of the conviction had already been shown to the jury by other proof. *Id.* at 350.

60. Mo. Laws 1877, at 356, § 1.

61. At common law, the accused could plead his case, but he was not sworn or given "witness" status. See 2 *J. Wigmore, supra* note 55, § 575.

62. Mo. Laws 1877, at 356, § 1 provided:

No person shall be rendered incompetent to testify in criminal causes by reason of being the person on trial or examination; but any such fact may be shown for the purpose of affecting his or her credibility: *Provided*, That no person on trial or examination shall be required to testify, except as a witness on behalf of the person on trial or examination...

63. 67 Mo. 380 (1878), overruled on other grounds, *State v. Williams*, 337 Mo. 884, 87 S.W.2d 175 (1935).
court held that a criminal defendant choosing to make himself a witness could be impeached, contradicted and subjected to the same tests as any other witness.64 This judicial extension of the new statute was reflected in the following year's statutory compilation,65 and remains ingrained in Missouri's present statutory matrix.66 The Clinton doctrine, now backed by statutory authority, ran counter to the long-established rule prohibiting the introduction of evidence of defendant's bad character until the defendant presented evidence of his good character.67 It has been held that the defendant must offer himself as a witness before he is subject to impeachment,68 but that his introduction of evidence of his good character need not be a prerequisite to impeachment.69 The conflict between the two lines of authority has never been thoroughly resolved in this state.70

In 1895 the general assembly removed the common-law incompetency of persons convicted of infamous crimes.71 The statute provided, though, that such prior convictions could be shown to affect the witness's credibility. Consequently, the evidentiary reform brought with it a host of new problems, some of which persist to the present day.

III. CRIMES WHICH CAN BE USED FOR IMPEACHMENT

A. Approaches

One of the main problems posed by statutorily authorized impeachment by evidence of prior conviction is determining which convictions may be used for that purpose. The problem in the United States has been decided in almost as many ways as there are states. For the most part, the various rules can be grouped into the seven categories which follow.

1. Common-law Infamous Crimes

"Infamous crimes" at common law included treason, other felonies, and misdemeanors involving dishonesty or the obstruction of justice.72

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64. Id. at 391.
65. The portion of the 1877 act quoted in note 62 supra became part of § 1918, RSMo 1879. This statute differed from the 1877 act by making minor changes in wording and by allowing contradiction and impeachment in the same manner as for any other witness.

The text of § 1918, RSMo 1879, is as follows:

No person shall be incompetent to testify in any criminal cause or prosecution by reason of being the person on trial or examination; . . . [deleted portions relate to husband-wife privilege] but any such facts may be shown for the purpose of affecting the credibility of such witness; provided, That no person on trial or examination, nor wife or husband of such person, shall be required to testify, but any such person may, at the option of the defendant, testify in his behalf, or on behalf of a codefendant, and shall be liable to crossexamination, as to any matter referred to in his examination in chief, and may be contradicted and impeached as any other witness in the case. . . .

66. § 546.260, RSMo 1969, is identical to § 1918, RSMo 1879, except for minor changes in punctuation.
68. State v. Wellman, 253 Mo. 302, 161 S.W. 795 (1913).
70. Bishop, supra note 54, at 157.
71. Mo. Laws 1895 § 1, at 284 [the ancestor of § 491.050, RSMo 1969, and identical to it].
72. C. McCormick, supra note 55, §§ 43, 64; 2 J. Wigmore, supra note 55, § 520.
These crimes formerly rendered a witness incompetent. Consequently, when states passed statutes giving such witnesses competency, allowing impeachment by the formerly incapacitating crimes was a logical step. Indeed, this was the earliest interpretation of the statute by Missouri courts. Impeachment by infamous crimes is the approach followed today in Illinois, where the legislature has avoided potential problems in determining whether a conviction is "infamous" by enumerating such crimes specifically.

2. Felonies Only

This approach is administered easily, since most jurisdictions specify by statute what constitutes a felony. However, such an approach would allow impeachment of credibility by culpably negligent manslaughter, such as a death arising out of a traffic accident, but would exclude impeachment by an attempt to improperly influence a juror. Nevertheless, the "felonies only" approach has wide acceptance, including Arizona, Iowa, Nebraska and the federal courts of the eighth circuit.

3. Crimes Involving Moral Turpitude

This approach appears to be more consistent with the purpose of credibility impeachment, as it limits impeachment to those crimes displaying reprehensible character traits. However, a great deal of uncertainty plagues the determination of what constitutes a "crime involving moral turpitude." It has been defined as

An act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellowmen or to society in general.

73. Authorities cited note 72 supra.
74. E.g., § 491.050, RSMo 1969.
76. See People v. Kirkpatrick, 413 Ill. 595, 110 N.E.2d 519 (1953); Bartholomew v. People, 104 Ill. 601 (1882).
77. ILL. REV. STAT. ch. 38, § 124-1 (1967) provides: "Infamous crimes" are the offenses of arson, bigamy, bribery, burglary, deviant sexual assault, forgery, incest or aggravated incest, indecent liberties with a child, kidnapping or aggravated kidnapping, murder, perjury, rape, robbery, sale of narcotic drugs, subordination of perjury, and theft if the punishment imposed is imprisonment in the penitentiary.
78. E.g., § 556.020, RSMo 1969, provides: The term "felony," when used in this or any other statute, shall be construed to mean any offense for which the offender, on conviction, is liable by law to be punished with death or imprisonment in a correctional institution of the state department of corrections, and no other.
79. § 559.140, RSMo 1969, declares such a crime to be punishable by as much as ten years in the penitentiary.
80. § 557.130, RSMo 1969, declares such a crime to be a misdemeanor.
82. See IOWA CODE § 622.17 (1966).
84. See Montgomery v. United States, 403 F.2d 605 (8th Cir. 1968) (affirming a decision from the western district of Missouri); Whitfield v. United States, 376 F.2d 5 (8th Cir.), cert. denied, 389 U.S. 883 (1967).
contrary to the accepted rule of right and duty between man and man.85

The difficulty in administering such a rule can be inferred from the vagueness of the court's definition, and the rule has been the subject of criticism.86 Nevertheless, South Carolina,87 Tennessee,88 Texas89 and federal courts in the sixth circuit90 have adopted this approach.

4. Crimes Involving Dishonesty or False Statement

This rule was originally promulgated by the American Law Institute in its Model Code of Evidence91 and was subsequently recommended by the Missouri Bar in its Proposed Missouri Evidence Code92 and by the state commissioners in the Uniform Rules of Evidence.93 However, neither was ever enacted by the Missouri Legislature. Kansas has adopted this approach by statute,94 and the Kentucky Court of Appeals recently adopted a modification of it.95 It has the advantage of admitting only those prior convictions which bear a relation to the witness's likelihood to tell the truth.

5. Any Crime

This "wide-open" approach to impeachment avoids the difficulty in administration inherent in some of the foregoing rules. As will be discussed later, it also is subject to the most abuse.96 The "any crime" approach enjoys great popularity with state courts. Missouri,97 Oklahoma,98 Arkansas,99 Ohio100 and New Jersey101 are among the states which follow this rule.

88. See Davis v. Wicker, 206 Tenn. 403, 333 S.W.2d 921 (1960); McGee v. State, 206 Tenn. 230, 332 S.W.2d 507 (1960).
91. MODEL CODE OF EVIDENCE rule 106 (1942).
93. UNIFORM RULE OF EVIDENCE 21 (1953).
94. KAN. STAT. ANN. § 60-421 (1963). Kansas statutorily adopted the Uniform Rules in their entirety. Thus, this statute, identical to UNIFORM RULE OF EVIDENCE 21 (1953), takes the protection of the criminal defendant a step further by excluding impeachment by any conviction until he has first introduced evidence in support of his credibility. See pt. VII, § B of this comment.
95. The new Kentucky rule restricts impeachment to felonies involving dishonesty or false statement. See Cotton v. Commonwealth, 454 S.W.2d 698, 701 (Ky. 1970), noted in 59 KY. L.J. 514 (1971).
96. See pts. V & VI of this comment.
97. Cases are discussed in detail in pt. III, §§ B & C of this comment.
6. Trial-court Discretion.\textsuperscript{102}

This view requires the trial judge to balance the impeaching conviction's relevancy against (1) the prejudice against the accused and (2) the probable effect of such evidence on the accused's election to testify. It has been adopted in the District of Columbia\textsuperscript{103} on the basis of a statute\textsuperscript{104} substantially the same as the Missouri statute.\textsuperscript{105} Two other federal circuits have now followed the lead of the District of Columbia in adhering to this approach.\textsuperscript{106} Although New Mexico has adopted a similar rule,\textsuperscript{107} trial-court discretion has not generally been well received by state courts.\textsuperscript{108}

The Missouri Supreme Court was given the opportunity to adopt this rule last year. The defendant in \textit{State v. Morris}\textsuperscript{109} contended that section 491.050, RSMo 1969 \textit{allowed} a court to admit prior convictions for impeachment purposes, but did not \textit{require} such admission.\textsuperscript{110} The District of Columbia statute\textsuperscript{111} and Missouri's section 491.050 both provide that prior convictions "may" be used to affect credibility. The District of Columbia Court of Appeals had said:

Section 305 is not written in mandatory terms. It says, in effect, that the conviction "may," as opposed to "shall," be admitted; and we think the choice of words in this instance is significant. The trial court is not \textit{required} to allow impeachment by prior conviction every time a defendant takes the stand in his own defense. The statute, in our view, leaves room for the operation of a sound ju-


\textsuperscript{104} \textit{D.C. Code Ann} § 14-305 (1966).

\textsuperscript{105} § 491.050, RSMo 1969.


\textsuperscript{107} \textit{See State v. Coca}, 80 N.M. 95, 451 P.2d 999 (Ct. App. 1969). The court reasoned from prior New Mexico cases and did not cite \textit{Luck}.

\textsuperscript{108} Recent cases rejecting the approach include People v. Gilmore, 118 Ill. App. 2d 100, 254 N.E.2d 590 (1969); \textit{State v. West}, 285 Minn. 188, 173 N.W.2d 465 (1969); \textit{State v. Morris}, 460 S.W.2d 624 (Mo. 1970); and \textit{State v. Hawthorne}, 49 N.J. 130, 228 A.2d 682 (1967).

\textsuperscript{109} \textit{Id.} at 627.

\textsuperscript{111} \textit{D.C. Code Ann.} § 14-305 provides:

A person is not incompetent to testify . . . by reason of his having been convicted of crime. The fact of conviction may be given in evidence to affect his credibility as a witness . . . .
dicial discretion to play upon the circumstances as they unfold in a particular case.\textsuperscript{112}

Defendant Morris urged that admission of prior convictions which were not logically related to the probability of untruthfulness or to defendant's credibility as a witness constituted an abuse of the "discretion" provided in section 491.050.\textsuperscript{113} However, the court rejected this argument, concluding that the statute conferred "an absolute right to show prior convictions solely to affect credibility."\textsuperscript{114} The court insisted that any change should be left to the legislature.\textsuperscript{115}

7. Federal Approach

Federal courts in at least three circuits\textsuperscript{116} combine two of the above approaches. They allow impeachment only by felonies and those misdemeanors involving dishonesty or false statement. While the preliminary draft of the Proposed Federal Rules of Evidence adopted the same rule,\textsuperscript{117} the revised draft of 1971 added the limitations of a third approach—an overall restriction of "trial court discretion."\textsuperscript{118}

B. Crimes Usable for Impeachment in Missouri

Early Missouri cases subscribed to the "infamous crimes" approach.\textsuperscript{119} However, in 1903 the supreme court seized on the words "convicted of a criminal offense" in the 1895 act\textsuperscript{120} and held that those words constituted a legislative mandate to allow impeachment by any criminal offense, including misdemeanors.\textsuperscript{121} What weight is to be given to such evidence of impeachment is to be determined by the jury.\textsuperscript{122} This rule has been followed even though the conviction used for impeachment is for the same crime as the one on trial,\textsuperscript{123} and when the crime forming the basis of the impeaching conviction arose out of the same conduct as the civil cause of action on trial. For example, \textit{Fischer v. Gunn}\textsuperscript{124} was a civil suit arising out of an auto-

\textsuperscript{112} Luck v. United States, 348 F.2d 763, 767-68 (D.C. Cir. 1965).
\textsuperscript{113} State v. Morris, 460 S.W.2d 624, 627 (Mo. 1970).
\textsuperscript{114} Id. at 629.
\textsuperscript{115} Id.
\textsuperscript{116} See United States v. Sanders, 412 F.2d 854, 855 (5th Cir. 1969); United States v. Remco, 388 F.2d 783 (3d Cir. 1968); United States v. Provoo, 215 F.2d 531 (2d Cir. 1954); United States v. Montgomery, 126 F.2d 151, 155 (3d Cir.), cert. denied, 316 U.S. 681 (1942).
\textsuperscript{120} Mo. Laws 1895 § 1, at 284 [now § 491.050, RSMo 1969].
\textsuperscript{121} State v. Blitz, 171 Mo. 530, 71 S.W. 1027 (1905).
\textsuperscript{122} State v. Ransom, 340 Mo. 165, 174, 100 S.W.2d 294, 298 (1936).
\textsuperscript{124} 270 S.W.2d 869 (Mo. 1954).
mobile accident. When the defendant took the stand his credibility was impeached by a traffic violation arising out of the same accident.125

C. Limitations to the Missouri Rule

Missouri has narrowed its "any crime" rule somewhat by construing strictly the statutory requirements of "conviction" and "criminal offense."126 In State v. Frey127 the prosecutor asked the defendant, accused of illegal sale of narcotics, if he had ever been convicted of a narcotics charge before. When the defendant replied that he had not, the prosecutor was allowed to introduce the record of prior proceedings in another circuit court showing that defendant had pleaded guilty to unlawful possession of narcotics, and that the court had suspended the imposition of sentence and had placed the defendant on two year's probation.128 The supreme court held that the prior proceedings, notwithstanding the plea of guilty, did not constitute a "conviction" within the meaning of section 491.050, and that the introduction of the record of the prior proceedings constituted reversible error.129 The court based its decision on prior Missouri dictum130 and cases in accord from other jurisdictions.131 The court, though, ignored Missouri cases suggesting the contrary,132 as well as contrary holdings in other jurisdictions.133

It is clear that mere arrests134 or indictments135 cannot be the basis of inquiry. The court has also ruled that there can be no impeachment by a conviction void on its face136 or by the record of a conviction pending on appeal.137 Moreover, violations of municipal ordinances138 and adjudica-

125. Id. at 876-77. But see State v. Tannell, 296 S.W. 423 (Mo. 1927) (a criminal action where the court found that allowing cross-examination of the accused as to another crime arising out of the same circumstances as the crime for which he is tried is error).
126. § 491.050, RSMo 1969.
127. 459 S.W.2d 359 (Mo. 1970).
128. Id. at 360.
129. Id. at 362.
130. State v. Blevins, 425 S.W.2d 155 (Mo. 1968); State v. Rumfelt, 258 S.W.2d 619, 620 (Mo. 1953); Neibling v. Terry, 352 Mo. 396, 399, 177 S.W.2d 502, 504 (En Banc 1944); State v. Townley, 147 Mo. 205, 208, 48 S.W. 833, (1898); Meyer v. Missouri Real Estate Comm'n, 258 Mo. App. 476, 482, 183 S.W.2d 342, 345 (1944).
132. State v. Rose, 325 S.W.2d 485 (Mo. 1959), and State v. Merrell, 263 S.W. 118 (Mo. 1924), suggest strongly, but do not explicitly state, that a plea of guilty constitutes a conviction. The state offered these cases, but the court did not mention them at all in the opinion. See Brief for Respondent at 12-14, State v. Frey, 459 S.W.2d 359 (Mo. 1970).
134. State v. Howard, 102 Mo. 142, 14 S.W. 937 (1890).
136. State v. Wagner, 237 S.W. 750 (Mo. 1922).
137. State v. Blevins, 425 S.W.2d 155 (Mo. 1968). The Proposed Federal Rules restrict this exclusion to annulments or pardons given pursuant to a pro-
tions of juvenile delinquency do not constitute "criminal offenses" for impeachment purposes. Failure to constitute a prior conviction may preclude such matters from being used for impeachment, since a line of cases beginning in 1865 provides that, while a witness may be impeached by inquiry into particular acts of misconduct for which he has not been convicted, counsel is bound by his answer.

In addition, the trial judge may, within his discretion, exclude otherwise proper convictions if they are "so remote as not to bear reasonably on the present character of the witness." The stated reason for this limitation is to allow for the possibility that the witness may have reformed. The decision of the trial judge will be reversed only for an abuse of discretion.

This wide latitude which the trial judge has been granted has led to uncertainty on when an impeaching conviction becomes too remote. Missouri courts have approved impeachment by a 35-year-old conviction and disapproved impeachment by evidence of a ten-year-old crime. The court has intimated that convictions which are otherwise too remote may nevertheless be admitted once the inference of reformation has been rebutted by defendant’s admission of subsequent offenses. Missouri has relatively strict standards of remoteness with regard to the admission of prior-crimes evidence within other exceptions to the general rule excluding character evidence. For example, in a trial for obtaining money by false pretenses, a showing that defendant had engaged in similar dealings within 14 months

138. Commerford v. Kreiter, 462 S.W.2d 726, 733 (Mo. 1971) (dictum); Willis v. Wabash R.R., 284 S.W.2d 503 (Mo. 1955); State v. Taylor, 98 Mo. 240, 11 S.W. 570 (1889).

139. State ex rel. Shartel v. Trimble, 333 Mo. 888, 63 S.W.2d 37 (1933). The Proposed Federal Rules would allow discretionary admission of juvenile adjudications for the impeachment of a witness other than the accused if the adjudication involved dishonesty or false statement or would have been punishable by one year or more imprisonment if the witness had been tried as an adult and if the evidence is deemed necessary to the determination of the guilt or innocence of the accused. PROP. FED. R. EVID. 609(d) (Rev. Draft, 1971).

140. State v. Long, 201 Mo. 664, 100 S.W. 587, 590 (1907).

141. Such misconduct may not be proved by extrinsic evidence. State v. Perkins, 342 Mo. 560, 116 S.W.2d 80 (1938). This rule and its exceptions in Missouri are analyzed by Bishop, Impeachment and Rehabilitation of Witnesses by Character Evidence in Missouri, 20 Mo. L. Rev. 142, 166-72 (1955).

142. State v. Long, 201 Mo. 664, 100 S.W. 587, 590 (1907).


144. Collins v. Leahy, 102 S.W.2d 801, 811 (St. L. Mo. App. 1937).

145. State v. Long, 201 Mo. 664, 100 S.W. 587 (1907).

146. Jackson v. City of Malden, 72 S.W.2d 850, 855 (Spr. Mo. App. 1934).

147. Page v. Payne, 293 Mo. 600, 240 S.W. 156 (1922).


149. See pt. 1 of this comment.
of the offense on trial was deemed by the court to be too remote to be admitted for the purpose of showing intent. However, such strict standards have not been applied to the admission of prior convictions for the purpose of impeachment. The Proposed Federal Rules offer a simpler approach, specifying an arbitrary ten-year time limit for impeaching convictions.

IV. CIRCUMSTANCE INQUIRY

Once it has been determined that a particular prior conviction may be inquired into for the purpose of impeachment, the court must determine what aspects of that conviction may be the subject of inquiry. In the recent case of State v. Scott, the accused admitted prior burglary convictions on direct examination. Then on cross examination, the prosecutor was allowed to inquire into the details of those prior convictions. Defendant’s responses to the prosecutor’s detailed inquiries revealed that the burglaries involved the theft of adding machines, that he had achieved entry by breaking window panes in the door, and that the burglaries had taken place in a particular neighborhood. Defendant was being tried for a burglary in that same neighborhood, in which entry was achieved by breaking a window pane in the door and in which an adding machine was stolen. The prior convictions were clearly too remote to show habit, design or criminal intent.

The court examined section 491.050 and concluded that the statute “merely provides that if there is a denial of the prior conviction, the state is not precluded from showing that in fact the witness had been convicted previously.” The court held that allowing the prosecutor’s inquiries into the circumstances of defendant’s prior convictions constituted prejudicial error which was not corrected by the limiting instruction. The rationale of the decision was that impeachment evidence should not be designed to provide evidence of guilt. Implicit in this rationale is the idea that inquiry into the circumstances is improper because of the prejudicial impact on the jury.

Earlier Missouri decisions had expanded the use that could be made of prior convictions. In State v. McBride, the court stated that it was proper to show the jury of what crime the witness had been convicted in addition to the mere fact of prior conviction. Later decisions extended the

150. State v. Stegall, 353 S.W.2d 656, 658 (Mo. 1962).
152. 459 S.W.2d 321 (Mo. 1970).
153. Id. at 322-23.
154. Id. at 322.
155. Id. at 324, citing State v. Stegall, 353 S.W.2d 656 (Mo. 1962).
156. § 491.050, RSMo 1969 is quoted in the text accompanying note 2 supra.
157. 459 S.W.2d at 323 (emphasis added).
158. Id. at 324.
159. Id. Judge Morgan thus based the decision on a broad ground. The rationale argued by the appellant, that such extra facts regarding the prior convictions are inadmissible because they are irrelevant (Brief for Appellant at 18, 21-22, 28, State v. Scott, 459 S.W.2d 321 (Mo. 1970)), would have been a narrower ground which might have provided subsequent opportunity for the court to distinguish this decision on its facts and water down the prohibition.
160. 231 S.W. 592 (Mo. 1921).
161. Id. at 594.
permissible inquiry to the nature of the crime and the punishment.\textsuperscript{162} However, implicit in the language of these latter decisions was the idea that no further inquiry would be permitted.\textsuperscript{163} One possible roadblock to the Scott decision was dictum in State v. Holloway\textsuperscript{164} suggesting that where a defendant has testified as to previous convictions of other felonies on direct examination, eliciting more details about those convictions is within the permissible scope of cross-examination. However, the case cited by the court in Holloway as authority for this proposition\textsuperscript{165} did not support the stated principle, and Holloway has never been followed on this point.\textsuperscript{166}

Another line of cases\textsuperscript{167} supports the principle that once the witness admits a particular crime, even the record of his prior conviction is inadmissible because the statute\textsuperscript{168} allows the showing of the conviction by cross examination or by the record but not by both. However, the authority on which this line of cases rests is unreliable.\textsuperscript{169}

Finally in State v. Mobley\textsuperscript{170} the court, dealing with improper inferences from prior convictions made by the prosecutor in closing argument, stated the principle that prosecutors should not "convey the idea of guilt

\textsuperscript{162} State v. Washington, 383 S.W.2d 518, 523 (Mo. 1964); State v. Hood, 313 S.W.2d 661, 663-64 (Mo. 1958). Presumably, "punishment" refers to the sentence adjudged rather than the amount of the sentence actually served.

\textsuperscript{163} E.g., in State v. Hood, 313 S.W.2d 661 (Mo. 1958), the cross-examination elicited answers as to the specific crime convicted of, its general nature, and the punishment. The court stated that the trial court had "complied literally with the statute and properly limited the examination of each of the witnesses on that score in the manner heretofore approved by this court." \textit{Id.} at 664 (emphasis added).

\textsuperscript{164} 355 Mo. 217, 195 S.W.2d 662 (1946).

\textsuperscript{165} State v. Couch, 341 Mo. 1239, 111 S.W.2d 147 (1937).

\textsuperscript{166} The state did not even cite Holloway. Brief for Respondent, State v. Scott, 459 S.W.2d 321 (Mo. 1970).

\textsuperscript{167} Hoover v. Denton, 335 S.W.2d 46 (Mo. 1960); Stack v. General Baking Co., 283 Mo. 396, 223 S.W. 89 (1920); State v. Sovern, 225 Mo. 580, 125 S.W. 769 (1910); Myles v. Saint Louis Pub. Serv. Co., 52 S.W.2d 595 (St. L. Mo. App. 1932).

\textsuperscript{168} § 491.050, RSMo 1969.

\textsuperscript{169} In State v. Sovern, 225 Mo. 580, 125 S.W. 769 (1910), the court held that proof of an impeaching offense must be by evidence sufficient to establish the fact that the witness had been convicted. In dictum describing such competent evidence, the opinion noted that the statute (currently § 491.050, RSMo 1969) "makes the suggestion that the inquiry be made of the witness, and that if the witness should deny it, the opposing party could resort to proof by the record." \textit{Id.} at 591, 125 S.W. at 773. In Stack v. General Baking Co., 283 Mo. 396, 223 S.W. 89 (1920), the court seized on the words "if the witness should deny it" in the Sovern opinion, and held the record of a prior conviction was properly excluded after the witness had admitted the conviction. \textit{Id.} at 418-19, 223 S.W. at 96. Dictum to the same effect appeared in Myles v. Saint Louis Pub. Serv. Co., 52 S.W.2d 595 (St. L. Mo. App. 1932). Finally, in Hoover v. Denton, 335 S.W.2d 46 (Mo. 1960), the court purported to hold that once a witness admits a particular crime, the record of that crime is inadmissible. However, the thrust of the decision was that the record is admissible if the witness evades the question, equivocates, or denies the conviction. \textit{Id.} at 48. Consequently, Hoover is probably mere dictum in spite of the court's use of the word "hold."

\textsuperscript{170} 369 S.W.2d 576 (Mo. 1963).
by reason of the prior offenses."\textsuperscript{171} This reasoning was applied by the court in deciding \textit{Scott}.\textsuperscript{172}

The \textit{Scott} holding puts Missouri officially in line with the overwhelming weight of authority.\textsuperscript{173} Most states, like Missouri, allow inquiry into the crime for which the defendant has been previously convicted, the nature of the crime, and its punishment.\textsuperscript{174} A minority of states, however, allow showing only the fact that the witness has been convicted of a crime, and prohibit further inquiry, even into the name of the crime for which the witness was convicted.\textsuperscript{175} The rationale behind the minority decisions is that the mere fact of conviction affects credibility; therefore, any further details contribute nothing to impeachment, while providing the jury with the raw material for prejudicial inferences.\textsuperscript{176}

Cases allowing an inquiry into the circumstances of prior convictions are infrequent. The Texas courts allow the prosecutor to ask about particular circumstances when the witness requests more specific information about the crime to which the prosecutor referred.\textsuperscript{177} A New Jersey case, reasoning from the fact that a prior conviction may be shown by the record of conviction, allows a prosecutor to inquire about any details which the record of conviction would tell the jury if it were introduced.\textsuperscript{178} However, there appear to be no reported cases still in effect in any American jurisdiction which purport to allow inquiry into the circumstances of prior convictions after the witness has admitted them.\textsuperscript{179}

\begin{enumerate}
\item \textsuperscript{171} \textit{Id.} at 581.
\item \textsuperscript{172} 459 S.W.2d at 324.
\item \textsuperscript{174} C. McCormick, \textit{Evidence} § 48 (1954).
\item \textsuperscript{175} Watts v. State, 160 Fla. 268, 34 So.2d 429 (1948); Norton v. Commonwealth, 196 Ky. 90, 244 S.W. 310 (1922); Vanderpool v. State, 115 Neb. 94, 211 N.W. 605 (1926); Rice v. State, 191 Wis. 181, 217 N.W. 697 (1928).
\item \textsuperscript{176} E.g., Watts v. State, 160 Fla. 268, 34 So.2d 429 (1948).
\item \textsuperscript{177} \textit{See} Hulbert v. State, 97 Tex. Crim. 186, 260 S.W. 575 (1924).
\item \textsuperscript{178} State v. Rodia, 132 N.J.L. 199, 39 A.2d 484 (Ct. Err. & App. 1944) (Court upheld a question asking if the witness had been convicted of atrocious assault and battery "by cutting").
\item \textsuperscript{179} The state did not argue this point in \textit{Scott}. Its argument can be summarized as follows: (1) failure to preserve points for appeal; (2) attempts to distinguish appellant's cases as not dealing with details inquired into in the course of laying the foundation for asking defendant whether he had committed the prior burglaries, as not governing where the defendant replied that he didn't remember, or as dealing with more serious circumstance inquiries than the case at bar; and (3) any error committed was curable by instruction. Brief for Respondent, State v. Scott, 459 S.W.2d 321 (Mo. 1970).
\end{enumerate}
Like many other areas of the law in recent years, impeachment of the criminal defendant with his prior convictions is coming under constitutional attack. Three basic constitutional issues appear to be involved: (1) prejudice as a violation of one’s right to trial by an impartial jury; (2) deterrence from testifying as a violation of one’s implied “right to testify” in his own behalf; and (3) the use for impeachment purposes of convictions not relevant to veracity as a violation of equal protection.

A. Prejudice Vis-a-vis the Impartial Jury

The basic thrust of the first constitutional challenge is that evidence of the defendant’s prior convictions tends to lighten the jury’s sense of responsibility through the inference that, as a “criminal,” he is not worthy of any painstaking consideration. The sixth amendment provides, in part, that “in all criminal prosecutions, the accused shall enjoy the right to... trial, by an impartial jury of the State...” Cases involving undue influence of mass media on juries have established the proposition that a court procedure which “involves such a probability that prejudice will result... is deemed inherently lacking in due process...” It has been argued that this proposition is applicable to improper prejudice of the jury by way of impeachment by prior convictions.

Aside from the merits of the constitutional law, a well-known empirical study by Professors Kalven and Zeisel lends support to the suggestion that the accused is in fact prejudiced by being impeached by his prior convictions. Defendants were divided into two classes. One group consisted of defendants whose criminal records were either known or suspected. The second group consisted of those who either had no record or whom the jury had no reason to believe had a record. The strength of evidence for both groups was held constant. The acquittal rate for the defendants with records was 38 percent, compared to 65 percent for the “clean” defendants.


182. U.S. Const. amend VI.


185. Note, supra note 180, at 174:

The principal problem as to prior record convictions is analogous to the mass media cases in that the procedures used in both situations are prejudicial to the defendant’s right to a trial by an impartial jury. ... [T]he strong policy considerations that the courts must prevent prejudice which subverts impartiality of the jury should be applicable to the principal problem.


187. Id. at 160.
For a time it appeared as though this constitutional challenge might succeed. In 1963 the United States Court of Appeals for the Fourth Circuit decided *Lane v. Warden*,\(^{188}\) stating that reading the defendant's prior narcotics violations into the record "destroyed the impartiality of the jury and denied him due process of law."\(^{189}\) The high hopes of reformers were dashed to the ground in 1967, when the United States Supreme Court rejected the reasoning of *Lane v. Warden* in its decision in *Spencer v. Texas*\(^{190}\). The Court brushed aside the Kalven and Zeisel study, claiming that any prejudice would be curable by the limiting instructions.\(^{191}\)

The *Spencer* decision has been severely criticized,\(^{192}\) especially the Court's unqualified support of the limiting instruction as a prejudice-alleviating device.\(^{193}\) Much of the criticism appears logically sound, and this constitutional challenge may ultimately succeed. However, *Spencer* has to be viewed realistically as a setback, and the recent trend of Supreme Court decisions do not suggest a likelihood that the challenge will succeed in the next few years.\(^{194}\)

### B. Deprivation of "Right to Testify"

The second constitutional challenge deals with the "chilling effect" of prior convictions on the accused. This occurs when the accused fears the prejudice emanating from disclosure of his criminal record so much that he elects not to testify. Empirical documentation lends support to the existence of this "chilling effect."\(^{195}\) For example, defendants with criminal records refused to testify in 26 percent of all the cases studied in the Kalven and Zeisel project, compared to only nine percent of the defendants without records.\(^{196}\)

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188. 320 F.2d 179 (4th Cir. 1963).
189. Id. at 187.
190. 385 U.S. 554 (1967). Like *Lane*, this case involved habitual criminal procedures rather than impeachment. Nevertheless, the reasoning is applicable.
191. Id. at 565. In *Montgomery v. United States*, 405 F.2d 605 (8th Cir. 1968), the deprivation of impartial jury argument was rejected, affirming a decision by the western district of Missouri.
192. See, e.g., Note, supra note 180, at 176-78.
194. The limiting instruction has also received a great deal of criticism from the bench. See *Bruton v. United States*, 391 U.S. 123, 135 (1968); *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring); *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932) (opinion by Judge Learned Hand).
195. E.g., the Court recently decided that confessions which are constitutionally infirm under *Miranda v. Arizona*, 384 U.S. 436 (1965), may nevertheless be used for impeachment purposes. Harris v. New York, 401 U.S. 222 (1971).
198. *H. Kalven & H. Zeisel*, supra note 186, at 146. The study also found a strong positive correlation between the existence of a prior record and the unwillingness of the defendant to testify. Id. at 160-61.
The thrust of the constitutional challenge is that the "chilling effect" deprives the accused of his "right to testify." One proponent argues:

This privilege [against self-incrimination] allows the defendant to remain silent if his testimony would incriminate him. The correlative privilege is that the defendant can testify without subjecting himself to incrimination when remaining silent would prejudice him. The right is abridged for a defendant with a criminal record because he cannot testify without having his criminal record introduced into evidence, which consequently incriminates him. 198

There are cases which suggest that depriving an accused of his right to testify is a procedural due process violation. 199 However, applying these decisions to a criminal defendant whose fear of prejudice from his criminal record kept him from testifying is a big step which the courts have not yet chosen to take.

C. Deprivation of Equal Protection

The thrust of the third constitutional challenge is that whenever the prior convictions used for impeachment have no logical relationship to the veracity of the defendant-witness, such impeachment constitutes invidious discrimination between a defendant with a prior record and a defendant who has none, in violation of the equal protection clause 200 of the fourteenth amendment. 201 The equal protection cases have made it clear that a state cannot discriminate between persons without a reasonable basis for such discrimination. 202 It is argued that a defendant with a criminal record is discriminated against in favor of a similar defendant without a record because the former suffers prejudice from impeachment which the latter does not. 203 Where such impeachment is pursuant to a statute allowing impeachment by convictions of crimes whose commission was unrelated to the veracity of the defendant as witness, 204 there is arguably no reasonable connection between the purpose of the law (credibility impeachment) and the discriminating effects.

The chances that this argument will prevail are poor. The constitutionality of impeachment with "infamous crimes" has been explicitly upheld by an Illinois tribunal. 205 One predominant interpretation of the equal protection clause is that its sole purpose was to protect the newly freed slaves from discrimination. 206 Under this interpretation a criminal

198. Note, supra note 180, at 179.
200. U.S. Const. amend. XIV, § 1 provides: "[N]or shall any State ... deny to any person within its jurisdiction the equal protection of the laws."
201. Cohen, supra note 181, at 37; Note, supra note 180, at 179-80.
203. Note, supra note 180, at 180.
204. E.g., § 491.050, RSMo 1969.
206. See Strauder v. West Virginia, 100 U.S. 303 (1880).
defendant has no standing to raise the equal protection argument. Moreover, the Court's approach toward non-racial equal protection cases for the past generation has been to uphold statutes if the legislature may have had any reasonable basis for its passage. Finally, the Court's treatment of the prejudicial effects of jury knowledge of prior convictions in *Spencer v. Texas* suggests that one may have a difficult time getting the Court to recognize that a defendant is thereby prejudiced. One commentator suggests that "while the process of impeachment under discussion has many defects, it is doubtful if it is unconstitutional. It is probably merely an outmoded and archaic method of conducting a trial."

VI. Policy Considerations

The underlying policy behind the exclusion of character evidence in general, and evidence of other crimes in particular, is to protect the accused from unfair prejudice. Impeachment is an exception through which evidence of the defendant's prior crimes is allowed. The policy for allowing these convictions to be disclosed to the jury is to enable the jurors to determine whether to believe what the defendant, as a witness, says. A frequently quoted New Hampshire opinion explains:

No sufficient reason appears why the jury should not be informed what sort of person is asking them to take his word. In transactions of everyday life, this is probably the first thing they'd wish to know.

Mr. Justice Holmes, when sitting with the high court in Massachusetts, pointed out the reasoning involved in such impeachment:

When it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact. The evidence has no tendency to prove that he was mistaken, but only that he has perjured himself.


209. *Spector*, *supra* note 198, at 5 n.15.

210. C. *McCormick*, *supra* note 174, § 157. The Missouri Supreme Court has stated two grounds for excluding evidence of other crimes:

[f]irst, the impropriety of inferring from the commission of one crime that the defendant is guilty of another; and, second, the constitutional objection to compelling a defendant to meet charges of which the indictment gives no information.


212. "Thus, with a wave of the evidentiary wand, what previously was too prejudicial to be heard by the jury becomes reliable valid evidence." *Comment*, *supra* note 181, at 278.

and it reaches that conclusion solely through the general proposition that he is of bad character and unworthy of credit.\textsuperscript{214}

This policy has been criticized as unsound. For example, one commentator complains of the irrationality of asking the jury to determine credibility on the basis of a single incident rather than on a course of conduct.\textsuperscript{215} Another critic asserts that the impeachment process fails to recognize the absence of a reasonable connection between criminal convictions in general and the witness' tendency to testify truthfully.\textsuperscript{216}

Two other strong policy considerations cut \textit{against} the use of prior convictions for impeachment purposes. The more significant consideration is the danger of prejudice to the accused.\textsuperscript{217} Professor McCormick's opinion of the problem is representative of the views of most textwriters. He states:

If the accused is forced to admit that he has a 'record' of past convictions, particularly if they are crimes similar to the one on trial, the danger is obvious that the jury, despite instructions, will give more heed to the past convictions as evidence that the accused is the kind of man who would commit the crime on charge, or even that he ought to be put away without too much concern for present guilt, than they will to its legitimate bearing on credibility.\textsuperscript{218}

Another commentator has isolated two separate variants of this prejudice: (1) a juror's tendency to brand the defendant as one who, regardless of his guilt or innocence for the present offense, should be locked up for the other crimes which he has in fact committed and been convicted of, and (2) the logical, but improper, inference that since the accused has committed other crimes, he probably committed the present one.\textsuperscript{219} As has been pointed out,\textsuperscript{220} the Kalven and Zeisel study lends empirical evidence of the existence of this kind of prejudice.\textsuperscript{221}

In addition, the defendant cannot escape prejudice altogether by refusing to testify, for this forebearance arguably has a prejudicial impact of its own. Defendant's silence is often interpreted by the jury to mean that he has something to hide, especially when the defendant is in a position to add testimony that no one else is able to give.\textsuperscript{222} Furthermore, an indirect form of prejudice results from what has been called the "associational effect."\textsuperscript{223} This is the risk that prejudice against a witness due to his police

\textsuperscript{214} Gertz v. Fitchburg R.R., 137 Mass. 77, 78 (1884).
\textsuperscript{215} Spector, \textit{supra} note 193, at 22.
\textsuperscript{216} Note, \textit{supra} note 180, at 170.
\textsuperscript{217} Some examples of prejudice were discussed in pt. V of this comment.
\textsuperscript{218} C. McCormick, \textit{supra} note 174, § 43; \textit{see also} 1 J. Wigmore, \textit{Evidence} § 57 (3d ed. 1940).
\textsuperscript{219} Cohen, \textit{supra} note 181, at 33.
\textsuperscript{220} See pt. V of this comment.
\textsuperscript{221} H. Kalven & H. Zeisel, \textit{supra} note 186, at 160. \textit{See text accompanying note 186 supra.}
\textsuperscript{222} 2 ABA-ALLI \textit{TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES} 390 (Amsterdam, Segal, Miller, rptrs. 1967); C. McCormick, \textit{supra} note 174, § 43; Spector, \textit{supra} note 193, at 7. \textit{See also} Brown v. United States, 370 F.2d 242, 245 (D.C. Cir. 1966).
\textsuperscript{223} Spector, \textit{supra} note 193, at 7.
record will be transferred to the party for whom he testifies. Although it can harm any party to litigation, the associational effect is especially prejudicial to the criminal defendant, who may be associated in jurors' minds with his witnesses as "another criminal." If, as has been suggested, there is an actual likelihood that a criminal defendant will have witnesses with criminal records, the magnitude and frequency of such associational prejudice is alarming.

Moreover, the occurrence of prejudice by the use of prior convictions for impeachment purposes encourages abuse of that procedure. Evidence which discloses that the defendant has committed crimes besides the one for which he is being tried has been called an area "where an eager prosecutor can follow a course of conduct designed to lead the jury to decide cases on the basis of emotion rather than reason." Such abuse is said to be tactically wise because of a juror's inability to follow limiting instructions. The cases reflect the grim fact that such abuse by prosecutors, and even attorneys in civil litigation, is frequent. Thus, if evidence of other crimes is generally excluded in order to protect the accused from unfair prejudice, the impeachment exception undermines the rule by letting all of the proscribed evils in through the back door.

Of course, a high degree of prejudice in a given case can give rise to a second major policy consideration. One should ask in every case: "Does the danger of unfair prejudice against the witness and the party calling him outweigh the probable value of the light shed on credibility?" If the prejudice outweighs the value, there is a real question as to whether the evidence should be excluded altogether.

VII. PROPOSED SOLUTIONS

A. Trial Court Discretion

Professor McCormick has suggested that courts stop determining the admissibility of evidence of other crimes by "pigeon-holing" the cases into the appropriate exceptions to the exclusionary rule. Instead he suggests that the trial judge in his discretion determine admissibility with a balancing test. On one side the judge considers (1) the need for such evidence in light of the issues and the other evidence available to the prosecution, (2) the strength of the proof that the accused did in fact commit the other crimes, and (3) the strength or weakness of the other crimes evidence in supporting the issue. Against this he weighs the prejudicial impact of the

224. Id. at 8.
225. Id. at 7-8.
228. See State v. Hunt, 352 S.W.2d 57 (K.C. Mo. App. 1961), where the court tacitly approved of a flagrantly abusive impeachment. The decision is critically analyzed by Hunvald, supra note 226, at 547-52.
230. Id. § 41.
231. Id. §§ 151-52.
evidence on the jury. This approach is, in effect, the approach of the District of Columbia courts after *Luck v. United States*.

However, there are disadvantages to this approach. The author of the *Luck* opinion has pointed out three major faults. First, the rule produces a new chance for delay "at a time when expedition in the clearing of the criminal docket is of critical importance." Second, it has drastically increased the number of criminal appeals, thereby increasing the strain in relations between trial and appellate courts. Finally, the approach solves none of the problems regarding what crimes are appropriate for impeachment. This last criticism would appear to be the most significant. Indeed, the first two might be regarded as logical results of the third. The trial judge needs a firm standard on which he, as well as the prosecution, the defense and parties to civil litigation, can dependably rely with respect to whether a witness can be impeached by a given conviction. Impeachment is, after all, merely collateral to the substantive issues on trial. The elaborate balancing process adopted by the District of Columbia circuit seems inappropriate when a simple rule could do the job.

### B. Immunization of Criminal Defendant from All Impeachment by Prior Conviction

Another possibility is a flat ban on impeaching a criminal defendant with prior convictions. A modification of this approach was recommended by the ALI Model Code, the Proposed Missouri Code and

232. *Id.* § 157.
235. *Id.*
236. *Id.*
237. *Id.*
238. *Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967); Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965).*
240. *Model Code of Evidence Rule 106 (1942).*
241. *Mo. Bar, Proposed Missouri Evidence Code § 5.10 (a) (4-5) (1948) provides:*

4. No evidence concerning his [i.e., a criminal defendant as witness] conviction of other crimes shall be elicited on cross-examination, or otherwise introduced, for the sole purpose of impairing the credibility of an accused person on trial who elects to testify but who does not introduce any evidence for the sole purpose of supporting his credibility as a witness. If an accused person on trial introduces evidence for the sole purpose of supporting his credibility as a witness, he shall be subject to examination and extrinsic evidence may be introduced, as is the case with respect to other witnesses, with respect to his convictions of crimes involving untruthfulness or false statement.

5. The conviction of a witness of a criminal offense involving untruthfulness or false statement, when competent evidence, may be proved by the record or by his own cross-examination, upon which the witness must answer any question relevant to that inquiry, and the party cross-examining shall not be concluded by the answers of the witness.
the Uniform Rules,\textsuperscript{242} and has been adopted by the legislature in Kansas.\textsuperscript{243} This modified approach allows no impeachment of a defendant-witness by his prior convictions unless he has first introduced evidence solely for the purpose of supporting his credibility.\textsuperscript{244} A rule nearly as sweeping has been in effect in England for nearly three-quarters of a century. The Criminal Evidence Act\textsuperscript{245} excludes evidence of any crime other than the one charged except (1) when relevant toward proof of the pending charge, (2) when the defense has sought to prove either the good character of the defendant or the bad character of prosecution witnesses, or (3) when the accused has testified against a co-defendant.\textsuperscript{246} Certainly any of these approaches would alleviate the prejudice now facing a defendant impeached by his prior record. Indeed, even the author of the Luck opinion has indicated that he now favors such an approach over trial-court discretion.\textsuperscript{247} But such immunization of a criminal defendant protects him at the expense of depriving the jury of knowing "what sort of person is asking them to take his word."\textsuperscript{248} The approach allows the defendant with a record to appear, perhaps wrongfully, as a man of credible character, and deny a valuable argument to the defendant-witness who has no record.\textsuperscript{249} It would appear that such an approach goes too far.

C. The Proposed Federal Rules

The revised draft of the Proposed Federal Rules of Evidence\textsuperscript{250} suggests a complicated compromise approach. Basically the rule would allow impeachment by any felony and by misdemeanors involving dishonesty or false statement, subject to an overall "trial court discretion" limitation.\textsuperscript{251} This rule is a step forward, because it excludes most misdemeanors and the evils which attend their admission.\textsuperscript{252} The only misdemeanors admiss-

\begin{itemize}
  \item 242. \textit{Uniform Rule of Evidence} 21 (1953).
  \item 244. A defendant-witness who has introduced evidence in support of his credibility, as well as other witnesses generally, are impeachable only by crimes involving dishonesty or false statement.
  \item 245. \textit{Criminal Evidence Act}, 61 & 62 Vict., c. 36 (1898).
  \item 246. \textit{Id.} § 1 (f).
  \item 247. McGowan, \textit{supra} note 234, at 12.
  \item 250. \textit{Prop. Fed. R. Evid.} 609 (a) (Rev. Draft, 1971) provides:
    For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime, except on a plea of \textit{nolo contendere}, is admissible but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involved dishonesty or false statement regardless of the punishment, unless (3), in either case, the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice.
  \item 252. \textit{See} pt. III, § B of this comment.
\end{itemize}
sible for impeachment purposes will be those having probative value regarding credibility. In addition, the discretion limitation may alleviate some of the prejudice problems which accompany impeachment by any felony. However, this protection depends solely on the discretion of the trial judge and is by no means guaranteed. An unsympathetic district judge could open the door to prejudice, leaving the injured party with only a faint hope for reversal due to abuse of discretion. Finally, as suggested earlier, desired guidelines for admissibility are lacking.

D. Limitation to Crimes Involving Dishonesty or False Statement

Another solution borrows a common thread from each of the two previous solutions. When one strips the “all felonies” proviso and the “discretion” limitation from the Proposed Federal Rules and the general immunity of the criminal defendant from impeachment by any prior crimes from the Kansas statute, the Uniform Rules, the Proposed Missouri Evidence Code and the ALI Model Code, the remainder consists of a rule permitting any witness to be subject to impeachment by his prior convictions; but only by those crimes, whether felony or misdemeanor, involving dishonesty or false statement. Such an approach would eliminate much of the prejudice inherent in most other approaches, including Missouri’s “any crime” rule. At the same time, it would allow the jury to know about prior convictions in the very instances when they would substantively illuminate the witness’s credibility. Credibility consists basically of whether the witness should be believed; convictions involving dishonesty or false statement have high probative value in that regard. It is submitted that any prejudice emanating from the jury’s knowledge of such convictions is outweighed by the magnitude of their probative value.

The advisory comment to the preliminary draft of the Proposed Federal Rules dismissed this approach summarily, asserting that “[m]ost crimes regarded as having a substantial impeaching effect would be excluded.” The committee did not bother to specify any particular crime fitting its description. One might surmise that murder would be such a crime. However, the jurors should not really be concerned with whether a witness is a murderer; they should be concerned as to whether the witness

253. An example of such prejudice is a driver in a fatal highway accident who is convicted of culpably negligent manslaughter. He could be impeached by that conviction under an “any felony” approach, ostensibly even in a subsequent tort action arising out of the same accident. Such impeachment would tell the civil jurors that another trier of fact thought the driver was culpably negligent beyond a reasonable doubt. Yet, what does such a conviction really add to the determination of the driver’s credibility as a witness?

254. See pt. VII, § A of this comment.
255. PROP. FED. R. EVID. 609 (a) (Rev. Draft, 1971).
257. UNIFORM RULE OF EVIDENCE 21 (1953).
258. Mo. Bar, Proposed Missouri Evidence Code § 5.10 (a) (4-5) (1948).
259. MODEL CODE OF EVIDENCE rule 106 (1942).
260. See pts. III & VI of this comment.
is telling them the truth. Does the fact that a witness has committed a murder make it *that* unlikely that he would tell the truth? It is submitted that any logical probative value is substantially out-weighed by prejudice, either directly to the defendant as witness, or by association with the party for whom the witness testifies.

One possible problem lies in getting this approach enacted. It has been observed that "statutes loom large as an impediment to progress. In the main they do not make this classification of permissible crimes, and the courts are loath to depart from the classification provided for by the legislature."\(^{262}\) The Missouri statute\(^{263}\) refers only to "criminal offenses" without classification, and 68 years of interpretation\(^{264}\) is not likely to be overturned.

**VIII. CONCLUSION**

Missouri and most other American jurisdictions currently allow a witness, including a criminal defendant testifying in his own behalf, to be impeached by prior convictions in a manner which may prejudice the proponent of the testimony without necessarily shedding significant light on the credibility of the witness. The policy reasons behind such practices would seem to be outweighed by policy considerations against them. Even the constitutional base of current practices appears to be on uneasy footing, although their immediate demise is not foreseeable. What is needed is a process which will protect the criminal defendant, or indeed any party to litigation, from the unfair prejudice resulting from the introduction of one's prior crimes, while still allowing the jurors to "be informed what sort of person is asking them to take his word."\(^{265}\) Limiting prior-conviction impeachment to those crimes involving dishonesty or false statement appears to satisfy that goal. In view of Missouri's entrenched case law, the legislature should be urged to amend section 491.050 to effect the desired change.

One scholar has observed that such statutory reform has little chance because no interest group has a stake in it.\(^{266}\) Therefore, it is incumbent upon members of the bar to make known their concern for such reform.

In addition, Missouri would do well to clarify when a prior conviction becomes too remote for impeachment purposes. The ten-year time limit of Proposed Federal Rule 609 (b)\(^{267}\) would seem to be a reasonable solution and worthy of adoption in this state. A judicial decision to that effect would seem to fit within section 491.050. Moreover, if the legislature could be persuaded to amend that section to reflect the "dishonesty or false statement" reform, it might also include in the amendment the ten-year limit in Rule 609 (b) of the Proposed Federal Rules.

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263. § 491.050, RSMo 1969.

264. Missouri's "any crime" rule was first stated in *State v. Blitz*, 171 Mo. 530, 71 S.W. 1027 (1903). See pt. III, § B of this comment.


267. See pt. III, § C of this comment.