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Impeaching the Accused with Prior Convictions: Does Proposition 8 Put *Beagle* in the Doghouse?

On June 8, 1982, California voters passed Proposition 8, known as the "Victim’s Bill of Rights." The scope of Proposition 8 is so broad that it represents the most dramatic change in criminal justice procedures the people of this state have ever seen. The provision amended the California Constitution and significantly modified the Penal, Evidence, and Welfare and Institutions Codes. Perhaps the most significant changes are those made in the Evidence Code. The "truth-in-evidence" section of Proposition 8 provides that "relevant evidence shall not be excluded in any criminal proceeding." This section renders a large portion of the Evidence Code ineffective and virtually eliminates the exclusionary rule.

Another provision of Proposition 8 affecting the Evidence Code is section 28, subdivision (f) of the California Constitution. This subdivision provides that "[a]ny prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment...." The primary intent of the voters in adopting subdivision (f) was to overrule the California Supreme Court case of *People v. Beagle*. *Beagle* gave the trial court authority to exclude evidence of prior felony convictions offered for impeachment purposes when the probative value of the evidence is outweighed by the risk of undue prejudice. In light of the adoption of subdivision (f), the current status of California law concerning the impeachment of witnesses with prior felony convictions is unsettled. Until the courts construe this new provision, the full meaning and effect of subdivision (f) will remain unclear.

3. CAL. CONST. art. I, §28(d).
4. Legislation by Senator Barry Keene would have provided that all provisions of the Evidence Code, with the exception of a provision restricting the use of prior felony convictions to attack the credibility of a witness, shall control the admission of evidence in criminal proceedings. This legislation, however, died in committee.
7. Id.
8. See *infra* notes 71-142 and accompanying text.
9. 6 Cal. 3d 441, 452-53, 492 P.2d 1, 8, 99 Cal. Rptr. 313, 320 (1972).
The purpose of this comment is to analyze and interpret subdivision (f) to resolve some of the uncertainty created by this provision. This comment will begin with a discussion of the theory underlying the use of character evidence to attack the credibility of a witness. Generally, any witness is subject to impeachment, including the accused who testifies in his own behalf. Unlike other witnesses, however, impeaching the accused with character evidence involves special considerations. The position of a defendant witness differs from an ordinary witness because the trier of fact determines his guilt or innocence as a defendant, as well as his credibility as a witness. When evidence of the accused's bad character is introduced to impeach his credibility, the jury may be unable or unwilling to limit use of the evidence to the issue of credibility. Instead, the jury may use the evidence for the improper purpose of determining the defendant's guilt. In this comment, the author will explore the potential for, and source of, this forbidden prejudice. The author then will continue with an interpretation of subdivision (f). This interpretation will employ well-settled rules of constitutional construction to show that the primary effect of subdivision (f) is to overrule People v. Beagle, thereby removing the discretion of the trial court to exclude evidence of prior felony convictions when the probative value of the evidence is substantially outweighed by the risk of undue prejudice.

Finally, this comment will address the impact that divesting the trial court of its discretion has on the constitutionality of impeaching the accused with his prior felony convictions. Due process requires the presence of procedures adequate to protect the defendant's right to a fair trial. The author will show that prior convictions may not constitutionally be used to impeach the defendant's credibility in a criminal trial without judicial discretion to exclude evidence of extremely prejudicial prior convictions. Before discussing the constitutional issues, however, the theory of character evidence and the potential for prejudice that exists when the accused is impeached must be understood.

**The Theory of Character Evidence**

A logical starting point for a discussion of character evidence is with the definition of "character" itself. Although the term has been variously defined, character is generally understood to involve a moral quality, implying something good or bad about a person.  

1984 / Prior Felony Convictions

scholar in the field defines character as the "generalized description of one's disposition . . . in respect to a general trait, such as honesty, temperance, or peacefulness."11

At trial, a person's character may be "in issue."12 For example, in a suit for defamation, the plaintiff places his character in issue.13 As a defense, the defendant may offer evidence of the plaintiff's bad character.14 In other situations, however, character is not "in issue," but is offered as circumstantial evidence of conduct.15 Evidence may be introduced that A robbed X; therefore, an inference is that A has a dishonest character. From this view of A's character, a logical inference is that A acted pursuant to this character and committed the crime charged.16 Although character is always logically relevant to prove conduct consistent with that character,17 certain rules of exclusion have developed.18 In California, for example, the general rule is that evidence of a criminal defendant's character is inadmissible to prove his conduct on a specified occasion.19 Thus, the prosecution may not offer evidence that the accused has been convicted of a crime for the purpose of proving he committed the crime for which he is on trial.20 In the above example, then, evidence of A's prior robbery conviction would be excluded. The purpose of this rule is to protect the innocent defendant from being found guilty of the present charge based on his past crimes.21 The introduction of prior convictions places tremendous pressure on the jury to convict the accused, not because he is guilty of the present charge, but because his prior record justifies his incarceration, regardless of his guilt or innocence.22 One legal scholar has recognized that "the deep tendency of human nature is to punish, not because the accused is guilty, but because he is a bad man and may well be condemned now that he is caught."23

Article I, section 28, subdivision (f) of the California Constitution is an exception24 to the general rule that character evidence may not be

13. See id. at 342.
14. See id.
15. Id. at 341.
17. Hale, supra note 12, at 346.
18. See generally, Kuhn, supra note 10, at 780-81.
20. See id.
24. Prior to the adoption of article I, §28(f) of the California Constitution, Cal. Evid. Code §1101(c) provided the same exception.
used as proof of a person's conduct.\textsuperscript{24} This provision makes prior felony convictions of a witness admissible for purposes of impeaching the credibility of that witness.\textsuperscript{26} For example, the impeaching party may introduce evidence that the witness has previously been convicted of issuing a check with insufficient funds. The jury could infer that the witness is deceitful, and therefore conclude that the witness is likely to tell a false story while testifying. This exception also applies when the witness being impeached is the accused. If the defendant takes the stand, his prior convictions will be admitted, not as evidence of his present guilt, but as evidence to aid the trier of fact in assessing the defendant's credibility.\textsuperscript{27} Inherent in the use of prior convictions to impeach criminal defendants, however, is the danger that the jury will be unable to restrict its use of the evidence to the issue of credibility.\textsuperscript{28} Instead, the jury may infer that the defendant is guilty of the crime charged.\textsuperscript{29} Also, the jury may conclude improperly that the defendant has a criminal disposition and should be incarcerated for that reason alone.\textsuperscript{30} Convicting a person on either theory is legally impermissible.\textsuperscript{31} This danger exists despite instructions to the jury that evidence of a defendant's prior crimes must be limited to the issue of credibility.\textsuperscript{\textsuperscript{32}}

The tendency of the jury to misuse this kind of evidence derives in part from the similarity of the inferential chains. Consequently, whether the evidence is used to prove that the accused committed the crime charged, or to undermine his credibility, the jury is invited to infer that the accused is dishonest, deceitful, or otherwise possesses a "bad character." Thus, even when the jury is instructed to limit its use of the evidence to the issue of credibility, an intermediate step in the inferential chain requires the jurors to form an unfavorable opinion of the defendant's character. Only the most disciplined juror could prevent this from influencing his determination of the facts.

Courts and legislatures recognize the danger that the jury will be unable to restrict its use of prior convictions to the issue of credibility.\textsuperscript{33} Consequently, procedures to protect the defendant from this danger

\begin{itemize}
\item \textsuperscript{25} CAL. EVID. CODE §1101.
\item \textsuperscript{26} See CAL. CONST., art. I, §28(f).
\item \textsuperscript{27} Note, To Take the Stand or not To Take the Stand: The Dilemma of the Defendant with a Criminal Record, 4 COLUM. L. J. & SOC. PROBS. 215, 215 (1968).
\item \textsuperscript{28} See MCCORMICK, supra note 11, at 89 (1972).
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} See id.
\item \textsuperscript{32} Id.
\item \textsuperscript{33} See, e.g., FED. R. EVID. 609(a).
\end{itemize}
have developed. For example, under the Federal Rules of Evidence, a witness may be impeached with evidence of his prior felony convictions. The prosecution, however, must establish that the probative value of the evidence substantially outweighs the possibility of undue prejudice; otherwise, the evidence will be excluded. California courts have also developed safeguards to protect the defendant from being convicted based on his criminal record. In 1972 the California Supreme Court decided People v. Beagle. That case gave the trial court discretion to exclude evidence of prior convictions when the potential for unfair prejudice outweighed the probative value. The following section discusses this important case.

**People v. Beagle**

Until the seminal case of People v. Beagle, any prior felony conviction was admissible to impeach the credibility of any witness, including the defendant. At that time, California Evidence Code section 788 controlled the admissibility of felony convictions offered for impeachment purposes. Section 788 provided: “For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness, or by the record of the judgment that he has been convicted of a felony. . . .” In Beagle, the court addressed the relationship between Evidence Code sections 788 and 352. Section 352 authorizes the trial judge to exercise discretion and exclude evidence that is particularly prejudicial. The court held that these two code sections, when read together, provided the trial judge with discretion to exclude evidence of prior felony convictions when their probative value on the issue of credibility was substantially outweighed by the risk of undue prejudice.

The analysis of the court focused upon the language of section 788. The court interpreted the use by the legislature of the permissive word “may,” rather than the mandatory word “shall,” as evidence of an intent that the trial court is not obliged in every instance to admit
The court concluded that section 352 applied to Evidence Code section 788; therefore, the trial court possessed discretion to exclude evidence of prior felony convictions.\(^4\) To support this interpretation of Evidence Code sections 788 and 352, the court relied on the case of *Luck v. United States*.\(^5\) The *Luck* court recognized that the jury, despite limiting instructions, was likely to consider evidence of the accused’s prior crimes in determining the issue of guilt or innocence.\(^6\) In these circumstances, the court held that the trial court may, in its discretion, exclude the evidence to protect the interests of the accused.\(^7\) The *Beagle* court refused to establish rigid standards to govern the introduction of prior felony convictions.\(^8\) The trial courts were to have discretion concerning the admissibility of prior convictions.\(^9\) To aid the trial courts in exercising this discretion, however, the court outlined a number of factors to be considered: (1) the relevancy of the prior conviction to the honesty and integrity of the witness; (2) the proximity in time of the prior conviction to the crime charged; (3) the similarity between the prior conviction and the present criminal charge; and (4) the effect on the administration of justice should the defendant, fearing jury prejudice, choose not to testify.\(^10\)

By vesting the trial court with discretion, the *Beagle* court imposed substantial limitations on the use of prior felony convictions to impeach the credibility of a witness.\(^11\) While *Beagle* did not preclude the admission of prior convictions, cases that followed *Beagle* circumscribed the discretion of the trial court to admit prior felonies.\(^12\) For example, in *People v. Rist*\(^13\) the California Supreme Court ruled that prior convictions may not be introduced to attack the defendant’s credibility if the prior convictions are similar to the offense charged and other dissimilar convictions are available.\(^14\) In a subsequent case, the Supreme Court clarified the meaning of the *Rist* decision\(^15\) and held that the absence in a particular case of dissimilar prior convic-

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46. *Id.* at 452, 492 P.2d at 7, 99 Cal. Rptr. at 319.
47. *Id.*
49. *Id.* at 768, n.8.
50. *Id.*
51. 6 Cal. 3d at 453, 492 P.2d at 8, 99 Cal. Rptr. at 320.
52. *Id.*
53. *Id.* at 453-54, 492 P.2d at 8-9, 99 Cal. Rptr. at 320-21.
54. See *id.* at 451-54, 492 P.2d at 7-9, 99 Cal. Rptr. at 319-21.
55. See infra notes 56-64 and accompanying text.
56. 16 Cal. 3d 211, 545 P.2d 833, 127 Cal. Rptr. 457 (1976).
57. See *id.* at 220-21, 545 P.2d at 839, 127 Cal. Rptr. at 463.
tions did not automatically justify the admission of similar or identical priors. The court established a rigid rule that prior convictions similar or identical to the offense charged are per se inadmissible to impeach the defendant's credibility. This rule circumscribed the discretion of the trial court to admit evidence of prior convictions. The California Supreme Court imposed further limitations on the exercise of discretion in People v. Antick, when the court held that the remoteness of a conviction significantly detracts from its probative value. Antick is important because it represents the willingness of the court to balance the probative value against the prejudicial effect of the evidence and make an independent determination of admissibility. The decision, therefore, signaled a trend away from the rule that the decision of the trial court to admit or exclude evidence of prior felonies was not subject to reversal on appeal.

The procedural protections announced in Beagle and refined in subsequent cases, were developed in response to the prejudice that may exist when a witness, especially the accused, is impeached by his prior felony convictions. Without adequate safeguards, such as limiting instructions and judicial discretion, this use of prior convictions may deprive the defendant of his right to a fair trial. Section 28, subdivision (f), however, removes trial court discretion to exclude unduly prejudicial prior convictions. The provision implicitly mandates the admission of prior convictions whose probative value is substantially outweighed by the risk of unfair prejudice. In light of the United States Supreme Court case of Spencer v. Texas, the constitutionality of impeaching the accused with his prior felony convictions absent adequate safeguards is questionable. Before the constitutional ramifications of subdivision (f) can be discussed, however, the provision itself must be interpreted.

INTERPRETING THE PROVISION: Beagle Is Overruled

Article I, section 28, subdivision (f) of the California Constitution
provides in relevant part: "Any prior felony conviction, of any person . . . shall subsequently be used without limitation for purposes of impeachment. . . ." The key to interpreting any new law is to ascertain the intent of the framers. Proposition 8 was enacted through the initiative power of the citizens of California. In this case, then, the intent of the electorate must be ascertained. The first step in determining the intent of the voters is to examine the express language of the provision. When the language is clear and unambiguous, its plain meaning must be followed. Extrinsic aids may be used to interpret a new provision only if the language is ambiguous. Subdivision (f), then, will be interpreted by employing these general rules of construction. This analysis will show that subdivision (f) overrules Beagle, divesting the trial court of its discretion to exclude evidence of unduly prejudicial convictions.

An examination of the language of subdivision (f) reveals that prior felony convictions "shall" subsequently be used "without limitation" for purposes of impeachment. Webster's Dictionary defines the word "shall" as being synonymous with the word "must." The term "shall" is normally used to express a command or exhortation. As used in a constitutional provision, "shall" generally is considered as an indication that the provision is mandatory in nature. Furthermore, Black's Law Dictionary provides that the use of the word "shall" usually "excludes the idea of discretion . . . and operates to impose a duty . . . which may be enforced. . . ." The term "without" is clearly defined as meaning "exempt or free from." "Limitation" is defined as "a restriction or restraint imposed from outside." Accordingly, when these words are joined to form the phrase "shall subsequently be used without limitation," the meaning is clear and unambiguous: the use of prior conviction for purposes of impeachment must be free from restrictions. Thus, the trial court

71. CAL. CONST. art. I, §28(f).
74. See supra notes 72-73 and accompanying text.
76. Id.
77. Id.
78. See supra notes 72-73 and accompanying text.
79. WEBSTER'S THIRD NEW WORLD INTERNATIONAL DICTIONARY 2085 (1971).
80. Id.
82. BLACK'S LAW DICTIONARY 1233 (1979).
83. WEBSTER'S THIRD NEW WORLD INTERNATIONAL DICTIONARY 2627 (1971).
84. Id. at 1312.
85. See supra notes 78-84 and accompanying text.
has received a mandate. Evidence of prior felony convictions, if offered, must be admitted to impeach the credibility of a witness. Under subdivision (f), the trial court is no longer free to exercise its discretion to exclude prior felony convictions. The exercise of discretion is tantamount to the imposition of a "restriction," which is expressly prohibited by the provision.

This conclusion is supported by the overall tone and language of the provision, which is written in broad, all inclusive terms: "Any prior felony conviction of any person in any criminal proceeding . . . shall subsequently be used without limitation for purposes of impeachment. . . ." (emphasis added). The language of subdivision (f) is clear. When the words of a constitutional provision are not used in a technical manner, the voters must be deemed to have adopted the ordinary meaning of the language. The generally understood meaning of the words used in subdivision (f) indicates that no restriction shall be imposed on the use of prior felony convictions for impeachment purposes. Since Beagle imposed a restriction on the use of prior felony convictions, the intent of the electorate in adopting subdivision (f) undoubtedly was to overrule Beagle and remove the limitations that it imposed.

If, contrary to the conclusion of this author, subdivision (f) is found to be ambiguous, extrinsic evidence may be used in interpreting the provision. Examples of extrinsic aids available to assist in the interpretation of an ambiguous constitutional amendment are the official reports of the California Constitution Revision Commission and records of debates. Other examples include legislative committee reports and contemporaneous exposition or interpretation of the provision. Since Proposition 8 was enacted pursuant to the initiative power of the people of California, rather than by the legislature, these aids are not available. An extrinsic aid that is available, however, is evidence of the evil intended to be remedied by the provision.

86. See supra note 81 and accompanying text.
87. See supra notes 78-84 and accompanying text.
88. See supra notes 75-84 and accompanying text.
89. See Cal. Const. art. I., §28(f).
91. See supra notes 78-84 and accompanying text.
92. Id.
93. Id.
94. Id.
95. Id.
96. Id.
97. See Brosnahan v. Brown, 32 Cal. 3d at 256, 651 P.2d at 286, 186 Cal. Rptr. at 42.
98. See In re Quinn, 35 Cal. App. 3d at 483, 110 Cal. Rptr. at 888.
Moreover, in the case of initiatives, the arguments in support of the provisions contained in the voter pamphlet may be used to ascertain the intent of the electorate.\textsuperscript{99} Although the voter pamphlet does not state explicitly that the trial court is not to retain discretion under subdivision (f), the ballot arguments in support of Proposition 8 are instructive.\textsuperscript{100}

These arguments indicate that the passage of Proposition 8 would result in tougher laws for the criminally accused.\textsuperscript{101} Specifically, Proposition 8 would overrule decisions of California courts that created additional rights for criminal defendants and placed more restrictions on law enforcement officials.\textsuperscript{102} By ruling that Evidence Code section 352 applied to section 788, the California Supreme Court, in \textit{Beagle}, clearly placed significant restrictions on the use of felony convictions for impeachment.\textsuperscript{103} First, \textit{Beagle} gave defendants the right to apply for the exclusion of incriminating evidence.\textsuperscript{104} Second, \textit{Beagle} had the effect of restricting the ability of the prosecution to impeach defense witnesses.\textsuperscript{105} Thus, Proposition 8 was designed in part to overcome the \textit{Beagle} decision.\textsuperscript{106}

Another aid that may be employed in interpreting the language of subdivision (f) is the preamble to article I, section 28 of the California Constitution. The preamble provides an indication of the evils intended to be remedied: "a matter of grave statewide concern" is the protection of public safety and the rights of victims.\textsuperscript{107} Clearly, the evil intended to be remedied is the victimization of innocent citizens. Broad procedural reforms and the enactment of laws sufficient to ensure that accused persons are appropriately detained, tried, and punished are necessary to secure this protection.\textsuperscript{108} The preamble further states that these stricter procedures and laws will act to deter criminal behavior.\textsuperscript{109}

Subdivision (f) is a procedural reform that provides for unlimited introduction of a witness' prior felony convictions to impeach his

\textsuperscript{100} See Proposition 8, Cal. Voter Pamphlet, June 1982, Primary Election, at 32 (Copy on file at the \textit{Pacific Law Journal}).
\textsuperscript{101} Id. at 34.
\textsuperscript{102} Id.
\textsuperscript{103} See supra notes 51-64 and accompanying text.
\textsuperscript{104} See supra notes 39-44 and accompanying text.
\textsuperscript{105} See supra notes 39-44 and accompanying text.
\textsuperscript{106} See supra notes 39-44, 100-02 and accompanying text.
\textsuperscript{107} See \textit{CAL. CONST.} art. I, §28(a).
\textsuperscript{108} Id.
\textsuperscript{109} Id.
credibility. Interpreting this provision as divesting the trial court of its discretion to exclude evidence of prior felony convictions would act as a deterrent to future criminal behavior. To the extent that the accused would be subject to impeachment with prior convictions otherwise excludable under the Beagle rule, the defendant would be deterred from future criminal conduct.

A. Interpretation by Analogy

Further examination of the language of subdivision (f) reveals a clear intent to overrule Beagle. As previously discussed, the Beagle decision was based on an interpretation of the language of Evidence Code section 788. Section 788 provides, in part: "For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony. . . ." The court reasoned that the legislature, in using the permissive word "may" rather than the mandatory word "shall," intended section 788 to be read with section 352, giving the trial court discretion to exclude highly prejudicial felony convictions. Subdivision (f), however, is not written in the same permissive language, but rather in mandatory terms providing that prior convictions "shall" be admitted. This choice of terms is significant. By changing the language of the provision controlling the introduction of prior felonies for impeachment purposes, the electorate removed the very foundation of the Beagle decision.

This interpretation of subdivision (f) is not unique. A similar situation occurred in the District of Columbia. In Luck v. United States, a court was faced with the task of interpreting a District of Columbia statute providing that the prior convictions of a witness "may be given in evidence to affect his credibility." The Luck court focused on the language of the statute and held that the use by the legislature of the permissive word "may," rather than the word "shall," left room for the exercise of sound judicial discretion. The statute was amended, however, to provide that the prior convictions

110. See id. §28(f).
111. See infra notes 112-28 and accompanying text.
112. 6 Cal. 3d at 452, 492 P.2d at 7, 99 Cal. Rptr. at 319.
113. CAL. EVID. CODE §788.
114. See 6 Cal. 3d at 452, 492 P.2d at 7, 99 Cal. Rptr. at 319.
115. See CAL. CONST. art. I, §28(f).
116. Id.
117. See supra notes 42-50 and accompanying text.
118. 348 F.2d 763 (D.C. 1968).
119. See id. at 768, n.6.
120. See id. at 768.
of a witness "shall be admitted if offered."121 Faced with the task of interpreting the amended provision, a District of Columbia Court of Appeals held that Congress, by removing the word "may" and adopting a mandatory provision that prior convictions "shall be admitted if offered," effectively overruled the Luck doctrine.122 The trial court no longer had discretion to limit or prohibit impeachment of witnesses with their prior convictions.123

A nearly identical situation exists in California. The Beagle decision was based on the premise that the California Legislature deliberately used the word "may" in Evidence Code section 788 for the purpose of permitting the trial court to exercise its discretion.124 Once the California voters adopted subdivision (f) substituting the word "shall," the justification for the rule announced in Beagle vanished.125 An analysis of subdivision (f), focusing on its plain language and employing extrinsic evidence to aid in its interpretation, clearly indicates that the intent of the voters in adopting this provision was to overrule People v. Beagle.126 This interpretation is also compelling in light of the analogous situation in the District of Columbia.127 Some litigants, however, continue to insist that under subdivision (f), trial courts remain free to exercise their discretion to exclude evidence of prior felony convictions.128

B. Interpretation Based on Subdivisions (d) and (f)

The argument employed by these litigants is based on the contention that article I, section 28 of the California Constitution specifically preserves Evidence Code section 352 as a basis for excluding unduly prejudicial evidence.129 Subdivision (d) specifically states that "nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, sections 352, 788, or 1103."130 The quoted language suggests that Evidence Code section 352 is applicable throughout section 28.131 Section 28 includes subdivision (f);
therefore, the trial court retains discretion under Evidence Code section 352 to exclude evidence of prior felony convictions when the risk of prejudice substantially outweighs the probative value. While the language of subdivision (d), if read literally, would seem to support this argument, the interpretation relied on fails for two reasons. First, the argument is contrary to the intent of the voters as expressed above. Second, the interpretation violates a well-settled rule of constitutional construction. A basic rule of construction provides that when the two provisions cannot be read harmoniously, a specific provision will control over a more general provision. The first question in this analysis, then, is whether subdivision (d) conflicts with subdivision (f).

Subdivision (d) states that relevant evidence shall not be excluded in any criminal proceeding. The provision further provides that Evidence Code section 352 is not affected by this section. If subdivision (d) is interpreted as making Evidence Code section 352 applicable to subdivision (f), a limitation on the use of prior felonies for impeachment purposes would necessarily be imposed. Since subdivision (f) provides that prior felonies shall be used without limitation, the provisions directly conflict. The specific provision, then, will control over the general provision.

Subdivision (f) relates to the use of a particular type of evidence (prior felony convictions) for a specified purpose (impeachment). Subdivision (d), on the other hand, concerns the admissibility of evidence, without reference to its nature or the purpose for which the evidence is being introduced. Subdivision (f), being more specific, would control over subdivision (d); therefore, subdivision (d) cannot be read as making Evidence Code section 352 applicable to subdivision (f).

An interpretation of subdivision (f), employing well-settled rules of constitutional construction has shown that the intent of the electorate in adopting this provision was to overrule Beagle. Under subdivision

132. Id.
135. Id.
136. See supra notes 54-64 and accompanying text.
137. See supra notes 134-36 and accompanying text.
138. See supra note 133 and accompanying text.
140. See id. §28(d).
141. See supra notes 133-40 and accompanying text.
142. Id.
(f), the trial court no longer retains discretion to exclude evidence of unduly prejudicial prior convictions. This conclusion, however, raises serious constitutional questions. When the accused is subject to impeachment with prior felony convictions, due process requires the utilization of procedures adequate to protect his right to a fair trial. In the following section this author will establish that judicial discretion is indispensible to the constitutionality of impeaching the defendant with prior felony convictions.

**Due Process**

The defendant in a criminal proceeding has a fundamental right to a fair trial. This right derives from the fourteenth amendment to the United States Constitution which provides that no state shall deprive any person of life, liberty, or property without due process of law. Due process is an elusive concept and is not subject to exact definition. As applied to criminal proceedings, however, due process requires that the trial proceed in a manner consistent with the notion of fundamental fairness.

Subdivision (f) compels the admission of the defendant’s prior felonies to impeach his credibility should he testify in his own behalf. This includes evidence of extremely prejudicial prior convictions. For example, in a prosecution for rape, the defendant’s prior rape conviction would be admissible to impeach his credibility. The introduction of that identical prior conviction would be extremely prejudicial. The jury would be under tremendous pressure to convict the accused based solely on his prior conviction. This pressure would increase when the prosecutor’s case is weak. Moreover, the protection afforded the accused by a limiting instruction would be minimal. “To inform the jury in a rape case that the defendant has a prior conviction and then instruct them to consider the conviction only in evaluating the defendant’s credibility is to recommend a mental gymnastic which is beyond, not only their power, but anybody else’s.”

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144. U.S. Const. amend. XIV, §1.
147. See supra notes 71-128 and accompanying text.
149. See id.
152. See infra notes 180-200 and accompanying text.
This comment posits that despite the use of limiting instructions, introduction of highly prejudicial prior felony convictions operates to deny the accused his right to fundamental fairness as guaranteed by the due process clause of the fourteenth amendment.154

If the defendant is subject to impeachment with his prior convictions, due process requires the utilization of procedures adequate to protect his right to a fair trial.155 In the impeachment situation, two procedural devices are available to protect the interests of the accused.156 The first, and perhaps most effective method of protecting the accused, is the discretion resting in the trial court to exclude evidence of prior crimes when the probative value is substantially outweighed by the potential for prejudice.157 The second method is a limiting instruction to the jurors, directing them to consider the prior felony conviction only in determining the issue of credibility.158 These two procedures, when used in conjunction with one another, provide the only adequate means of protecting the accused from the undeniable prejudice that results when his prior crimes are introduced to impeach his credibility.159

The United States Supreme Court has never directly held that the constitutionality of impeaching the accused with his prior felony convictions requires that these procedures be employed. In Spencer v. Texas,160 the Court, in dicta, addressed the question of whether impeaching the accused with his prior convictions would deprive him of due process of law under the fourteenth amendment.161 The Spencer court upheld a state recidivist statute162 from a constitutional attack.163 The state procedure permitted evidence of the defendant's prior conviction to be considered by the jury in determining appropriate punishment. The jury, however, was informed of the defendant's prior crimes before the issue of guilt or innocence had been decided. In holding that this procedure did not violate due process guarantees, the majority opinion analogized to other situations in which evidence of the

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154. See infra notes 155-206 and accompanying text.
157. See, e.g., CAL. EVID. CODE §352.
159. See infra notes 160-206 and accompanying text.
161. See id. at 560-63.
162. A recidivist or "habitual offender" statute permits the defendant's prior conviction(s) for the same or similar offense to be considered by the jury in determining the punishment for the subsequent conviction. See e.g., TEX. CODE ANN., PENAL (1974) §§12.42, 12.43.
163. 385 U.S. at 559-60.
defendant's prior convictions had been admissible. Recognizing the prejudicial effect of prior convictions, the Court noted that evidence of prior crimes is generally excluded unless (1) the evidence is probative of issues such as intent, identity, motive, or (2) the defendant has testified and the state seeks to impeach his credibility.

The court pointed out that in those situations, the state interest in admitting felony convictions could be reconciled with the inherent possibility of prejudice. This reconciliation was possible because certain procedures had developed to ensure that the defendant's interests were protected: (1) the discretion of the trial court to exclude evidence of prior claims when the evidence is particularly likely to be prejudicial, and (2) the limiting instruction.

Mr. Chief Justice Warren dissented, stating that the Texas recidivist procedure was unconstitutional. The Chief Justice, however, agreed with the majority concerning the validity of using prior convictions to show intent, common design, or to impeach the credibility of the defendant. In the examples cited, the prior convictions were said to be admissible because they were probative of issues other than the accused's disposition to commit the crime charged. The dissent emphasized that the admission of prior crimes was justified only when the probative value of the evidence outweighed the inherent potential for prejudice. The problem was said to be the "delicate one of balancing the probative value against the possibility of prejudice. . . ." This coincides with the observation of the majority that one of the procedures that had developed to protect the defendant's interest was the discretion of the trial court to limit the admissibility of prior felony convictions. This discretion could be exercised to limit or prohibit the admission of particularly prejudicial evidence.

*Spencer* has been read by California courts as foreclosing the argument that impeaching a defendant with his prior felony convictions denies the accused fundamental fairness in a criminal trial. As both the majority and dissent in *Spencer* make clear, however, the con-

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164. See id. at 560-62.
165. Id. at 560-61.
166. Id. at 562.
167. Id. at 561-62.
168. Id. at 570 (Warren, C.J., dissenting).
169. See id. at 576.
170. Id. at 570-75, 77.
171. Id. at 577-78.
172. Id. at 578.
173. Id. at 561.
174. See, e.g., CAL. EVID. CODE §352.
institutional validity of using prior convictions to impeach the accused depends on the existence of procedures adequate to protect the defendant’s right to a fair trial.\textsuperscript{176}

The primary effect of subdivision (f), as discussed above, is to remove the discretion of the trial court to exclude unduly prejudicial evidence.\textsuperscript{177} Thus, one of the important procedural devices relied upon in \textit{Spencer} has been stripped away.\textsuperscript{178} The \textit{Spencer} court also relied heavily upon the use of limiting instructions to the jury as a means of protecting the defendant from the undeniably prejudicial effect of introducing prior convictions.\textsuperscript{179} The effectiveness of limiting instructions as a means of protecting the defendant from the prejudicial effects of prior crimes is highly suspect.\textsuperscript{180}

The United States Supreme Court in \textit{Bruton v. United States}\textsuperscript{181} acknowledged that a jury may be unable to follow instructions to disregard improperly admitted hearsay evidence.\textsuperscript{182} \textit{Bruton} involved the joint trial of a defendant and codefendant. The codefendant’s confession was admitted into evidence.\textsuperscript{183} Although the confession implicated the defendant, the jury was instructed that the confession was competent evidence against the codefendant only.\textsuperscript{184} The confession was incompetent against the defendant and had to be disregarded in determining the defendant’s guilt or innocence.\textsuperscript{185} The Court recognized the existence of a substantial risk that the jury, despite instructions to the contrary, would use the codefendant’s confession in determining the defendant’s guilt.\textsuperscript{186}

The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such an inadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails in its purpose as a legal protection to defendants. . . .\textsuperscript{187}

\textit{Bruton v. United States} is not the only case demonstrating the distrust of the Court for the limiting instruction as a means of protecting the defendant from undue prejudice. In \textit{Kruewitch v. United States},\textsuperscript{188}

\begin{footnotesize}
\textsuperscript{176} See \textit{supra} notes 160-74 and accompanying text.
\textsuperscript{177} See \textit{supra} notes 71-142 and accompanying text.
\textsuperscript{178} See \textit{supra} notes 167-74, 177 and accompanying text.
\textsuperscript{179} 385 U.S. at 561-63.
\textsuperscript{180} See \textit{infra} notes 180-200 and accompanying text.
\textsuperscript{181} 391 U.S. 123 (1968).
\textsuperscript{182} \textit{Id.} at 126-29.
\textsuperscript{183} \textit{Id.} at 124.
\textsuperscript{184} \textit{Id.} at 123-24.
\textsuperscript{185} \textit{Id.} at 125.
\textsuperscript{186} \textit{Id.} at 126.
\textsuperscript{187} \textit{Id.} at 129 (quoting the dissent in \textit{Delli Paoli v. United States}, 352 U.S. 232, 267 (1956)).
\textsuperscript{188} 336 U.S. 440 (1949).
\end{footnotesize}
Justice Jackson, in his concurring opinion stated: "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction. . . ."¹⁸⁹

The skepticism of the Court concerning the effectiveness of the limiting instructions is supported by a number of empirical studies.¹⁹⁰ One survey polled a group of trial judges and criminal defense attorneys.¹⁹¹ These individuals were asked whether juries were able to follow instructions directing them to consider evidence of prior crimes only on the issue of the accused’s credibility, and not as evidence of his guilt.¹⁹² Ninety-eight percent of the attorneys and forty-three percent of the judges responding to the survey answered in the negative.¹⁹³

The California Supreme Court also has expressed doubt concerning the effectiveness of limiting instructions, particularly in the impeachment situation.¹⁹⁴ In People v. Antick,¹⁹⁵ the prosecution, during cross-examination, questioned the defendant regarding his prior forgery convictions.¹⁹⁶ The court held that the trial court had abused its discretion in permitting nineteen and seventeen year old prior convictions to be introduced to impeach the credibility of the defendant.¹⁹⁷ The court noted that, in this situation, the jury was likely to consider the prior conviction as proof that the accused was the type of person willing to engage in unlawful activities, and therefore probably committed the crimes in question.¹⁹⁸

While we do not intimate that the jury intentionally ignored the trial court’s instruction limiting use of this evidence to impeachment purposes, we are of the view that . . . a (d)iscrimination so subtle is a feat beyond the compass of ordinary minds . . . It is for ordinary minds, not for psychoanalysts, that our rules of evidence are framed.¹⁹⁹

Clearly, the jury cannot limit its consideration of prior convictions to the issue of credibility.²⁰⁰ Furthermore, limiting instructions, so heavily relied upon in Spencer to protect the defendant’s interests, actually afford the accused little protection from the inherent pre-

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¹⁸⁹. Id. at 453 (Jackson, J., concurring).
¹⁹⁰. See Kalven & Zeisel, THE AMERICAN JURY 127-30, 177-80 (empirical study of jury behavior and limiting instructions); see also supra note 27, at 218.
¹⁹¹. See Note, supra note 27, at 218.
¹⁹². Id.
¹⁹³. Id.
¹⁹⁵. Id.
¹⁹⁶. Id. at 96, 539 P.2d at 54, 123 Cal. Rptr. at 486.
¹⁹⁷. Id. at 99, 539 P.2d at 56, 123 Cal. Rptr. at 488.
¹⁹⁸. Id. at 98, 539 P.2d at 56, 123 Cal. Rptr. at 488.
¹⁹⁹. Id.
²⁰⁰. See supra notes 190-99 and accompanying text.
judicial effect. As the Court noted, the introduction of prior convictions for certain valid purposes, such as proving intent, motive, or impeaching the defendant's credibility, was justified. The law of evidence had developed procedures adequate to reconcile the interest of the state in admitting this evidence with the conceded possibility of prejudice. As demonstrated, however, the ineffectiveness of limiting instructions as a means of protecting the defendant from the prejudicial effect of his prior criminal acts is well recognized. Clearly, then, some additional procedural device is necessary to protect the defendant's right to a fair trial. The one other procedure relied upon by the Spencer Court was the discretion residing in the trial judge to limit the introduction of particularly prejudicial evidence. As discussed above, however, the primary effect of subdivision (f) is to divest the trial judge of this discretion. Under subdivision (f), therefore, no adequate procedural device is available to protect the defendant's right to due process.

CONCLUSION

The passage of Proposition 8 has necessitated a reexamination of the long-standing procedure of impeaching the accused with his prior convictions. This examination has shown that the use of prior convictions to impeach the accused involves a risk that the jury will not limit its use of this evidence to the issue of credibility. Instead, the jury may use the evidence for either of two legally impermissible purposes: (1) determining that the defendant has a criminal disposition and should be incarcerated for that reason alone, or (2) as evidence that the accused committed the crime charged. In an effort to protect the defendant from this prejudice, the California Supreme Court, in People v. Beagle, held that the trial judge had discretion to exclude evidence of prior felony convictions when the possibility of prejudice substantially outweighed the probative value.

An interpretation of subdivision (f), employing well-settled rules of constitutional construction, has revealed that the primary effect of the provision is to divest the trial court of its discretion. This conclusion, however, is not without important constitutional ramifications. The United States Supreme Court, in Spencer v. Texas, addressed the constitutionality of impeaching the accused with prior convictions.

201. See supra notes 180-200 and accompanying text.
202. 385 U.S. at 560-61.
203. See supra notes 180-200 and accompanying text.
204. See supra notes 155, 180-200 and accompanying text.
205. 385 U.S. at 561.
206. See supra notes 71-142 and accompanying text.
The Court concluded that the fourteenth amendment did not bar the use of prior convictions to impeach the accused. In so stating, however, the Court recognized that certain safeguards had developed to protect the defendant's right to a fair trial: limiting instructions and judicial discretion.

This comment has demonstrated the inadequacy of the limiting instruction as a method of protecting the defendant's interests. Moreover, the use of judicial discretion as a means of excluding particularly prejudicial evidence has been foreclosed by subdivision (f). As a practical matter, then, no adequate procedure is available in California to protect the defendant's right to a fair trial in this situation. *Spencer,* therefore, should no longer be read by California courts as foreclosing the argument that impeaching the accused with prior convictions deprives him of fundamental fairness under the due process clause of the fourteenth amendment.

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