CONVICTION BY PRIOR IMPEACHMENT

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Impeaching the testimony of criminal defendants through the use of their prior convictions is a practice that is triply flawed: (1) it relies on assumptions belied by data; (2) it has devastating impacts on individual trials; and (3) it contributes to many of the criminal justice system's most urgent dysfunctions. Yet critiques of the practice are often paired with resignation. Abolition is thought too ambitious because this practice is widespread, long-standing, and beloved by prosecutors. Widespread does not mean universal, however, and a careful focus on the states that have abolished this practice reveals arguments

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that overcame prosecutorial resistance and that intervening developments have strengthened. It also reveals decades of courtroom experience, illustrating both the potential and weaknesses of existing bans on this form of impeachment. Examining and finding wanting the reasons for this practice's ongoing existence, this Article proposes a model statute for states considering abolition.

INTRODUCTION

Through four sets of amendments, one controversial provision of the Federal Rules of Evidence ("FRE") has remained largely unaltered.[1] It is not just controversial, but perhaps "*the* most controversial . . . of all of the rules of evidence."[2] This is the rule that permits criminal defendants who testify in their own defense to face impeachment by prior conviction[3]: in other words, to face potentially devastating questions about their criminal record.

This practice is flawed in three main ways. First, its justifications—such as they are—are shaky. The practice rests on assumptions that each of us has a "character for truthfulness,"[4] that this character for truthfulness will help predict the likelihood of our testifying truthfully when on trial, that certain prior convictions will shed meaningful light on this character trait, and that judicial instructions can control the risk of unfair prejudice.[5] Each of these assumptions has been undermined.[6]

Second, this practice has harmful consequences in individual trials. Like Odysseus, defendants must attempt to sail between Scylla and Charybdis,[7] choosing whether to waive their right to testify, and thus either plead guilty or remain mute at trial, or to take the witness stand and risk the demolition of their testimony through the use of their criminal records. Odysseus made it to his destination: it just took a while.[8] But for many defendants the result is disastrous:

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[1] Federal Rule of Evidence 609 was enacted in 1975, and was amended in 1987, 1990, 2006, and 2011. *See* FED. R. EVID. 609 historical note.

[2] Montré D. Carodine, *"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 524 (2009).

[3] FED. R. EVID. 609.

[4] *Id.* 609(a) ("The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction . . . .").

[5] *See* Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 301-02 (2008) (describing the "permitted inferential chain" relating to this form of impeachment). Generally, prejudicial evidence leads a "jury to unintentionally commit an inferential error." Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 506 (1983). Such "[i]nferential error occurs when the jury incorrectly decides that evidence is probative of an alleged fact or event." *Id.*

[6] *See* Bellin, *supra* note 5, at 299-302.

[7] Ed Gainor, Note, *Character Evidence by Any Other Name . . . : A Proposal to Limit Impeachment by Prior Conviction Under Rule 609*, 58 GEO. WASH. L. REV. 762, 762 (1990).

[8] *See* HOMER, THE ODYSSEY 179-90 (W.H.D. Rouse trans., Mentor Books 1949).

all too often, the result of impeachment—actual or threatened—is virtually automatic conviction.[9]

The third flaw requires a broader lens than is typically applied to this topic, but its exposition may, in the current climate, offer the most promise for reform.[10] The third flaw is that this practice contributes to some of the most urgent dysfunctions within the contemporary criminal justice system, many of which are the focus of current outrage and pushes for reform. Impeachment of criminal defendants with their prior convictions is, and needs to be recognized as, a contributor to many of the aspects of the system most vulnerable to critique: the myriad of crippling collateral consequences and other bars to postconviction reintegration, the prevalence of wrongful convictions, the silencing of the criminal defendant, the endorsement and enhancement of stereotypes and disparities, the obscuring of the prosecutor's role as minister of justice, and the dominance and inequity of the plea bargain. It is wrong, in other words, to bracket this as merely an evidentiary problem, or solely a trial issue.[11]

These three flaws raise urgent questions about whether the practice should be allowed to continue, but it is often presented like death: unfortunate but inevitable.[12] All that can be done is to try to make it less painful and degrading.[13] There are three possible reasons for this perspective. First, scholars frequently

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[9] *See* United States v. Gilliland, 586 F.2d 1384, 1389-90 (10th Cir. 1978) ("[A]n obvious truth is that once prior convictions are introduced the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality." (quoting United States v. Burkhart, 458 F.2d 201, 204-05 (10th Cir. 1972))).

[10] *See* Carrie Johnson, *After Baltimore and Ferguson, Major Momentum for Criminal Justice System Reform*, NPR: IT'S ALL POLITICS (May 14, 2015, 5:52 PM), http://www.npr.org/sections/itsallpolitics/2015/05/14/406768355/after-baltimore-and-ferguson-major-momentum-for-criminal-justice-system-reform [https://perma.cc/T46C-PDFG] ("Lawmakers working on fixes to the justice system say that unrest in places like Ferguson, Mo., and Baltimore is pushing them to act.").

[11] *See infra* Section II.C (noting the frequent failure of commentators to recognize prior conviction impeachment as a collateral consequence of conviction—and one with devastating effects).

[12] *See, e.g.*, James E. Beaver & Steven L. Marques, *A Proposal to Modify the Rule on Criminal Conviction Impeachment*, 58 TEMP. L.Q. 585, 589 (1985); Mason Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166, 178 (1940); Robert G. Spector, *Impeachment Through Past Convictions: A Time for Reform*, 18 DEPAUL L. REV. 1, 23 (1968).

[13] Thus, prior commentators, including this one, have proposed that prosecutors should be more moderate in their proffering of convictions for impeachment, that defense attorneys should improve their arguments in opposition to the proffering of convictions, and that judges should improve their analysis of the relevant factors in deciding whether convictions should be admitted. *See, e.g.*, Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563, 592-606 (2014) [hereinafter Roberts, *Unreliable Conviction*]; Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 873-82 (2016) [hereinafter Roberts, *Prior Conviction Impeachment*].

use the Federal Rules of Evidence as their model,[14] an approach that can leave one assuming that state rules drafters are necessarily as wedded to the practice as their federal counterparts.[15] Second, this practice makes it easier for prosecutors to win cases,[16] and one might therefore assume that prosecutorial resistance to any abolition effort would prove insuperable.[17] Third, impeachment impeachment by prior conviction is a long-standing and widespread practice: it sprang up when common law witness disqualification on the basis of criminal convictions was phased out,[18] and forty-seven states continue to allow criminal defendants to be impeached with their criminal records.[19]

One neglected and crucial part of efforts to reform impeachment of criminal defendants with their convictions is an examination of the other three states[20]:

[14] *See, e.g.*, Carodine, *supra* note 2, at 539 ("This Article will refer mainly to the federal rule, as it represents the 'model rule' for dealing with prior conviction impeachment."); Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 637 (1991) ("The current law . . . varies widely from one jurisdiction to another, but the Federal Rules of Evidence are representative.").

[15] *See* Dannye W. Holley, *Federalism Gone Far Astray from Policy and Constitutional Concerns: The Admission of Convictions to Impeach by State's Rules—1990-2004*, 2 TENN. J.L. & POL'Y 239, 329-30 (2005).

[16] *See* Carodine, *supra* note 2, at 525.

[17] *See* Beaver & Marques, *supra* note 12, at 589; Bellin, *supra* note 5, at 308 n.69; Richard Lempert, *The Economic Analysis of Evidence Law: Common Sense on Stilts*, 87 VA. L. REV. 1619, 1627-28 (2001).

[18] *See* Bellin, *supra* note 5, at 297 ("[T]he practice of impeaching testifying witnesses with prior convictions . . . was a byproduct of a progressive reform that removed rather than added to the obstacles facing convicts (including, of course, many criminal defendants) who sought to testify."); H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 866 (1982) ("As the descendant of absolute disqualification, the modern predictor of mendacity may be one of those inherited artifacts that masquerade as the product of a contemporary and rational analysis of common experience.").

[19] *See infra* note 66 and accompanying text.

[20] For lack of scholarly interest in these three states, see Robert D. Dodson, *What Went Wrong with FRE Rule 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1, 21-22 (1999). These states are not only insufficiently scrutinized; they are sometimes not even recognized. *See, e.g.*, Jane G. Bitz, State v. Ray*: All Theft Crimes Now Admissible to Impeach Witnesses Under ER 609*, 28 GONZ. L. REV. 141, 145 (1992-93) (omitting Montana); Gene R. Nichol, Jr., *Prior Crime Impeachment of Criminal Defendants: A Constitutional Analysis of Rule 609*, 82 W. VA. L. REV. 391, 394 n.14 (1980) (omitting Kansas and Montana); Gainor, *supra* note 7, at 783 n.131 (omitting Kansas).

Hawai'i,[21] Kansas,[22] and Montana.[23] The practice may be long-standing, but these three diverse states offer examples of jurisdictions where it has been rejected for decades. The practice may be widespread, but these states remind us that it is not universal. An examination of these three examples offers data on several important questions: What arguments were successful in bringing about abolition (and in overcoming any prosecutorial opposition)? How have these states fared?[24] What do their experiences suggest about which of these three models—or what alternative model—might work best in other jurisdictions? And have developments in subsequent decades strengthened or weakened the arguments for abolition?

This Article is part of a trilogy of works in which I offer critiques of the impeachment of criminal defendants with their prior convictions. The first, *Impeachment by Unreliable Conviction*, criticized the assumption that prior convictions are reliable indicators of relative culpability;[25] the second, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, highlighted the neglect of doctrinal protections of defendants' testimony, and the resultant loss of a possible de-biasing opportunity.[26] In this third piece, I present a way forward, arguing that the experiences of jurisdictions that have experimented with abolition give us the tools needed to push for a permanent shift in the use of convictions to impeach criminal defendants.

Part I introduces the practice of impeachment by prior conviction, describing both FRE 609 and the contours of its state counterparts. Part II describes three important ways in which the impeachment of criminal defendants with their convictions is flawed, and makes suggestions about why the practice persists, regardless of its flaws. Part III suggests that while these flaws support a powerful argument for abolition, various factors have made this solution seem

[21] *See* HAW. R. EVID. 609(a) ("[I]n a criminal case where the defendant takes the stand, the defendant shall not be questioned or evidence introduced as to whether the defendant has been convicted of a crime, for the sole purpose of attacking credibility, unless the defendant has oneself introduced testimony for the purpose of establishing the defendant's credibility as a witness, in which case the defendant shall be treated as any other witness as provided in this rule.").

[22] *See* KAN. STAT. ANN. § 60-421 (2011) ("If the witness be the accused in a criminal proceeding, no evidence of his or her conviction of a crime shall be admissible for the sole purpose of impairing his or her credibility unless the witness has first introduced evidence admissible solely for the purpose of supporting his or her credibility.").

[23] *See* MONT. R. EVID. 609 ("For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible.").

[24] *See* Leslie Alan Glick, *Impeachment by Prior Convictions: A Critique of Rule 6-09 of the Proposed Rules of Evidence for U.S. District Courts*, 6 CRIM. L. BULL. 330, 337 (1970) (noting that at the time of the article, it was difficult to assess the effectiveness of a rule like Kansas's, in part because "no extensive case law ha[d] developed").

[25] *See* Roberts, *Unreliable Conviction*, *supra* note 13.

[26] *See* Roberts, *Prior Conviction Impeachment*, *supra* note 13.

impracticable: the endurance of the federal rule, the long-standing and widespread nature of this practice, and a presumed resistance from the prosecutorial lobby. A focus on the three states that have moved toward abolition, and have sustained that approach for decades, helps to counter these concerns. Part III then applies that focus, and draws from it a model statute and other potential reforms for states to consider.

I. PRIOR CONVICTION IMPEACHMENT

This Part will begin by describing the federal rule on impeachment by prior criminal conviction, before outlining the contours of its various state counterparts. It will then note that the practice of impeachment by prior conviction originated as what Jeffrey Bellin calls "a byproduct of a progressive reform,"[27] namely the abandonment of rules that disqualified those with certain criminal records from testifying.

A. *Prior Conviction Impeachment Under the Federal Rules of Evidence*

The federal system recognizes various ways of impeaching—or attacking the credibility of—a witness.[28] One of them involves attacking the witness's "character for truthfulness,"[29] and the parameters of this form of impeachment are introduced in FRE 608. This form of impeachment includes, as one method, impeaching a witness with his or her prior criminal record, and this method has its own rule: FRE 609.

While FRE 609 provides for the possibility of impeachment by prior conviction of all kinds of witnesses in criminal and civil trials, this Article focuses on the type of impeachment that creates the greatest concern: the impeachment by prosecutors of criminal defendants.[30] The drafters of the rule were particularly concerned about this form of impeachment, noting the almost inescapable prejudice that it threatened.[31]

The FRE 609 rules on impeachment of criminal defendants represented a political compromise: the House of Representatives wanted only convictions involving dishonesty or false statements to be admissible, while the Senate

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[27] Bellin, *supra* note 5, at 297.

[28] *See* FED. R. EVID. 607 (using "impeach" and "attacking the witness's credibility" interchangeably); State v. Redmond, 803 N.W.2d 112, 122 (Iowa 2011) ("Counsel may attempt to show a witness's testimony is unpersuasive in a number of ways, such as showing bias, motive to lie, or flaws in perception.").

[29] FED. R. EVID. 608.

[30] As described below, this form of impeachment creates the greatest concerns along each of the three dimensions laid out in this Article: flawed assumptions, consequences in individual trials, and contribution to broader dysfunctions.

[31] *See* FED. R. EVID. 609 advisory committee's note to 1990 amendments ("[I]n virtually every case in which prior convictions are used to impeach the testifying defendant, the defendant faces a unique risk of prejudice . . . .").

wanted felony convictions to be admissible as well.[32] The rule that emerged permits the use of two kinds of criminal convictions to impeach criminal defendants: felony convictions that survive a balancing test[33] and *crimina falsi* (crimes involving "a dishonest act or false statement").[34]

With respect to the first category, trial judges must admit prior felony convictions if their probative value outweighs their prejudicial effect.[35] Courts assessing probative value are required to determine the extent to which convictions shed light on the defendant's "character for truthfulness,"[36] because this is the only issue in connection with which they are admissible.[37] In order to determine whether a particular conviction has probative value that outweighs its prejudicial effect, federal courts typically apply a nonexclusive multifactor test,[38] which includes the following five factors: "(1) The impeachment value of the prior crime. (2) The point in time of the conviction and the witness' subsequent history. (3) The similarity between the past crime and the charged crime. (4) The importance of the defendant's testimony. [And] (5) [t]he centrality of the credibility issue."[39]

The second category is implicated only "if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement."[40] If the conviction falls within this category, evidence about it "must be admitted,"[41] whatever its probative value or prejudicial effect.[42] This provision thus stands in contrast to the other

[32] *See* Roderick Surratt, *Prior-Conviction Impeachment Under the Federal Rules of Evidence: A Suggested Approach to Applying the "Balancing" Provision of Rule 609(a)*, 31 SYRACUSE L. REV. 907, 919-20 (1980).

[33] *See* FED. R. EVID. 609(a)(1). More precisely, the convictions permitted under this heading are those that "in the convicting jurisdiction, [were] punishable by death or by imprisonment for more than one year." *Id.*

[34] *Id.* 609(a)(2).

[35] *See id.* 609(a)(1)(B).

[36] *Id.* 609(a).

[37] *See id*.

[38] *See, e.g.*, United States v. Mahone, 537 F.2d 922, 929 (7th Cir. 1976) (citing 3 JACK B. WEINSTEIN, EVIDENCE ¶ 609[3], at 609-78 to 609-75 (1975)). This test, or a close variant thereof, is used in all but two federal circuits. *See* Roberts, *Prior Conviction Impeachment*, *supra* note 13, at 846 & n.51 (noting use of the test, or a close variant thereof, in all but the Courts of Appeals for the Fourth and Eighth Circuits).

[39] *Mahone*, 537 F.2d at 929 (citing Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967)).

[40] FED. R. EVID. 609(a)(2). For further clarification of this provision, see FED. R. EVID. 609(a)'s advisory committee note to 2006 amendments.

[41] *Id.* 609(a)(2).

[42] *See* Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547, 1580-81 (pointing out that this permits the use of convictions identical to the charged crime).

provisions of the Federal Rules of Evidence, which permit trial courts to exclude evidence if it fails the balancing test contained within FRE 403.[43]

FRE 609 is exceptional in another way too. In the federal courts, as in state courts,[44] propensity reasoning is generally prohibited.[45] In other words, evidence evidence whose relevance relies on an inference about what kind of person a defendant is, and thus what kind of behavior he or she is likely to commit, is generally prohibited.[46] Its prejudicial effect is thought too great,[47] and its probative value too small.[48] FRE 609 rejects some propensity reasoning: jurors are instructed not to use impeachment evidence to conclude that because a defendant committed a crime before, he or she probably committed the crime charged.[49] However, it *relies on* other propensity reasoning: prior convictions

[43] *See* FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."); Roberts, *Unreliable Conviction*, *supra* note 13, at 567-68; Julia Simon-Kerr, *Credibility by Proxy*, 85 GEO. WASH. L. REV. (forthcoming 2017) (manuscript at 30) (on file with author).

[44] *See* Note, *Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime*, 78 HARV. L. REV. 426, 436 (1964).

[45] *See* FED. R. EVID. 404(a)(1) ("Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."); *id.* 404(b)(1) ("Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.").

[46] *See* Robert G. Spector, *Impeaching the Defendant by His Prior Convictions and the Proposed Federal Rules of Evidence: A Half Step Forward and Three Steps Backward*, 1 LOY. U. CHI. L.J. 247, 250 (1970) ("It seems rather ridiculous to prevent the prosecutor from using this evidence at one stage but allow it at another stage just because the defendant has elected to testify."); Note, *supra* note 44, at 436.

[47] Michelson v. United States, 335 U.S. 469, 476 (1948) ("[Character] is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."); Note, *supra* note 44, at 436 ("The introduction of such evidence is said to create a danger that the jury will punish the defendant for offenses other than those charged, or at least that it will convict when unsure of guilt, because it is convinced that the defendant is a bad man deserving of punishment.").

[48] *See* Robert G. Spector, Commentary, *Rule 609: A Last Plea for Its Withdrawal*, 32 OKLA. L. REV. 334, 345 (1979) ("[T]he reasons for exclusion [of prior criminal conduct] are fairly clear. The evidence has only minimal probative value; it is always risky to reason from past actions to present conduct. The prejudice can be overwhelming. The risk that the fact-finder will convict the defendant in order to take a bad person off the streets is too great to be borne.").

[49] *See* People v. McGee, 501 N.E.2d 576, 578 (N.Y. 1986).

are deemed relevant precisely because they permit the jurors to reason, in the case of felonies, that a defendant violated a serious legal norm before, and therefore is more likely to be violating one now (the prohibition against perjury),[50] or, in the case of *crimina falsi*, that he or she lied before and therefore is more likely to be doing so now.[51]

After laying out those categories of convictions that are admissible, FRE 609 proceeds to specify certain limitations.[52] For example, evidence of a conviction is not admissible if "the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated."[53] In addition, if more than ten years have passed since the conviction or the "release from confinement for it," heightened standards must be met in order for the conviction to be admitted.[54] Use of a prior conviction to impeach is not prohibited if the conviction is on appeal, however, provided that the other requirements of FRE 609 are met.[55] The drafters found support for this decision in "[t]he presumption of correctness which ought to attend judicial proceedings."[56]

Case law has added crucial content to FRE 609. It has set limits, for example, on the type of evidence that can be admitted with respect to convictions that satisfy FRE 609. Typically, courts permit the name of the crime, the date of the crime, and the sentence imposed.[57] The Supreme Court has clarified that convictions that were garnered in violation of the right to counsel cannot be used for impeachment.[58] This does not necessarily mean, however, that convictions garnered without the protection of a lawyer are inadmissible under FRE 609:

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[50] *See* Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 296-301 (1969) ("[A]cts are constituted major crimes because they entail substantial injury to and disregard of the rights of other persons or the public. A demonstrated instance of willingness to engage in conduct in disregard of accepted patterns is translatable into willingness to give false testimony."). For a refutation of this idea through Bentham's hypothetical involving a man who kills to protect his reputation for veracity, see 7 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 406 (1827).

[51] *See* Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2310-11 (1994) ("Convictions for crimes involving acts of untruthfulness allegedly increase the probability that the witness has that specific character trait and, thus, might lie when testifying.").

[52] *See* FED. R. EVID. 609(b)-(d).

[53] *Id.* 609(c)(1).

[54] *Id.* 609(b).

[55] *See id.* (adding that "[e]vidence of the pendency is also admissible").

[56] FED. R. EVID. 609(e)'s advisory committee note in 1973.

[57] *See, e.g.*, United States v. Smith, 454 F.3d 707, 716 (7th Cir. 2006) (cautioning that the prosecution may identify the crime charged, the date, and the disposition of the case, but it may not "harp on the witness's crime" or "parade it lovingly before the jury in all its gruesome details"); United States v. Phillips, 488 F. Supp. 508, 513-14 (W.D. Mo. 1980) (concluding that the court has discretion to exclude even some of these details).

[58] *See* Loper v. Beto, 405 U.S. 473, 483 (1972).

because FRE 609 permits the admission of certain *crimen falsi* misdemeanors, it is possible for certain uncounseled misdemeanors to be used to impeach.[59] Lower courts have found for defendants where other constitutional violations infected the convictions that were used for impeachment.[60]

Two Supreme Court cases, meanwhile, have placed landmines in the paths of defense attorneys attempting to navigate FRE 609. In *Luce v. United States*,[61] the Court held that if a defendant refrains from testifying in response to an evidentiary ruling permitting impeachment, the defendant cannot subsequently appeal the evidentiary ruling.[62] Several state courts have adopted this rule,[63] which means that a defendant can only avoid the destructive effect of prior conviction impeachment by destroying his or her ability to appeal. In *Ohler v. United States*,[64] the Court relied on *Luce* to hold that if a defendant attempts to "remove the sting" by discussing his or her criminal record on direct examination, the defendant cannot subsequently appeal the evidentiary ruling.[65] The import of this case is similar to that of *Luce*: one can attempt to mitigate the

[59] *See* Scott v. Illinois, 440 U.S. 367, 373-74 (1979) (cabining right to appointed misdemeanor counsel to convictions for which a term of imprisonment is imposed).

[60] *See, e.g.*, United States v. Fisher, 106 F.3d 622, 630-31 (5th Cir. 1997) (granting new trial because defendant was impeached with a conviction that was obtained in violation of due process); Biller v. Lopes, 834 F.2d 41, 45 (2d Cir. 1987) (ruling that impeachment by means of a conviction obtained by coerced testimony constitutes a violation of due process).

[61] 469 U.S. 38 (1984).

[62] *Id.* at 43.

[63] States that follow *Luce* include Alaska, Arizona, Connecticut, Delaware, Iowa, Michigan, North Carolina, Rhode Island, South Carolina, and Utah. *See, e.g.*, State v. Wickham, 796 P.2d 1354, 1357 (Alaska 1990) (adopting the "*Luce* rule as a rule of state criminal procedure"); State v. Allie, 710 P.2d 430, 437 (Ariz. 1985) (en banc) (recognizing its holding as similar to the Supreme Court's in *Luce*); State v. Harrell, 506 A.2d 1041, 1046 (Conn. 1986) (holding that *Luce* will apply prospectively only); Fennell v. State, 691 A.2d 624, 626 (Del. 1997) (finding the Supreme Court's reasoning in *Luce* "persuasive" but holding that the rule will apply prospectively only); State v. Derby, 800 N.W.2d 52, 58-60 (Iowa 2011) (refusing to overturn state precedent that reached the same conclusion as *Luce*); People v. Finley, 431 N.W.2d 19, 25-27 (Mich. 1988) (holding that the *Luce* rule will apply prospectively); State v. Hunt, 475 S.E.2d 722, 726-27 (N.C. Ct. App. 1996) (arguing that the *Luce* rule is especially applicable to North Carolina Rule of Evidence 609(b) because of its policy considerations and potential problems); State v. Silvia, 898 A.2d 707, 720 (R.I. 2006) (adopting the *Luce* rule and finding nothing "unfair" in what it asks of the defendant); State v. Glenn, 330 S.E.2d 285, 286 (S.C. 1985) (per curiam) ("We agree with the reasoning of the *Luce* decision and refuse to engage in speculation in reviewing claims of improper impeachment."); State v. Gentry, 747 P.2d 1032, 1036 (Utah 1987) (formally adopting the *Luce* rule by declaring that "[t]o preserve for appellate review a claim of improper impeachment with a prior conviction, a defendant must testify").

[64] 529 U.S. 753 (2000).

[65] *Id.* at 758 ("The defendant must choose whether to introduce the conviction on direct examination and remove the sting or to take her chances with the prosecutor's possible elicitation of the conviction on cross-examination.").

destructive effects of this form of impeachment only by destroying one's ability to appeal.[66]

B. *Prior Conviction Impeachment as Permitted by the States*

The scholarly focus on FRE 609 has obscured the variety of rules in those states that permit impeachment of criminal defendants with their convictions. Forty-seven states, along with the District of Columbia, follow the federal government in permitting impeachment of criminal defendants with their criminal records, but of those only seventeen states follow FRE 609 either exactly or very closely.[67]

Several states restrict this type of impeachment more tightly than do the Federal Rules of Evidence. Some, for example, restrict the types of convictions that can be used, admitting only felonies,[68] or crimes of dishonesty,[69] or, in the case of West Virginia, crimes that "involved perjury or false swearing."[70] Some maintain the two categories of *crimen falsi* and felony, but limit the types of felonies that are admissible within the second category.[71] Some require that before a conviction is admitted to impeach, notice be given to the defendant;[72] some also require that no impeachment be attempted without judicial permission.[73] Some reject the federal decision to mandate admission of certain

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[66] *See* L. Timothy Perrin, *Pricking Boils, Preserving Error: On the Horns of a Dilemma After* Ohler v. United States, 34 U.C. DAVIS L. REV. 615, 669-70 (2001) ("It is really a choice between two unattractive alternatives, particularly for criminal defendants. As a general matter, the chances of success on appeal are small, and yet the chances of acquittal at trial if the jury learns for the first time from the prosecution that the defendant has a prior conviction are equally small." (footnote omitted)).

[67] *See* OKLA. STAT. tit. 12, § 2609 (2015); S.D. CODIFIED LAWS § 19-19-609 (2016); ALA. R. EVID. 609; ARIZ. R. EVID. 609; ARK. R. EVID. 609; DEL. R. EVID. 609; IOWA R. EVID. 5.609; MINN. R. EVID. 609; MISS. R. EVID. 609; N.H. R. EVID. 609; N.M. R. EVID. 11-609; N.D. R. EVID. 609; OHIO R. EVID. 609; S.C. R. EVID. 609; UTAH R. EVID. 609; WASH. R. EVID. 609; WYO. R. EVID. 609.

[68] *See, e.g.*, COLO. REV. STAT. § 13-90-101 (2016); NEV. REV. STAT. § 50.095 (2016); CONN. CODE EVID. § 6-7; IDAHO R. EVID. 609; KY. R. EVID. 609.

[69] *See* GA. CODE ANN. § 24-6-609(a)(2) (2015); ALASKA R. EVID. 609(a); PA. R. EVID. 609(a); Glick, *supra* note 24, at 336.

[70] W. VA. R. EVID. 609(a)(1).

[71] *See* IND. R. EVID. 609(a)(1) ("For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or an attempt of a crime must be admitted but only if the crime committed or attempted is . . . murder, treason, rape, robbery, kidnapping, burglary, arson, or criminal confinement . . . ."); MICH. R. EVID. 609(a)(2)(A) (allowing such evidence for felonies that contain an element of theft).

[72] *See, e.g.*, TEX. R. EVID. 609(f). Notice is only required in federal court for convictions more than ten years old. *See* FED. R. EVID. 609(b)(2); United States v. Williams, 472 F.3d 81, 87 (3d Cir. 2007).

[73] *See, e.g.*, ALASKA R. EVID. 609(c); TENN. R. EVID. 609(a)(3); WIS. R. EVID. 906.09(3).

convictions,[74] and instead require exclusion if the defendant prevails in a balancing test involving probative value and prejudicial effect.[75] Some impose a firm time bar,[76] rather than the heightened standard for admissibility that the federal rules impose,[77] though for some that firm time bar comes after a lengthier time period than the federal ten years.[78] Some have a shorter time bar than does the federal system,[79] at least for certain crimes.[80] For some, the fact that an appeal from a conviction is pending—or even that the time to appeal it has not yet expired—makes that conviction inadmissible.[81] With some exceptions, Pennsylvania bars impeachment of defendants by means of cross-examination about their convictions,[82] and requires instead that this form of impeachment take place on rebuttal.[83] Some states require more "sanitizing" of convictions than does FRE 609, by specifying particular limits on the details of a conviction that can be admitted.[84]

[74] *See* FED. R. EVID. 609(a)(2).

[75] *See* ALASKA R. EVID. 609(c); CONN. CODE EVID. § 6-7(a); IDAHO R. EVID. 609(a); ILL. R. EVID. 609(a); ME. R. EVID. 609(a); MD. R. EVID. 5-609(a)(2); N.J. R. EVID. 609(b)(1); R.I. R. EVID. 609(b); TENN. R. EVID. 609(a)(3); TEX. R. EVID. 609(a)(2); VT. R. EVID. 609(a); WIS. R. EVID. 906.09(2); People v. McGee, 501 N.E.2d 576, 578 (N.Y. 1986).

[76] *See* ME. R. EVID. 609(b); MD. R. EVID. 5-609(b); MICH. R. EVID. 609(c).

[77] *See* FED. R. EVID. 609(b).

[78] *See*, *e.g.*, MD. R. EVID. 5-609(b) (fifteen years); OR. EVID. CODE 609(3)(a) (same).

[79] *See*, *e.g.*, ALASKA R. EVID. 609(b) (five years).

[80] *See*, *e.g.*, MASS. GEN. LAWS ch. 233, § 21 (2016) (making a misdemeanor conviction inadmissible "after five years from the date on which sentence on said conviction was imposed, unless [the defendant was subsequently] convicted of a crime within five years of the time of his testifying").

[81] *See*, *e.g.*, NEB. REV. STAT. § 27-609(5) (2016) ("Pendency of an appeal renders evidence of a conviction inadmissible."); MD. R. EVID. 5-609(c)(3) (providing that otherwise admissible evidence of a conviction shall be excluded if "an appeal or application for leave to appeal from the judgment of conviction is pending, or the time for noting an appeal or filing an application for leave to appeal has not expired").

[82] 42 PA. CONS. STAT. § 5918 (2013).

[83] Commonwealth v. Bighum, 307 A.2d 255, 260 (Pa. 1973).

[84] CONN. CODE EVID. § 6-7(c) ("[T]he court shall limit the evidence to the name of the crime and when and where the conviction was rendered, except that (1) the court may exclude evidence of the name of the crime and (2) if the witness denies the conviction, the court may permit evidence of the punishment imposed."); KY. R. EVID. 609(a) ("The identity of the crime upon which conviction was based may not be disclosed upon cross-examination unless the witness has denied the existence of the conviction."); N.J. R. EVID. 609(a)(2) ("[T]he State may only introduce evidence of the defendant's prior convictions limited to the degree of the crimes, the dates of the convictions, and the sentences imposed, excluding any evidence of the specific crimes of which defendant was convicted, unless the defendant waives any objection to the non-sanitized form of the evidence."); VA. SUP. CT. R. 2:609(a) (providing that while the fact of a previous felony conviction, or misdemeanor conviction "involving moral turpitude, and the number of such convictions may be elicited," "the name or nature of

Some states have also rejected the two key Supreme Court cases that, in the federal context, intensified the strategic dilemmas faced by defendants. First, some have rejected the rule that *Luce* established for federal courts, specifying instead that defendants do not need to testify in order to preserve their ability to appeal impeachment decisions.[85] Second, several have diverted from the rule announced in *Ohler*. These states specify instead that attempting to explain convictions on direct examination does not preclude an appeal against a ruling admitting prior convictions for impeachment purposes.[86]

On the other hand, some state rules are more permissive of this form of impeachment than are the Federal Rules of Evidence. Some, for example, permit impeachment with any sort of conviction.[87] Some permit, at least in certain instances, the details of the offense to be admitted.[88] Some dispense with any

any crime of which the . . . accused was convicted, except for perjury, may not be shown, nor may the details of prior convictions be elicited, unless offered to rebut other evidence concerning prior convictions").

[85] *See* MINN. R. EVID. 609(a) committee's comment to 1989 amendment ("Contrary to the practice in federal courts, the defendant can preserve the issue at a motion in limine and need not testify to litigate the issue in post trial motions and appeals."); TENN. R. EVID. 609(a)(3); State v. Swanson, 707 N.W.2d 645, 654 (Minn. 2006) (noting that defendants, under Minnesota law, do not need to testify to preserve their right to appeal); Wallace v. State, 160 So. 3d 1184, 1187 (Miss. Ct. App. 2014) (observing that defendants cannot appeal the admission of a prior conviction if they do not proffer testimony to demonstrate what they would have said); Warren v. State, 124 P.3d 522, 527 (Nev. 2005) ("[T]he problem of meaningful review is unfounded when the record sufficiently demonstrates, through an offer of proof, the nature of the defendant's proposed testimony and that the defendant refrained from testifying when faced with impeachment by a prior conviction. Under such conditions, a reviewing court would have a sufficient record to conduct a harmless error analysis." (footnote omitted)); State v. Whitehead, 517 A.2d 373, 377 (N.J. 1986) ("In light of the significant problems caused by requiring a defendant to describe his testimony before trial, a defendant should not be required to make an advance offer of proof."); People v. Contreras, 485 N.Y.S.2d 261, 263 (N.Y. App. Div. 1985) (recognizing that state precedent "does not impose any obligation upon a defendant to take the stand as a condition to" challenging impeachment rulings); State v. McClure, 692 P.2d 579, 584 n.4 (Or. 1984) ("We respectfully disagree [with *Luce*]. We prefer the motion in limine practice suggested in our opinion . . . ."); Commonwealth v. Richardson, 500 A.2d 1200, 1204 (Pa. Super. Ct. 1985) (noting that appellate courts have been able to give meaningful review without requiring the defendant to testify at trial).

[86] *See* State v. Daly, 623 N.W.2d 799, 801 (Iowa 2001); Zola v. Kelley, 826 A.2d 589, 591-93 (N.H. 2003); State v. Gary M.B., 676 N.W.2d 475, 482-83 (Wis. 2004).

[87] MASS. GEN. LAWS ch. 233, § 21 (2016); MO. ANN. STAT. § 491.050 (2016); LA. CODE EVID. ANN. art. 609.1.A; N.J. R. EVID. 609(a); N.C. R. EVID. 609; R.I. R. EVID. 609(a); WIS. R. EVID. 906.09(1).

[88] LA. CODE EVID. ANN. art. 609.1.C ("Ordinarily, only the fact of a conviction, the name of the offense, the date thereof, and the sentence imposed is admissible. However, details of the offense may become admissible to show the true nature of the offense: (1) When the witness has denied the conviction or denied recollection thereof; (2) When the witness has

balancing of probative value against prejudicial effect.[89] Some make no mention of a time limit.[90] Texas permits impeachment with crimes involving "moral turpitude, regardless of punishment."[91] In Oregon, defendants charged with certain offenses against family or household members can be impeached with a subset of those offenses, even though some are neither felonies nor *crimina falsi*.[92]

Within the states, one can detect trends—both judicial and legislative—toward expanding this form of impeachment. Dannye Holley identifies and criticizes a trend toward ever-increasing admission of prior conviction impeachment evidence, terming it a form of "judicial anarchy."[93] Georgia, previously a state that had a long-standing prohibition on the impeachment of criminal defendants by prior conviction,[94] lifted its prohibition in 2005.[95] Finally, the Missouri legislature recently considered a proposal that municipal court convictions be added to the list of those convictions that are admissible for impeachment.[96]

testified to exculpatory facts or circumstances surrounding the conviction; or (3) When the probative value thereof outweighs the danger of unfair prejudice, confusion of the issues, or misleading the jury."); MO. ANN. STAT. § 491.050 (permitting "any question relevant to th[e] inquiry [into credibility]").

[89] FLA. STAT. § 90.610 (2016); NEB. REV. STAT. § 27-609 (2016); OR. EVID. CODE 609; PA. R. EVID. 609(a); W. VA. R. EVID. 609.

[90] FLA. STAT. § 90.610 (providing for exclusion on grounds of remoteness only in connection with civil trials); WIS. R. EVID. 906.09.

[91] TEX. R. EVID. 609(a)(1).

[92] OR. EVID. CODE 609(2).

[93] Dannye R. Holley, *Judicial Anarchy: The Admission of Convictions to Impeach: State Supreme Courts' Interpretative Standards, 1990-2004*, 2007 MICH. ST. L. REV. 307, 315 ("The 150 state supreme court decisions analyzed in this Article collectively have the effect of further opening the door in the substantial majority of states to the wholesale admission of irrelevant and highly prejudicial evidence . . . .").

[94] Prior to July 1, 2005, Georgia's rule provided that "[i]f a defendant testifies, he shall be sworn as any other witness and may be examined and cross-examined as any other witness, except that no evidence of general bad character or prior convictions shall be admissible unless and until the defendant shall have first put his character in issue." GA. CODE ANN. § 24-9-20(b) (1995). This provision was amended as part of the Criminal Justice Act of 2005, 2005 Ga. Laws p. 27, § 14 et seq., effective July 1, 2005, to eliminate this language. The original provision had been in place for decades. Laura D. Hogue & Franklin J. Hogue, *Criminal Law*, 57 MERCER L. REV. 113, 125 (2005).

[95] *See* GA. CODE ANN. § 24-6-609(a)(2) (2013).

[96] *See* H.R. 1692, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016). *But see* OR. R. EVID. 609 advisory committee's note ("Convictions in an Oregon justice or municipal court, or in similar courts of other states, however designated, may not be used for impeachment. The offenses triable in these courts do not involve serious moral depravity. Furthermore, the proceedings are relatively informal, and often stray from the standards of a criminal trial in a court of record.").

C. *The Roots of Prior Conviction Impeachment in Progressive Reform*

An examination of how the practice of impeaching defendants with their prior convictions came to be reveals that it developed, in Bellin's words, as "a byproduct of a progressive reform"[97]: specifically, the lifting of the common law prohibition against testimony by those with felony or *crimen falsi* convictions.[98]

By 1953, each of the states had abandoned this prohibition,[99] but the legislation that lifted the prohibition generally also specified that while a criminal record no longer represented an absolute bar to testimony, it was available as a means of impeachment.[100] Some statutory provisions of this nature still remain. In Missouri, for example, the relevant rule first giveth and then taketh away, stating that, "[a]ny person who has been convicted of a crime is, notwithstanding, a competent witness; however, any prior criminal convictions may be proved to affect his credibility in a civil or criminal case."[101] The traces of this history are also apparent in the federal system. In their notes on an early version of FRE 609, the drafters mentioned that the two types of convictions admissible to impeach witnesses corresponded roughly to those that previously had served entirely to silence them.[102]

Despite the fact that the practice of impeachment by prior conviction evolved from the abandonment of automatic silencing of those with convictions, the current implementation of this practice frequently involves a similar kind of

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[97] Bellin, *supra* note 5, at 297.

[98] *See* Stuart P. Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of* Crimen Falsi, 90 J. CRIM. L. & CRIMINOLOGY 1087, 1105-13 (2000); Colin Miller, *Impeachable Offenses?: Why Civil Parties in Quasi-Criminal Cases Should Be Treated Like Criminal Defendants Under the Felony Impeachment Rule*, 36 PEPP. L. REV. 997, 1028 (2009); *see also* State v. Burton, 676 P.2d 975, 983 (Wash. 1984) (Brachtenbach, J., dissenting) (suggesting prohibition dated to the early seventeenth century).

[99] 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 601 App. 101[4] (Mark S. Brodin & Joseph M. McLaughlin eds., 2d ed. 2016) (adding that "conviction of perjury still rendered a witness incompetent in a few jurisdictions").

[100] *See Burton*, 676 P.2d at 984; Alan D. Hornstein, *Between* Rock *and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 VILL. L. REV. 1, 22 (1997) ("Typically, when a jurisdiction abolished the disqualification of witnesses who had been convicted of a crime, it permitted the conviction to be used to impeach the testimony of the witness. No distinction was made between the garden variety witness and the criminal defendant testifying in her own behalf, despite what now seems the obviously greater prejudicial impact on the latter." (footnote omitted)).

[101] MO. ANN. STAT. § 491.050 (2016); *see also* COLO. REV. STAT. § 13-90-101 (2016). Virginia's provision, entitled "Convicts as witnesses," states that "[a] person convicted of a felony or perjury shall not be incompetent to testify, but the fact of conviction may be shown in evidence to affect his credit." VA. CODE ANN. § 19.2-269 (2016).

[102] *See* Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 297-99 (1969).

silencing.[103] Additional reform is needed. Part II will explore various forms of critique of the current regime, before Part III turns to reform possibilities.

II. THREE DIMENSIONS OF CRITIQUE

This Part explores three critiques of the practice of impeaching criminal defendants with their prior convictions. Section II.A explores the flawed assumptions on which the impeachment of criminal defendants rests, Section II.B the consequences in individual trials, and Section II.C the role that this practice plays in some of the criminal justice system's deepest dysfunctions. Section II.D suggests that in order to reform prior conviction impeachment one must try to understand why the practice—for all its flaws—remains in such broad use.

A. *Flawed Assumptions*

Courts, commentators, and rules drafters have proffered justifications for the impeachment of criminal defendants with their convictions, asserting—as they must—not only that prior conviction impeachment is relevant to the issue of the defendant's credibility, but also that its probative value on this issue outweighs its prejudicial effect. In the federal system and in those states that follow the Federal Rules of Evidence in allowing the use of both felonies and *crimina falsi*, justifications have been proffered to address both categories of convictions. The justifications rest not on data but on what one might call "junk science at its worst,"[104] or, more charitably, a series of assumptions.[105] When one unpacks the assumptions, one finds that they are belied by data.

Starting with probative value, the notion that a prior conviction is useful to fact finders on the issue of whether a defendant is testifying truthfully relies on the following series of assumptions: first, that the defendant committed the crime of which she was convicted; second, that those without such a conviction have not committed the crime in question;[106] third, that the conviction was the product

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[103] *See* Simon-Kerr, *supra* note 43 (manuscript at 30) (noting similarities between the federal rules on impeachment by prior conviction and the "status-based exclusion approach of competency doctrine").

[104] Holley, *supra* note 15, at 303 (arguing that the assumption "that disobedience to law is logical evidence of a greater propensity to lie—is 'junk science' at its worst"); *id.* at 295 ("[S]tate supreme courts . . . interpret [their] diverse standards based on judicially crafted junk science heuristics, with an apparent eye to sanctioning admission of a vast array of convictions against persons accused of crimes.").

[105] *See* Robert D. Okun, *Character and Credibility: A Proposal to Realign Federal Rules of Evidence 608 and 609*, 37 VILL. L. REV. 533, 536 (1992) ("[T]he practice of impeachment with prior crimes and bad acts is consistent with what has been variously described as 'common sense,' 'intuition,' and 'social consensus.'").

[106] *See* 120 CONG. REC. 2376 (1974) (statement of Rep. Hogan) ("Should a witness with an antisocial background be allowed to stand on the same basis of believability before juries as law-abiding citizens with unblemished records? I think not.").

of a particular character trait—such as, in the case of a felony, knowing violation of serious legal norms; fourth, that the defendant possesses that character trait now, just as he or she had it then; fifth, that the character trait helps to predict the likelihood that he or she will lie while on the stand; and sixth, that the evidence provided to the jury will help them assess this likelihood.

Each of these assumptions is vulnerable to critique.[107] First, in an age of wrongful convictions,[108] and mass production of convictions,[109] it cannot be taken as a given that a conviction correlates to commission of the crime.[110] The old assumptions of commentators—that there can be no serious doubt that a conviction corresponds to guilt[111]—need to be rethought. This is true with trials.[112] It is also true with plea bargains[113]: sixteen percent of the convictions

[107] For the damning effect of an inferential chain with at least one faulty link, see Hornstein, *supra* note 100, at 14 ("[T]he probative value of the evidence of prior conviction is the product of the probabilities of each inference necessary to support the conclusion, and that product is perforce lower than the lowest probability of each of the several inferences to be drawn.").

[108] *See* Keith A. Findley, *Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence*, 47 GA. L. REV. 723, 756 (2013) ("[S]ociety has entered into what Marvin Zalman has called the 'age of innocence'—when the nature and risks of unreliable evidence have been recognized as never before." (quoting Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 ALB. L. REV. 1465, 1499 (2011))).

[109] *See* Montré D. Carodine, *Keeping It Real: Reforming the "Untried Conviction" Impeachment Rule*, 69 MD. L. REV. 501, 509 (2010).

[110] *See* NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2015, at 1 (2016), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2015.pdf [https://perma.cc/7A2W-KS4N] ("2015 set a record for exonerations in the United States—149 that we know of so far, in 29 states, the District of Columbia, federal courts and Guam. This record continues a trend: the rate of exonerations has been increasing rapidly for several years.").

[111] *See, e.g.*, Victor Gold, *Two Jurisdictions, Three Standards: The Admissibility of Misconduct Evidence to Impeach*, 36 SW. U. L. REV. 769, 775 (2008) (claiming that there is "no serious question" about the witness's guilt, "since a conviction must be based on either the witness' guilty plea or on proof of guilt beyond a reasonable doubt"); Edward J. Imwinkelried & Miguel A. Méndez, *Resurrecting California's Old Law on Character Evidence*, 23 PAC. L.J. 1005, 1034 (1992) ("[I]n the case of convictions the evidence is reliable. The accused either admitted committing the crime by a plea of guilty or has been found guilty of the crime beyond a reasonable doubt.").

[112] Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. SCH. L. REV. 911, 912 (2011) ("The current American system is marked by an adversary process so compromised by imbalance between the parties—in terms of resources and access to evidence—that true adversary testing is virtually impossible."); Ken Strutin, *Truth, Justice, and the American Style Plea Bargain*, 77 ALB. L. REV. 825, 827 (2014) ("[T]he accuracy and reliability of the trial as the final arbiter of correctness, and its ability to purge investigative shortfalls, has been diminished.").

[113] *See* John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 495 n.70 (2008)

included in the National Registry of Exonerations were the result of a guilty plea,[114] and the fact that guilty pleas need not be tied to actual commission of the crime is further demonstrated by the fact that it is possible to plead guilty to a nonexistent crime.[115] During many plea proceedings, the one thing established with any certainty is that the defendant admitted his guilt, which means that at the subsequent trial the government is attempting to establish his untruthfulness by relying on his purportedly true statement.[116]

Second, the assumption that a conviction conveys not only culpability but also relative culpability—guilt in contrast to the innocence of those who do not have a conviction[117]—is also vulnerable to critique, given the selective doling out of

("There are many reasons to question whether many defendants are in fact guilty of the underlying offense. For example, due to jail overcrowding and large criminal dockets in major metropolitan areas, many defendants plead guilty in order to obtain their immediate release or to get to a less restrictive custodial environment rather than spending a substantial amount of time in a local jail awaiting a trial date."); R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 45 (1981); Hornstein, *supra* note 100, at 10-11; Alexandra Natapoff, Gideon *Skepticism*, 70 WASH. & LEE L. REV. 1049, 1072 (2013).

[114] *See Recent Findings*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Recent-Findings.aspx [https://perma.cc/KU9A-Z938] (last visited Sept. 22, 2016) (listing 1740 exonerations, of which 276 involved guilty pleas).

[115] *See* Strutin, *supra* note 112, at 833 (stating that a plea is based not on "objective truth but rather legal compromise"); Donald H. Zeigler, *Harmonizing Rules 609 and 608(b) of the Federal Rules of Evidence*, 2003 UTAH. L. REV. 635, 692 ("[A] guilty plea may affirmatively misrepresent a defendant's wrongdoing . . . .").

[116] *See* 120 CONG. REC. 37,082 (1974) (statement of Sen. Biden) (stating that for a defendant, a guilty plea is like "having admitted their guilt, which in a way is almost speaking for their credibility, having acknowledged they did it").

[117] *See* State v. Harless, 459 P.2d 210, 211 (Utah 1969) ("[T]here is a basis in reason and experience why one may place more credence in the testimony of one who has lived within the rules of society and the discipline of the law than in that of one who has so demonstrated antisocial tendency as to be involved in and convicted of serious crime.").

arrests,[118] charges,[119] convictions,[120] felony convictions,[121] and expungements.[122]

Third, if there were days when a felony conviction necessarily conveyed a knowing violation of serious legal norms, those days are over.[123] Even where convictions do correspond to law breaking, a felony conviction can be garnered without a knowing violation of serious legal norms.[124] The family of strict liability offenses is growing, and even includes some felonies.[125] Thus, convictions can occur in the absence of any culpable mental state.[126] In addition, mistake of law is typically no defense.[127] Thus, convictions can occur in the absence of any understanding that the law is being broken.[128]

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[118] *See* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 37 (1998) (concluding that because of disparities in policing, "the existence or nonexistence of an arrest or conviction record may or may not reflect relative criminality in black and white defendants").

[119] *See* Carodine, *supra* note 109, at 544 ("It is undeniable that 'prosecutors can [and do] charge a handful of defendants and ignore hundreds of thousands of violators.'" (quoting William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 791 (2006))).

[120] *See* Davis, *supra* note 118, at 37.

[121] *See* VERA INST. OF JUSTICE, DO RACE AND ETHNICITY MATTER IN PROSECUTION?: A REVIEW OF EMPIRICAL STUDIES 3-4 (2012), https://storage.googleapis.com/vera-web-assets/downloads/Publications/do-race-and-ethnicity-matter-in-prosecution-a-review-of-empirical-studies/legacy_downloads/race-and-ethnicity-in-prosecution-first-edition.pdf [https://perma.cc/3XVH-VLY8].

[122] *See* Carodine, *supra* note 2, at 527 ("When Blacks are unfairly 'taxed' in the criminal system with perceived criminality, Whites receive an undeserved 'credit' with a perceived innocence or worthiness of redemption."); Uviller, *supra* note 18, at 886 ("[A]nother person in another case who did the same act without either the bad luck to be caught or the misfortune of conviction should stand in no better position as a witness or party."); Manny Garcia & Jason Grotto, *Odds Favor Whites for Plea Deals*, MIAMI HERALD, Jan. 26, 2004, at 1A (explaining that whites obtain more favorable plea deals, including more frequent expungement of convictions).

[123] *See* Margaret Colgate Love, *What's in a Name? A Lot, When the Name Is "Felon,"* CRIME REP. (Mar. 13, 2012, 11:00 AM), http://www.thecrimereport.org/viewpoints/2012-03-whats-in-a-name-a-lot-when-the-name-is-felon [https://perma.cc/7YRK-KUZB] (noting more than twenty million Americans with felony convictions).

[124] *See* Perez v. State, 11 S.W.3d 218, 221 (Tex. Crim. App. 2000).

[125] *See id.*

[126] *See* Imwinkelried & Méndez, *supra* note 111, at 1036 ("[F]elony convictions for conduct violating penal laws based on negligence or strict liability say nothing about the witness' willingness to violate the laws against perjury."); John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY 653, 684 (2012).

[127] *See* Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 726-27 (2012).

[128] *See id.* at 740.

Fourth, the "trait theory" of behavior[129]—the theory that traits such as a "character for truthfulness" determine how we act[130]—has largely been supplanted.[131] Psychologists no longer believe that lasting traits such as "truthfulness" exist;[132] rather, situations and interactions are thought to play an important role in shaping behavior,[133] and an act of dishonesty would be useful in predicting a second act of dishonesty only if all the surrounding facts and circumstances were identical[134]—which rarely, if ever, happens.[135]

Fifth, even if one did believe that we each have lasting traits that predispose us to particular behaviors, in the context of witness testimony scholars have identified other factors as far more important in determining who is truthful: in particular, what the stakes are, and what the chances seem to be that a lie will be detected.[136]

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[129] Teree E. Foster, *Rule 609(a) in the Civil Context: A Recommendation for Reform*, 57 FORDHAM L. REV. 1, 28 (1988) ("According to the trait theory, behavior derives from a unique combination of traits that make up the character of each individual.").

[130] FED. R. EVID. 609.

[131] *See* Beaver & Marques, *supra* note 12, at 612-13; Foster, *supra* note 129, at 29 (noting that trait theorists were unable to "buttress their theory with empirical data").

[132] *See* Spector, *supra* note 48, at 351.

[133] *See* JEROME BALLET ET AL., FREEDOM, RESPONSIBILITY AND ECONOMICS OF THE PERSON 119 (2013) ("Situationism seeks to highlight the fact that traits of character cannot be used to predict how people will behave and that, on the contrary, situations have a major influence on their behavior."); Foster, *supra* note 129, at 32 nn.147-48; *id.* at 31 ("Most social psychology theorists have rejected the trait theory, in favor of either situationism or interactionism."); Edward J. Imwinkelried, *Reshaping the "Grotesque" Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 SW. U. L. REV. 741, 763-64 (2008) ("[I]nteractionist research 'provides strong support for earlier commentators' . . . conclusion that impeachment by proof of the fact of prior conviction, especially a felony conviction not involving false statement, relies upon assumptions and inferences that lack scientific validity." (quoting Susan Marlene Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 532-33 (1991))); Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 47 B.C. L. REV. 949, 964 (2007) ("The theory that character evidence lacks probative value finds support in a view of personality that sees situational pressures as being more important as a cause of human behavior than are general traits of character.").

[134] *See* Beaver & Marques, *supra* note 12, at 613 ("Neither prevailing psychological theories nor existing empirical data supports the argument that someone who has been found guilty of a criminal offense in the past is more likely to lie on the witness stand than someone who has no prior conviction.").

[135] *See* Spector, *supra* note 48, at 351 ("[A] prior conviction for perjury will generally say nothing about the willingness of a person to lie on this occasion. It only has a tendency to do so if all the surrounding facts and circumstances are identical. As this rarely occurs, given the variety of individual circumstances that lead a witness to the stand, prior convictions become worthless as predictions of character." (footnote omitted)).

[136] *See* Blume, *supra* note 113, at 495 ("Most individuals charged with a serious crime would lie on the witness stand depending on their assessment of two variables: (1) the

Finally, even if one thought that a conviction could potentially offer useful information to jurors about whether to believe the defendant, the information that they are typically offered fails to give them any meaningful guidance. They may be told, for example, that a defendant has a felony conviction for a particular named crime, and that he or she received a particular sentence. The name of the crime may reveal nothing about the details of what actually occurred.[137] The sentence may be the product of randomness,[138] or of poverty.[139] And the word "felony," through its prejudicial effect, may prevent the jury from hearing anything else.[140] In addition, the jury already has every reason to suspect that a defendant faced with the loss of liberty and perhaps life might shape his or her testimony in order to maximize the possibility of acquittal.[141] Given this shadow over defendants' credibility, it remains uncertain what marginal probative value this form of impeachment could bring.[142]

In addition to these multiple flawed assumptions about probative value, the rule also rests on a mistaken assumption about cabining prejudicial effect. No one appears to doubt that this evidence threatens to impose unfair prejudice.[143] Acknowledged risks include its use as improper propensity evidence;[144] its use to support the notion that the defendant is a "bad" person who must be punished;[145] its use inappropriately to undermine the defense evidence or to

importance of having the untruthful testimony believed; and (2) their level of confidence that the false testimony will achieve that end without undue risk.").

[137] *See* MONT. R. EVID. 609 committee's comment.

[138] Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1 ("You see how easily accidents can happen? . . . He easily could have gotten three years instead of one.").

[139] *See* Roberts, *Unreliable Conviction*, *supra* note 13, at 596-97 (explaining that sentences may be "the length they [are] only because the defendant was too poor to pay bond, and was given a sentence that correspond[s] to 'time served'").

[140] *See* Victoria Law & Rachel Roth, *Names Do Hurt: The Case Against Using Derogatory Language to Describe People in Prison*, REWIRE (Apr. 20, 2015, 1:53 PM), http://rhrealitycheck.org/article/2015/04/20/case-using-derogatory-language-describe-person-prison/ [https://perma.cc/9XHJ-BG3D]; Karol Mason, *Guest Post: Justice Dept. Agency to Alter Its Terminology for Released Convicts, To Ease Reentry*, WASH. POST (May 4, 2016) https://www.washingtonpost.com/news/true-crime/wp/2016/05/04/guest-post-justice-dept-to-alter-its-terminology-for-released-convicts-to-ease-reentry/ [https://perma.cc/B2SJ-Z88U] (announcing policy that Office of Justice Programs will no longer use terms such as "felon," and noting that "[o]ur words have power" and that "[t]hey shape and color our estimations and judgments").

[141] *See* Holley, *supra* note 93, at 314.

[142] *See* Roger C. Park, *Impeachment with Evidence of Prior Convictions*, 36 SW. U. L. REV. 793, 811 (2008) ("The probative value of evidence is the degree to which it changes a rational decision maker's estimate of the probability that a proposition is true.").

[143] *See supra* note 31 and accompanying text.

[144] *See* Blume, *supra* note 113, at 493.

[145] *See* Spector, *supra* note 48, at 345 (observing agreement among all jurisdictions that

strengthen that of the prosecution;[146] and its use to assuage worry about the jury's verdict or the burden of proof because it is not as if an innocent person will be imprisoned.[147] The practice has been allowed to continue, however, on the basis of an assumption that the prejudice can be kept to acceptable levels through a judicial instruction.[148] The instruction tells the jury to consider the evidence only on the issue of credibility,[149] and—with the notable exception of a confession by one defendant that implicates another[150]—the Supreme Court has assumed that jurors will comply with judicial instructions to use evidence only for a particular purpose.[151] Yet this assumption has been thoroughly undermined.[152] There is no empirical support for the idea that jurors are more able to partition their brains in the case of convictions than in the case of confessions.[153] Even if they understood such an instruction, and were able to follow it, they might not wish to. [154] Rather, even when given this instruction,

prior crimes should not be used to show the defendant is a "bad person and therefore probably committed the crime").

[146] *See* State v. Cook, 249 P.3d 454, 460-61 (Kan. Ct. App. 2011).

[147] *See* Friedman, *supra* note 14, at 642 (positing that a jury who learns that the accused is a "bad person" may not attach much harm to punishing him even if he is innocent); Uviller, *supra* note 18, at 869 ("At the very least, the information about the defendant's background reduces the care with which the jury sifts the evidence, as they might regret a false positive less than they would with a 'clean' defendant.").

[148] *See* 120 CONG. REC. 37,076 (1974) (statement of Sen. McClellan) ("The court's instructions, of course, preclude the jury from using prior convictions [inappropriately].").

[149] For an example of such a jury instruction, see COMM. ON PATTERN JURY INSTRUCTIONS, DIST. JUDGES ASS'N FIFTH CIRCUIT, PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) 1.11 (2012):

> You have been told that the defendant . . . was found guilty . . . of _____ (e.g., bank robbery). This conviction has been brought to your attention only because you may wish to consider it when you decide, as with any witness, how much of the defendant's testimony you will believe in this trial. The fact that the defendant was previously found guilty of that crime does not mean that the defendant committed the crime for which the defendant is on trial, and you must not use this prior conviction as proof of the crime charged in this case.

Id.

[150] *See, e.g.*, Bruton v. United States, 391 U.S. 123, 135 (1968) ("There are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.").

[151] *See id.*

[152] *See* Dodson, *supra* note 20, at 31-32 (citing studies indicating that "jurors do use prior conviction evidence to infer criminal propensity and frequently ignore or fail to understand limiting instructions"); Sally Lloyd-Bostock, *The Effects on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study*, 2000 CRIM. L. REV. 734, 738.

[153] Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 323-24 (2013).

[154] *See* James W. Betro, Comment, *The Use of Prior Convictions to Impeach Criminal Defendants—Do the Risks Outweigh the Benefits?*, 4 ANTIOCH L.J. 211, 221 (1986) (citing

jurors tend to use the evidence to conclude that the defendant is a bad person and therefore more likely than not to be guilty as charged.[155] Indeed, the instruction may heighten the level of prejudice.[156]

Courts, rules drafters, and commentators also reason that impeachment by prior conviction is a necessary tool for the prosecution because if a defendant with a criminal record testifies in the absence of this form of impeachment, the jury will be misled into thinking that the defendant is blameless,[157] blemish-free,[158] or as trustworthy as a "Mother Superior."[159] This justification has done an enormous amount of work for the prosecution.[160] It has been used to justify the admission of some convictions rather than none, on the theory that silence would suggest innocence.[161] But sometimes the goalposts shift, so that the rule is used to justify the admission of not just a few, but more than a few convictions. Thus in cases where courts of appeal "approved the admission of 6 prior convictions (3 for the same offense as the one charged) and 5 prior convictions all for the same offense as that charged,"[162] the courts conceded that these numbers hinted at "prosecutorial overkill" and violations of due process,[163] but, as one brief explains, they "ultimately approved the admission of the large numbers in those cases in order to insure that the jury would not wrongly infer that the defendant had suffered only one or two momentary lapses into felonious behavior, and thereby profit from a 'false aura of veracity.'"[164]

studies indicating that subjects "are typically either incapable of disregarding inadmissible evidence, or unwilling to do so").

[155] Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763, 777 (1961).

[156] *See* Ladd, *supra* note 12, at 190 ("The more carefully the defense attorney and the court warn the jury that [the evidence's] purpose is only to test credibility, the more emphasized the fact becomes that the jury has before them one who has been convicted of crime before, that he is up for trial again, and that it is perhaps time that something should be done about it."); Sarah Tanford & Michele Cox, *The Effects of Impeachment Evidence and Limiting Instructions on Individual and Group Decision Making*, 12 LAW & HUM. BEHAV. 477, 479-80 (1988) (citing studies on this "backfire" effect where "strong instructions to disregard inadmissible evidence actually enhanced the prejudicial effect of the evidence").

[157] *See* 2 MCCORMICK ON EVIDENCE § 42, at 276 (Kenneth S. Broun ed., 7th ed. 2013).

[158] *See* State v. Brunson, 625 A.2d 1085, 1092 (N.J. 1993) (crafting a method of impeachment designed to "insure that a prior offender does not appear to the jury as a citizen of unassailable veracity").

[159] United States v. Lipscomb, 702 F.2d 1049, 1077 (D.C. Cir. 1983).

[160] *See* FED. R. EVID. 609(a) advisory committee's note; MCCORMICK ON EVIDENCE, *supra* note 157, § 42, at 276 (noting that "this argument has prevailed widely").

[161] *See Brunson*, 625 A.2d at 1092.

[162] Petition for Review at 15, People v. Corbin, No. S074064, 1998 WL 34287343 (Cal. Oct. 15, 1998).

[163] *Id.*

[164] *Id.*

Support for the notion that defendants are accorded these heavenly attributes is absent; the science suggests that all relevant assumptions run in the opposite direction.[165] Those who are poor, or people of color, or criminally accused are all the targets of assumptions of guilt[166]— heaven help those who are all three. In any event, the prosecution has at its disposal numerous methods for attacking a defendant's credibility that do not involve the use of convictions[167]: it can impeach based on the defendant's interest in the case,[168] it can argue that this interest makes him an untrustworthy witness,[169] and, if defendants falsely deny having a prior record, it can impeach them through contradiction.[170] More broadly, the prosecution has the power to cross-examine—a power described as "the greatest legal engine ever invented for the discovery of truth."[171] The prosecution also has the power to rebut defendant testimony,[172] a power aided by its investigative resources.[173] In addition, the judge may instruct jurors that a testifying defendant has a deep interest in the case that creates a motive for false testimony[174]: such an instruction informs jurors that they should treat the

[165] *See* Blume, *supra* note 113, at 494 (arguing that "jurors will inevitably view the defendant's testimony skeptically" because they assume that the accused is highly motivated to lie).

[166] *See* Bellin, *supra* note 5, at 494 ("[The] defendant's credibility as a witness is always minimal, even without impeachment evidence."); Nancy Gertner, *Is the Jury Worth Saving?*, 75 B.U. L. REV. 923, 931 n.44 (1995) (book review) (citing a study that found that a "substantial number" of jurors assume that merely because a defendant was accused of a crime, it probably means they are guilty of some crime); Kenneth L. Karst, *Local Discourse and the Social Issues*, 12 CARDOZO STUD. L. & LITERATURE 1, 18 (2000) (stating that the most typical middle-class assumptions about race and ethnicity "associate poverty with a black or brown face, with crime, with immorality . . . and with a preference for handouts over work"); Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 207 (2010) (explaining that mock jurors held "strong associations between Black and Guilty, relative to White and Guilty, and [that] these implicit associations predicted the way mock jurors evaluated ambiguous evidence").

[167] *See* Beaver & Marques, *supra* note 12, at 615 (listing other techniques); Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules that Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851, 869 (2008) (mentioning the use of evidence that would otherwise be inadmissible); Hornstein, *supra* note 98, at 19 (mentioning impeachment by prior inconsistent statement).

[168] *See* FED. R. EVID. 601 advisory committee's note.

[169] Dodson, *supra* note 20, at 50.

[170] *See* Gainor, *supra* note 7, at 800.

[171] 5 WIGMORE, EVIDENCE § 1367 (Chadbourn rev. 1974).

[172] *See* Gainor, *supra* note 7, at 799-800.

[173] *See* Bellin, *supra* note 167, at 856.

[174] *See* Alexander G.P. Goldenberg, Note, *Interested, but Presumed Innocent: Rethinking Instructions on the Credibility of Testifying Defendants*, 62 N.Y.U. ANN. SURV. AM. L. 745, 745 (2007).

defendant's testimony differently, and with more skepticism, than other kinds of witnesses.[175] Because a motive for false testimony suggests that the truth would condemn, this instruction may make conviction more likely by implying the defendant's guilt.[176]

Also underlying this practice is an assumption that trial judges are equipped to make all the decisions necessary in order to administer the prior conviction impeachment rules: that, where necessary, they can apply a nonexclusive five-factor test in order to weigh probative value against prejudicial effect;[177] and, where necessary, they can decide whether a conviction falls within the *crimen falsi* category; and they can decide whether a conviction was flawed in a way that makes its use for impeachment purposes unlawful.[178] Each of these projects has been criticized as either per se unworkable, or unworkable within the time appropriately spent on this kind of "side trial."[179]

B. *Consequences for Individual Trials*

The rules on prior conviction impeachment—and the ways in which they are implemented—leave criminal defendants with two perilous paths to choose from, each of which threatens constitutional guarantees. Because permitting prior conviction impeachment has become the default,[180] those many criminal defendants with qualifying criminal records usually have to choose between the

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[175] *See* Michael E. Antonio & Nicole E. Arone, *Damned if They Do, Damned if They Don't: Jurors' Reaction to Defendant Testimony or Silence During a Capital Trial*, 89 JUDICATURE 60, 66 (2005) (citing juror interviews suggesting that jurors typically mistrust defendant testimony); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37, 47 (1985); *id.* at 43 ("The defendant's credibility is already so much lower than that of the other witnesses . . . that the admission of prior convictions does not reduce the credibility of the defendant further.").

[176] *See* Goldenberg, *supra* note 174, at 775.

[177] *See* Tanford & Cox, *supra* note 156, at 495.

[178] As stated above, convictions obtained in violation of the right to counsel cannot be used for impeachment, and some scholars have discussed the possibility that trial courts be required to screen for infirmities in proffered convictions that go beyond denial of counsel. *See* Carodine, *supra* note 2, at 583 nn.456-57; Glick, *supra* note 24, at 347 (noting that the rule does not address the problem of what to do about prior convictions that were "not appealed but [are] clearly in violation of constitutional mandates").

[179] *See* Hornstein, *supra* note 100, at 12 ("It would be unrealistic to expect the legal system to question the integrity of convictions based on plea bargains, especially in the context of their use merely as impeaching evidence."); Uviller, *supra* note 18, at 871 ("Separating 'honest' from 'dishonest' criminal conduct is a task to delight a scholastic monk."); *id.* at 874 ("How is the wisest and most meticulous judge to make an intelligent discrimination between prior convictions using a probity-prejudice test? Compared to this exercise of judicial choice, decisions on bail and sentence are models of scientific precision.").

[180] *See* Blume, *supra* note 113, at 483, 490 n.50.

following options.[181] First, they can waive the constitutional right to testify. They thus forgo, in many instances, their best opportunity to obtain an acquittal.[182] Testimony permits a criminal defendant to present what is potentially the best evidence,[183] and, crucially, in a time of strained defense budgets,[184] the cheapest evidence.[185] It also permits a criminal defendant to remind—or show—the jury that he is a human being.[186] The capacity of testimony to bring a defendant to unique life offers some hope of tackling the juror stereotypes that otherwise mar the prospects of a fair trial.[187] Waiving the right to testify jeopardizes other constitutional rights too: if one sits silently through trial, silence breeds suspicion,[188] and threatens the presumption of innocence and the burden of proof.[189] On the other hand, if one concludes that trial without testimony offers too slim a chance at success, one can take a plea, thus waiving a whole host of trial—and sometimes appellate—rights.[190]

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[181] *See* THOMAS H. COHEN & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, at 1 (2010), http://www.bjs.gov/content/pub/pdf/fdluc06.pdf [https://perma.cc/4EKG-HQZJ] (noting that of state felony defendants in the seventy-five largest counties in the country, forty-three percent had a felony conviction record in 2006).

[182] Ferguson v. Georgia, 365 U.S. 570, 582 (1961) (noting that the defendant "above all others may be in a position to meet the prosecution's case").

[183] *See* United States v. Libby, 475 F. Supp. 2d 73, 93 (D.D.C. 2007) ("[A] defendant's choice to testify inevitably presents the possibility of a devastating cross-examination, while declining to testify may mean that the accused gives up the chance to put the most probative evidence in his favor before the jury."); State v. Burton, 676 P.2d 975, 987 (Wash. 1984) (Brachtenbach, J., dissenting).

[184] *See* Carodine, *supra* note 109, at 509 (discussing a Miami public defender, who "maintains about fifty serious felony cases at the same time").

[185] *See* Findley, supra note 112, at 914.

[186] *See* Roberts, *Prior Conviction Impeachment*, *supra* note 13, at 861.

[187] *See id.* at 874-75 (using the science of individuation to suggest that defendant narratives that bring a defendant to unique life offer potential to combat the implicit juror stereotypes that associate a racial identity—or even the identity of criminal defendant—with criminal guilt).

[188] *See* Okun, *supra* note 105, at 554. This suspicion may be enhanced by the gulf of experience between jurors and defendant. This gulf includes both frequent racial difference, *see* Roberts, *Prior Conviction Impeachment*, *supra* note 13, at 860, and the fact that juries are frequently purged of those with criminal records, *see* Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 595-96 (2013).

[189] *See* Beaver & Marques, *supra* note 12, at 609 ("Jurors expect innocent defendants to respond to false criminal accusations. From silence jurors draw an inference of guilt."); Blume, *supra* note 113, at 487-88; Nichol, *supra* note 20, at 392. While jurors are instructed not to draw an adverse inference from a defendant's silence, Carter v. Kentucky, 450 U.S. 288, 298 (1981), those instructions appear ineffectual, Spector, *supra* note 46, at 250.

[190] *See* Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503, 1545 (2015).

The second option is to press ahead with testimony. This path also brings constitutional hazard, because the right to hold the prosecution to its burden of proof appears nugatory when the jury can so easily assume culpability on the basis of a prior conviction.[191] Prior conviction evidence tends to "turn a jury against a defendant,"[192] and thus, as Robert Dodson puts it, "the presumption of innocence is reversed."[193] The right to a fair trial is also at risk if one's testimony about the pending allegations is obscured by references to a prior conviction.[194]

Prior conviction impeachment and the threat thereof have several other important consequences beyond those whose constitutional dimension is apparent. First, the silencing of the criminal defendant has troubling consequences for both the fact finder and the pursuit of truth. Losing defendant testimony means that the jury loses potentially valuable information,[195] the prosecution loses the chance to question the defendant in front of the jury,[196] and the defendant loses the opportunity to answer the charges.[197] While prior conviction impeachment offers some information about the defendant's past, when it chills defendant testimony it deprives jurors of information that may be important in order for them to fulfill their roles as fact finders.[198] There are other jury roles too that are jeopardized when jurors hear nothing from the defendant:

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[191] *See* Blume, *supra* note 113, at 487; Valerie P. Hans & Anthony N. Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 CRIM. L.Q. 235, 242 (1975) (finding that mock jurors who witnessed prior conviction impeachment considered the prosecution's evidence stronger than those who did not); Miguel A. Méndez, *The Law of Evidence and the Search for a Stable Personality*, 45 EMORY L.J. 221, 224 (1996). I am grateful to Eisha Jain and Benjamin Levin for pointing out that the adverse effects of a prior conviction in this context are compounded by the use of prior convictions to enhance potential punishment at stages of the criminal process that include legislative drafting, charging decisions, and sentencing.

[192] State v. Stevens, 558 A.2d 833, 841 (N.J. 1989).

[193] Dodson, *supra* note 20, at 49.

[194] *See* State v. Burton, 676 P.2d 975, 986 (Wash. 1984) (Brachtenbach, J., dissenting).

[195] *See* United States v. Walker, 772 F.2d 1172, 1179 (5th Cir. 1985) ("Where the very point of a trial is to determine whether an individual was involved in criminal activity, the testimony of the individual himself must be considered of prime importance."); Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1370 (2009) ("In the cases in which defendants testified, judges reported that, on average, defendant testimony was more important than that of the police, of informants, of co-defendants, and of expert witnesses.").

[196] *See* GARD'S KANSAS CODE OF CIVIL PROCEDURE ANNOTATED § 60-421 cmt., at 111 (2d ed. 1979).

[197] *See* Blume, *supra* note 113, at 480-81 (acknowledging the defendant's right to testify as "essential to due process of law," and the unfortunate reality that impeachment with prior convictions discourages defendants with criminal records from testifying).

[198] *See* People v. Allen, 420 N.W.2d 499, 504 (Mich. 1988); Blume, *supra* note 113, at 480; Dodson, *supra* note 151, at 47.

jurors are tasked with acting as the "conscience of the community,"[199] and inserting community values into our system of laws.[200] It is hard for them meaningfully to exercise these roles if the object of the community's judgment is silent.[201]

Finally, prior conviction impeachment increases the chances of conviction.[202] Depending on one's viewpoint, this may or may not provoke concern. Two things that should be of concern, regardless of one's viewpoint, are, first, that at least some of this increase appears to come through inappropriate use of the evidence,[203] and, second, that at least some of it appears to come in cases in which defendants are innocent.[204]

C. *Contribution to Broader Dysfunctions*

Evidentiary issues sometimes fail to catch scholarly fire.[205] Trial issues are easily dismissed as problems of the five percent.[206] An important part of the effort to reform or abolish prior conviction impeachment of criminal defendants is to recognize it as a phenomenon that forms part of the web of dysfunction currently stretching across the criminal justice system.[207]

The contribution that prior conviction impeachment of criminal defendants makes to perhaps the greatest dysfunction within the criminal justice system was explored in an earlier work by this author,[208] and can be briefly stated here: by

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[199] Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381, 2420 (1999).

[200] *See* Jenny E. Carroll, *The Jury's Second Coming*, 100 GEO. L.J. 657, 689 (2012).

[201] *See* Brief for Appellee at 46, United States v. Taylor, No. 98-4141 (7th Cir. Mar. 4, 1999) (arguing that the defendant's testimony was important to his nullification defense).

[202] *See* Blume, *supra* note 113, at 486.

[203] *See* Wissler & Saks, *supra* note 175, at 47 ("[T]he presentation of the defendant's criminal record does not affect [mock jurors' assessments of] the defendant's credibility, but does increase the likelihood of conviction, and . . . the judge's limiting instructions do not appear to correct that error."); *id.* at 43 (finding that the highest conviction rate occurred when the conviction used to impeach was the same as the present charge).

[204] *See* Blume, *supra* note 113, at 487 (suggesting that innocent people may be convicted simply because of prior conviction evidence, even if the jury is not convinced of the defendant's guilt).

[205] *See* Park & Saks, *supra* note 133, at 952.

[206] *See* COHEN & KYCKELHAHN, *supra* note 181, at 1 ("Sixty-eight percent of felony defendants were eventually convicted and more than 95% of these convictions occurred through a guilty plea.").

[207] For the concept of dysfunction, see WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 1 (2011).

[208] *See* Roberts, *Unreliable Conviction*, *supra* note 13, at 576 ("[D]ue to uneven distributions of criminal convictions, and because of race-based assumptions of guilt, the rule [permitting impeachment by prior conviction] disproportionately affects people of color."); *id.* at 585-86 (exploring ways in which disparities in enforcement undermine assumptions underlying prior conviction impeachment). For further discussion of the ways in which

compounding the racial disparity embodied within patterns of criminalization, prior conviction impeachment contributes to the racial disparity found throughout the criminal justice system.[209] Others require more explanation. This Section will examine collateral consequences, wrongful convictions, the silencing of criminal defendants, the role of prosecutors, and the dominance of plea bargaining.

One curious lacuna is the widespread failure to recognize impeachment by prior conviction as a member of the very extended family of collateral consequences.[210] Recent decades have seen a growing awareness of both the prevalence and the troublesome nature of these consequences,[211] an awareness voiced even by prominent prosecutors.[212] Prior conviction impeachment fits within standard definitions of collateral consequences; it presents many of the chief concerns provoked by this issue; and yet it is frequently omitted from analyses of the topic.[213]

Congress has provided a recent definition of collateral consequences.[214] Under that definition, "collateral consequence" means "a collateral sanction or

impeachment by prior conviction is racially skewed, see Simon-Kerr, *supra* note 43 (manuscript at 31-35).

[209] *See* Carodine, *supra* note 2, at 536.

[210] *See Project Description*, AM. BAR ASS'N NAT'L INVENTORY COLLATERAL CONSEQUENCES CONVICTION, http://www.abacollateralconsequences.org/description/ [https://perma.cc/W5LW-QFKP] (last visited Oct. 16, 2016) [hereinafter ABA INVENTORY].

[211] *See id.* ("While collateral consequences have been a familiar feature of the American justice system since colonial times, they have become more important and more problematic in the past 20 years for three reasons: they are more numerous and more severe, they affect more people, and they are harder to avoid or mitigate.").

[212] *See, e.g.*, Robert M.A. Johnson, *Message from the President*, NAT'L DISTRICT ATTY'S ASS'N (May-June 2001), https://web.archive.org/web/20020626041528/http://www.ndaa.org/ndaa/about/president_message_may_june_2001.html [https://perma.cc/4SMP-W2L9] ("At times, the collateral consequences of a conviction are so severe that we are unable to deliver a proportionate penalty in the criminal justice system without disproportionate collateral consequences."); Loretta Lynch, *Remove Roadblocks Faced by Former Prisoners Re-Entering Society*, USA TODAY (Apr. 27, 2016, 2:45 PM), http://www.usatoday.com/story/opinion/policing/2016/04/27/loretta-lynch-former-prisoners-shouldnt-face-roadblocks-when-re-entering-society/83599810/ [https://perma.cc/KPJ3-3GDP] ("[F]or far too many Americans, re-entry has become an all-but-impossible task because of what are known as collateral consequences . . . . The more than 45,000 collateral consequences that exist nationwide too often restrict—and sometimes prohibit—access to jobs, housing, education, public benefits and civic participation, leaving returning citizens with a freedom that exists in name only and undermining our nation's promise of liberty and justice for all.").

[213] *See* ABA INVENTORY, *supra* note 210.

[214] *See* Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 510(d), 121 Stat. 2534, 2544 (2008).

a disqualification."[215] "Collateral sanction" is further defined as "a penalty, disability, or disadvantage, however denominated, that is imposed by law as a result of an individual's conviction for a felony, misdemeanor, or other offense, but not as part of the judgment of the court."[216] This definition has been interpreted to encompass impeachment by prior conviction.[217]

Among the chief concerns raised about collateral consequences are that they are frequently hidden from defendants,[218] they are prevalent,[219] they threaten survival,[220] they heighten the risk of additional convictions,[221] and they have the effects and characteristics of punishment but without the scrutiny and restraints to which punishment is subject.[222]

These concerns all apply to prior conviction impeachment. Courts are not required to advise defendants of this risk before accepting guilty pleas.[223] Prior conviction impeachment adds to the prevalence of collateral consequences, and does so in many instances, given the likelihood that those on trial have qualifying prior convictions,[224] the likelihood that prosecutors proffer the convictions,[225]

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[215] *Id.*

[216] *Id.*

[217] *See* ABA INVENTORY, *supra* note 210.

[218] JEREMY TRAVIS, INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 16 (2002) (explaining that collateral consequences have been described as "invisible punishments" because they are "imposed by operation of law rather than by decision of the sentencing judge . . . [and] are not considered part of the practice or jurisprudence of sentencing"); Patricia Raburn-Remfry, *Due Process Concerns in Video Production of Defendants*, 23 STETSON L. REV. 805, 829 n.181 (1994) ("[D]efendants frequently are unaware of the collateral consequences of pleading guilty"); *see also* ABA INVENTORY, *supra* note 210.

[219] ABA INVENTORY, *supra* note 210.

[220] *See* Chandra Bozelko, *When We Deny Food Stamps to Ex-Offenders, We Set Them Up to Fail*, GUARDIAN (Jan. 14, 2016, 10:45 AM), http://www.theguardian.com/commentisfree/2016/jan/14/food-stamps-ex-offenders-economic-justice-prison-reform [https://perma.cc/UQ8V-VGRC].

[221] *See* Michael M. O'Hear, *Mass Incarceration in Three Midwestern States: Origins and Trends*, 47 VAL. U. L. REV. 709, 747 (2013).

[222] *See* ABA INVENTORY, *supra* note 210 ("When particular restrictions have no apparent regulatory rationale, and cannot be avoided or mitigated, they function as additional punishment, though without due process protections . . . .").

[223] *See, e.g.*, FED. R. CRIM. P. 11 (listing various adverse consequences of which a person taking a plea in federal court must be informed, and omitting impeachment by prior conviction); James P. Jones, *Guilty Plea Colloquy*, W.D. VA. (2015), http://www.vawd.uscourts.gov/media/1966/guiltypleacolloquy.pdf [https://perma.cc/8JRV-5QLX] (asking whether the defendant understands the consequences of a guilty plea but not including a warning about impeachment by prior conviction).

[224] *See* COHEN & KYCKELHAHN, *supra* note 181, at 1 (noting that forty-three percent of felony defendants had a felony conviction record in 2006).

[225] Roberts, *Unreliable Conviction*, *supra* note 13, at 600-01 ("[D]efendants are

and the frequency with which both trial and appellate judges find them admissible.[226] While this practice does not threaten survival with the immediacy of many collateral consequences—those that preclude housing,[227] food,[228] benefits,[229] or employment,[230] for example—it heightens the risk of additional convictions,[231] and thus jeopardizes the maintenance of a life outside of confinement.[232] The fact that the testimonial disqualification that was its predecessor was itself a kind of punishment suggests how similar this collateral consequence is to punishment.[233]

Despite the fact that it shares a definition with, and the disadvantages of, many of its better-known relatives, prior conviction impeachment is frequently absent from discussions of collateral consequences. The American Bar Association recently took an important step toward addressing this lacuna: it included impeachment by prior conviction in its National Inventory of the Collateral Consequences of Conviction ("NICCC"),[234] which aims to bring together for the first time as full a list as possible of each jurisdiction's collateral consequences.[235] One can see the innovative nature of this decision by consulting the key sources on collateral consequences that are included in the NICCC's bibliography: of the twenty-two listed sources with national scope, only two make any mention of prior conviction impeachment.[236]

impeached in over seventy percent of cases, and presumably prosecutors seek that permission still more often. " (footnote omitted)).

[226] Blume, *supra* note 113, at 485 n.31 ("A typical appellate decision involves a cursory determination that no abuse of discretion occurred."); Roberts, *Unreliable Conviction*, *supra* note 13, at 600-01.

[227] *See* Gerald S. Dickinson, *Towards a New Eviction Jurisprudence*, 23 GEO. J. POVERTY L. & POL'Y 1, 3, 28, 40 (2015).

[228] *See* Bozelko, *supra* note 220.

[229] *See* 21 U.S.C. § 862a (2012) (denying federal benefits to those with prior convictions for drug offenses).

[230] *See* Carodine, *supra* note 109, at 559.

[231] *See* O'Hear, *supra* note 221, at 747 (recognizing that past convictions increase the likelihood of additional convictions).

[232] For an example of other rules apparently designed to box those with convictions into untenable situations that inevitably lead to their further conviction, see Jabril Faraj, *Former Sex Offenders Left Out in the Cold by City Residency Restrictions*, MILWAUKEE NNS (Dec. 15, 2015), http://milwaukeenns.org/2015/12/15/former-sex-offenders-left-out-in-the-cold-by-city-residency-restrictions/ [https://perma.cc/R5BA-5U8E].

[233] *See* United States v. Chaco, 801 F. Supp. 2d 1217, 1221 (D.N.M. 2011) ("The disqualification arose as part of the punishment for the crime, only later being rationalized on the basis that such a person was unworthy of belief."); Green, *supra* note 98, at 1105.

[234] ABA INVENTORY, *supra* note 210.

[235] *See id.*

[236] *See id. See generally* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012); Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30

In the process of contributing to the list of collateral consequences, prior conviction impeachment contributes to a broader phenomenon: the challenging nature of the project of building a sustainable life after a criminal conviction.[237] Prior conviction impeachment adds to that challenge not only through its concrete effects but also through the public branding of those with convictions as being morally culpable not just at the moment of wrongdoing but in a more permanent way.[238] It is, in other words, one manifestation of an attitude that treats a conviction not as an event from which one can move on, but a demonstration of a status that is impossible to shed.[239] When Montana still permitted impeachment by felony conviction, the county attorney took the opportunity to present a felony conviction not as an event but as a brand. In a case that involved the word of a female witness against the word of a male defendant, the county attorney asked in final argument: "Is this girl telling the truth? You are judging her there. You are judging him there sitting there also and you may consider the fact that in judging his credibility the fact that he is a convicted felon."[240] Allowing this form of impeachment helps endorse a viewpoint that is in tension with concepts such as rehabilitation and reintegration.[241] Acknowledging the dominance of this viewpoint may help explain why avowed commitments to rehabilitation and reintegration frequently lack concrete support,[242] and why rehabilitation has in many instances been abandoned.[243]

In addition to being a lesser-known cousin within the collateral consequences family, prior conviction impeachment has an insufficiently prominent role in the otherwise increasingly prominent discussion of possible contributors to

FORDHAM URB. L.J. 1705 (2003).

[237] *See* Roberts, *Unreliable Conviction*, *supra* note 13, at 576.

[238] *See* 120 CONG. REC. 37,076 (1974) (statement of Sen. McClellan); H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 803-04 (1993) (mentioning the "ancient assumption" that "[f]elons of all descriptions are forever afterward less truthful than other folk on any subject").

[239] *See* 120 CONG. REC. 37,082 (1974) (statement of Sen. Biden) ("I do not see why [this type of evidence] should even be advanced as going to the credibility of the witness, because if we do that, we assume, under our justice system, that if you have once committed a crime, you have lost your virginity forever, you have lost your credibility forever . . . ."); Chin, *supra* note 236, at 1799 ("Every conviction implies a permanent change, because these disabilities will 'carry through life.'" (quoting Fiswick v. United States, 329 U.S. 211, 222 (1946))).

[240] State v. Gafford, 563 P.2d 1129, 1133 (Mont. 1977).

[241] *See* MONT. CONST. CONVENTION commission's comments to Bill of Rights (1971-72).

[242] *See* David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 32 (2011); Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 160 (1999); Love, *supra* note 123.

[243] *See* Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J.L. & PUB. POL'Y 1, 3 (2013).

wrongful convictions.[244] John Blume's investigation of a group of exonerees suggests that prior conviction impeachment may contribute to wrongful convictions.[245] Of those who testified at the trials that ended with their wrongful conviction, forty-three percent had criminal records that the prosecution could have used for impeachment purposes.[246] In every case, such impeachment was permitted.[247] Of those who declined to testify, ninety-one percent had convictions that potentially could have been used to impeach them.[248] Blume notes that "[i]n almost all instances in which a defendant with a prior record did not testify, counsel for the wrongfully convicted defendant indicated that avoiding impeachment was the principal reason the defendant did not take the stand."[249] He went on to conclude that his data "confirm[ed] that threatening a defendant with the introduction of his or her prior record contributes to wrongful convictions either directly—in cases where the defendant is impeached with the prior record and the jury draws the propensity inference—or indirectly—by keeping the defendant off the stand."[250] There are additional ways in which a wrongful conviction may result when prior conviction impeachment is permitted, all involving the jury's attention being pulled away from the need to look for proof beyond a reasonable doubt based on appropriate use of admissible evidence,[251] and instead toward improper use of the prior conviction(s).[252]

Despite Blume's study, prior conviction impeachment gets relatively little attention in the context of wrongful convictions. It is not one of the four top "contributing causes" that tend to provide an accessible focal point for this issue,[253] and that have spurred various reform efforts[254]: eyewitness misidentification, improper forensics, false confessions, and informants.[255] It might be particularly hard to measure the impact of prior conviction

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[244] *See* Blume, *supra* note 113, at 479 ("This is the first empirical study to consider the effects a defendant's prior record may have in cases where we know for a fact that there was a breakdown in the criminal justice system.").

[245] *Id.* at 479.

[246] *Id.* at 490.

[247] *See id.*

[248] *Id.*

[249] *Id.* at 491-92.

[250] *Id.* at 493.

[251] *See* United States v. Agostini, 280 F. Supp. 2d 260, 261 (S.D.N.Y. 2003).

[252] *See* Ted Sampsell-Jones, *Preventive Detention, Character Evidence, and the New Criminal Law*, 2010 UTAH L. REV. 723, 732.

[253] *See The Causes*, INNOCENCE PROJECT, http://www.innocenceproject.org/causes-wrongful-conviction [https://perma.cc/2USN-5T83] (last visited Oct. 17, 2016) (listing eyewitness misidentification, unvalidated or improper forensic science, false confessions or admissions, government misconduct, and incentivized informants).

[254] *See, e.g.*, State v. Henderson, 207 A.3d 872, 872 (N.J. 2011) (holding that cross-racial identification jury instruction should be given whenever cross-racial identification is in issue).

[255] *See The Causes*, *supra* note 253.

impeachment where its effect is to silence a defendant.[256] Yet if one assumes, as Blume's study suggests, that many of those who are wrongfully convicted hold back from testifying because of fear of this form of impeachment, these "contributing causes" may be given some of their potency by defendant silence.[257] A false confession, for example, might well carry less weight were it countered by a defendant's narrative of its origins.[258] In addition, where defendants testify and are impeached with their convictions, jurors are commonly said to worry less about potential flaws in the prosecution's evidence or in their own verdicts.[259]

Another broader dysfunction exacerbated by prior conviction impeachment of criminal defendants is the silencing of defendants within the criminal justice process.[260] Prior conviction impeachment frequently obscures the defendant's voice at trial, just as it is frequently obscured elsewhere in the process.[261] Hearing from criminal defendants can provide useful information to decision makers, including information regarding the factors that may lead to criminal justice system involvement, and the harms that such involvement inflicts.[262] It can also potentially provide useful information to complainants, helping to explain why a defendant committed a particular crime—or that he or she may not have.[263] If part of recovering from harm is understanding why harm

[256] *See* Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1458 (2005).

[257] *See* Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 7 n.20 (2009) ("Defendants who regret their confessions may not dare take the stand to recant because of a fear [of] being impeached with prior convictions or losing a benefit the confession has procured.").

[258] *See id.*

[259] *See* Ladd, *supra* note 12, at 190-91 (suggesting that the jury is less concerned about whether their verdict is correct when the defendant has a criminal record).

[260] Natapoff, *supra* note 256, at 1461.

[261] *See id.* (identifying the threat posed to the attorney-client relationship when prior convictions make defense counsel's speech more valuable, while making defendants' speech riskier).

[262] *See* Bellin, *supra* note 167, at 858 (mentioning "the interest of the criminal justice system in developing an accurate perception of its street-level effects").

[263] *See* Friedman, *supra* note 14, at 676 ("[C]riminal penalties are more acceptable if they are imposed in a system that comports with ideals of human dignity and, by leaving room for consideration of the defendant's human quality, minimizes room for doubt when he is found guilty.").

occurred,[264] it seems unlikely that from the complainant's perspective a process of demonization of the defendant is superior to a process of explanation.[265]

An additional broader phenomenon to which this kind of prior conviction impeachment contributes is the vulnerability—in practice and in perception—of the prosecutor's role as a "minister of justice."[266] Prior conviction impeachment, as it is described and in at least some of its usage, involves prosecutors who are not playing that role, but, instead, are trying to "tack as many skins of victims [that is, defendants] as possible to the wall."[267] Prosecutors have a duty to ensure "procedural justice" for every defendant,[268] but in cases where prosecutors are proffering fourteen prior convictions, thirteen of them for the same charge as the pending one,[269] it is hard to see that they are upholding that duty. Rather they seem to be guilty, as charged,[270] of hoping that the jury will use the evidence in forbidden ways, and of knowing that judicial instructions are ineffective.[271] Prosecutors also have a broader duty—grounded in due process—to "do justice."[272] However one defines "doing justice," it must include some level of interest in avoiding wrongful convictions,[273] and therefore should provoke hesitation about reliance on prior conviction impeachment.[274] Commentators often fail to emphasize prosecutors' ethical—as opposed to merely adversarial—commitments. Rather, they describe prior conviction impeachment as something

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[264] *See* LAURENCE MILLER, COUNSELING CRIME VICTIMS 125 (2008); Richard Delgado, *Prosecuting Violence: A Colloquy on Race, Community, and Justice*, 52 STAN. L. REV. 751, 757-58 (2000) ("While an adversarial dynamic may create the appearance of greater justice, it also provides minimal emotional closure for the victim and little direct accountability by the offender to the victim.").

[265] *See* Alex Kozinski, Preface, *Criminal Law 2.0*, 40 GEO. L.J. ANN. REV. CRIM. PROC. at iii, xliii (2005) ("If the defendant lies, a skilled prosecutor will trip him up on cross; there is no need to paint him as a monster before the jury.").

[266] *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (AM. BAR ASS'N 2014).

[267] Donnelly v. DeChristoforo, 416 U.S. 637, 648-49 (1974) (Douglas, J., dissenting).

[268] *See* MODEL RULES OF PROF'L CONDUCT, supra note 266, R. 3.8 cmt. 1 (mentioning obligation "to see that the defendant is accorded procedural justice").

[269] *See* Petition for Review, *supra* note 162, at 5.

[270] *See* Bellin, *supra* note 5, at 296 (asserting that prosecutors intend that the evidence be used for propensity purposes); Sherry F. Colb, *"Whodunit" Versus "What Was Done": When to Admit Character Evidence in Criminal Cases*, 79 N.C. L. REV. 939, 961 (2001).

[271] *See* Note, *supra* note 155, at 765.

[272] *See* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (AM. BAR ASS'N 1980) (stating that the prosecutor has a duty to pursue justice, and not simply to convict).

[273] *See* Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of* Alford *and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1382 (2003) ("It should go without saying that it is wrong to convict innocent defendants.").

[274] This is particularly true in light of the fact that due to the "usual suspects" phenomenon, those with prior convictions are especially vulnerable to wrongful arrest and prosecution. *See* Friedman, *supra* note 14, at 672.

that "makes . . . [a] prosecutor's . . . job easier,"[275] and that offers prosecutors a "windfall" because of the inevitability that the jury will misuse the evidence.[276] It is important to recall that the prosecutor's job is more complex than getting convictions. Similarly, FRE 609 has been described as "a powerful weapon in a prosecutor's arsenal against the defendant,"[277] but the prosecutor needs to have an arsenal against an even more formidable opponent: injustice.

A final dysfunction to which prior conviction impeachment contributes is the dominance of plea-bargaining. The threat of the admission of this evidence makes it more likely that defendants will accept plea bargains,[278] and, in particular, "unfavorable" plea bargains.[279] The inconsistency with which the five-factor balancing test is applied may leave the risk-averse defendant still more likely to take a plea.[280] Why does it matter that more than ninety-five percent of convictions are acquired through plea bargains?[281] Plea bargains dissolve the requirement that before a conviction and all its manifest consequences are imposed the prosecution must meet the burden of proof beyond a reasonable doubt[282]: a burden that is often still assumed to exist by those who seek to justify the consequences of a conviction.[283] Plea bargains can mean that no one—not judge, jury, or defense attorney—scrutinizes the government's evidence or lack thereof, or the law enforcement practices that led to the arrest and charge.[284] Plea bargains mean that the jury has no opportunity

[275] Dodson, *supra* note 20, at 44.

[276] Nichol, *supra* note 20, at 421 ("The procedure effectively allows the government 'the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.'" (quoting Delli Paoli v. United States, 352 U.S. 232, 248 (1956) (Frankfurter, J., dissenting))).

[277] Carodine, *supra* note 109, at 521-22; *accord* Hornstein, *supra* note 100, at 4.

[278] *See* Carodine, *supra* note 2, at 527.

[279] *See* O'Hear, *supra* note 221, at 747.

[280] *See* Beaver & Marques, *supra* note 12, at 601, 617; James H. Gold, *Sanitizing Prior Conviction Impeachment Evidence to Reduce its Prejudicial Effects*, 27 ARIZ. L. REV. 691, 701-02 (1985) ("Because of the deference commonly accorded trial court rulings on the admissibility of prior convictions, consistency and predictability are sacrificed under the balancing approach." (footnote omitted)).

[281] K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 292 (2014) ("In most jurisdictions, over 95% of all cases are resolved without trial (by dismissal or guilty plea). In misdemeanor courts, this percentage often exceeds 99%." (footnote omitted)).

[282] *See* David L. Shapiro, *Should a Guilty Plea Have Preclusive Effect?*, 70 IOWA L. REV. 27, 43-44 (1984) (stating that probable cause is probably sufficient at the plea stage).

[283] *See* Gold, *supra* note 51, at 2310 ("Any doubts that the witness committed the crime in question are negligible since a conviction rests on satisfaction of the most demanding burden of proof.").

[284] *See* United States v. Ruiz, 536 U.S. 622, 625 (2002); Howell, *supra* note 281, at 295-96 ("The failure to conduct adversarial hearings and trials insulates police conduct from judicial review, leaving the constitutional rights of all people unprotected." (footnote

to nullify: to declare that justice is best served by a dismissal of the charges.[285] Plea bargains remove or limit the ability of judges to determine sentences, and thus potentially unmoor sentences from any recognized theory of punishment.[286] Plea bargains risk eviscerating the ability of defense attorneys to advocate zealously on their clients' behalf, lest they jeopardize their client's ability to obtain a "favorable" deal.[287] Thus, among other risks, various constitutional guarantees are threatened.[288]

The problem, however, goes deeper. Even where trials still occur, trials involving prior conviction impeachment risk jettisoning the very characteristics that are unique to trials as opposed to pleas. The ideal of a jury trial is that a nongovernmental body—a group of ordinary citizens—decides the case.[289] Indeed, the jury is to act as a buffer between the defendant and the government, and to protect against the risks of a "corrupt or overzealous prosecutor," or a "compliant, biased, or eccentric judge."[290] The jury is to make an individualized finding of the facts and to apply a "beyond a reasonable doubt" standard, after both sides have had the opportunity to present contrary narratives.[291] The rules of evidence establish a preference for live testimony, so that jurors can exercise their particular skill at assessing credibility first-hand.[292] It is no longer the case that we accept trials based on hearsay accounts of allegations against

omitted)).

[285] For a recent endorsement by a Supreme Court Justice of the role of the nullifying jury, see NYU School of Law, *A Conversation with Associate Justice Sonia Sotomayor*, YOUTUBE (Feb. 9, 2016), https://www.youtube.com/watch?v=PXeMQAmrlIE [https://perma.cc/8NXA-PC42] ("There is a place, I think, for jury nullification, finding the balance of that and the role that a judge should or should not play in advising juries about that is, I think, a different thing. But I think that we need, you're right, our forefathers did not believe that juries necessarily always got it right, but it was, I think, what they believed is that the jury getting it wrong was better than the Crown getting it wrong."). For a recent endorsement by a former prosecutor of the role of the nullifying jury, see Paul Butler, *Jurors Need to Take the Law into Their Own Hands*, WASH. POST: IN THEORY (Apr. 5, 2016), https://www.washingtonpost.com/news/in-theory/wp/2016/04/05/jurors-need-to-take-the-law-into-their-own-hands/?utm_term=.5fd131929fb3 [https://perma.cc/5TV5-N5M5].

[286] *See* Stephen F. Smith, *Proportional Mens Rea*, 46 AM. CRIM. L. REV. 127, 128 (2009) (explaining that proportionality of punishment is something that many prosecutors "routinely ignore").

[287] *See* Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. REV. 2103, 2104 (2003).

[288] *See* Howell, *supra* note 281, at 295-96.

[289] *See* Gertner, *supra* note 166, at 924 (describing the ideal of the jury as a citizen buffer between the defendant and the state).

[290] Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

[291] *See* Jack Pope, *The Jury*, 39 TEX. L. REV. 426, 446-47 (1961).

[292] *See* Peter Nicolas, *But What if the Court Reporter Is Lying? The Right to Confront Hidden Declarants Found in Transcripts of Former Testimony*, 2010 BYU L. REV. 1149, 1153.

defendants.[293] By contrast, during a plea, a hearsay account of governmental allegations is recited and largely suffices in terms of proof;[294] the defendant just needs to sign his or her name on the dotted line.[295] What often seems to happen when a prior conviction is admitted as impeachment evidence at trial is that this evidence dominates the case,[296] and dilutes the burden of proof.[297] The government's recitation of wrongdoing—permitted because an exception to the prohibition on hearsay has been carved out for prior convictions[298]—often seems to suffice to indicate guilt.[299] There is little left for the jury to do, other than sign on the dotted line. Thus, the distinct advantages of the jury—as lay body, as blank slate, as fact-finder—are wiped out, and the risks that accompany trials no longer seem justified.[300]

D. *Why the Rules Persist*

The work done in the preceding Sections—the parsing of the various potential critiques of this practice, and the uncovering of those that often go unmentioned—is an important part of the project of attempting to reform this area of the law. But it creates another question, one that also urgently needs to be added to the debate: If prior conviction impeachment is vulnerable to so many types of critique, why does the practice persist?[301] How can it be that so many jurisdictions still cling to a practice that not only threatens constitutional rights and the improper use of evidence, but also has been called a "charade,"[302] a

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[293] *See* THE TRIAL OF SIR WALTER RALEIGH, 2 HOWELL'S STATE TRIALS 1, 25 (1603).

[294] Although with a plea entered in federal court there needs to be a finding that the plea has a factual basis, this is satisfied by a recitation of alleged facts from the prosecution. *See* FED. R. CRIM. P. 11; Shapiro, *supra* note 282, at 42-44 (adding that probable cause is probably sufficient at the plea stage). In state courts, such a recitation is not always necessary. *See* Shapiro, *supra*, at 42 n.72.

[295] *See* Carodine, *supra* note 109, at 541 ("[T]he government's evidence gets only the most perfunctory testing when the prosecutor orally summarizes, in a few moments at the guilty plea hearing, the 'factual basis' of the government's case." (quoting Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 93-94 (2005))).

[296] *See* Hans & Doob, *supra* note 191, at 251 ("The fact that the defendant has a record permeate[d] the entire discussion of the case, and appear[ed] to affect the juror's perception and interpretation of the evidence in the case.").

[297] *See id*.

[298] *See* FED. R. EVID. 803(22).

[299] *See* Hans & Doob, *supra* note 191, at 251.

[300] *See, e.g.*, Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 MISS. L.J. 1195, 1200 (2015).

[301] *See* Carodine, *supra* note 2, at 525 ("Given the degree of criticism of the rule, its failure to ascertain credibility with any measure of certainty, and the grave potential to cause prejudice to criminal defendants, it is baffling why it remains a part of evidence law.").

[302] Richard D. Friedman, *Character Impeachment Evidence: The Asymmetrical*

"hoax",[303] "unjust and arbitrary,"[304] "discriminatory and unfair,"[305] "rather ridiculous,"[306] "capricious at best, more likely pernicious,"[307] "just the reverse of what logic and good sense would commend,"[308] a way to get "cut-rate convictions,"[309] a way in which defendants are "crucified by being asked about entirely irrelevant offenses,"[310] and "a remnant from a barbaric past"?[311] How can judicial instructions continue to be relied on to cure the inevitable prejudice, despite the fact that they have been called "little more than a judicial placebo,"[312] a "judicial lie,"[313] a "hollow[] . . . pretense,"[314] "illogical,"[315] and "mere legal sophistry"?[316] Either the critics are all crazy, or something else is going on.[317]

Three forms of "something else" are worth considering: First, that despite its ostensible rejection of propensity thinking, the criminal justice system is actually wedded to it. Second, that the implications of a broad assault on the viability of a conviction as the basis for impeachment seem too threatening within a system that uses convictions as the basis for all sorts of other serious consequences. And third, that defendant silence is essential to the survival of the criminal justice system in its current form.

First, one of the most persistent critiques of this rule is that it permits jurors to rely on the type of propensity inference that is forbidden: that is, to assume that because the defendant has a prior conviction, he or she is by nature a "criminal," and is therefore more likely to have committed the crime charged.[318] The rule persists in spite of this critique,[319] and perhaps it persists in part because while this particular type of propensity reasoning is ostensibly rejected,[320] the

Interaction Between Personality and Situation, 43 DUKE L.J. 816, 833 (1994).

[303] Uviller, *supra* note 18, at 868.

[304] Spector, *supra* note 46, at 264.

[305] Alan E. Ashcraft, *Evidence of Former Convictions*, 41 CHI. B. REC. 303, 307 (1960).

[306] *Id.*

[307] Uviller, *supra* note 18, at 864.

[308] *Id.*

[309] Blakney v. United States, 397 F.2d 648, 650 (1968).

[310] 120 CONG. REC. 2377 (1974) (statement of Rep. Dennis).

[311] *See* State v. McAboy, 236 S.E.2d 431, 436 (W. Va. 1977).

[312] Beaver & Marques, *supra* note 12, at 606.

[313] United States v. Grunewald, 233 F.2d 556, 574 (2d Cir. 1956) (Frank, J., dissenting).

[314] *Blakney*, 397 F.2d at 650 (alteration in original).

[315] Note, *supra* note 155, at 778.

[316] Beaver & Marques, *supra* note 12, at 602.

[317] Or both.

[318] *See* People v. McGee, 501 N.E.2d 576, 580 (N.Y. 1986).

[319] *See* Carodine, *supra* note 2, at 541 ("[I]t has always been largely known and expected that juries will misuse this evidence despite courts' limiting instructions informing them of the purpose of the evidence.").

[320] *See* Beaver & Marques, *supra* note 12, at 598 ("[T]he Anglo-American adversarial system focuses on the alleged act rather than on the past and the character of the accused.").

consigning of those with convictions to criminal status is a part of the criminal justice system, is at some level endorsed by those who administer it,[321] and is a part of our societal belief system.[322] If propensity thinking is central to the operation of the criminal justice system—if elsewhere within that system a conviction is assumed to convey a status that helps decision makers predict defendant conduct[323]—it is unsurprising that it is permitted to operate *sub rosa* in this sphere.[324]

Second, many of the critiques of prior conviction impeachment could potentially be used to inquire more broadly about the imposition of convictions, and the imposition of their consequences. One may wonder how a conviction can be used for prior conviction impeachment without more of a guarantee that it has anything to say about guilt, or anything to say about character, or anything to say about willful violations of social norms.[325] Squelching the question in this context may help keep it from inspiring questions about the justifiability of more basic components of the criminal justice system, such as criminal records and sentences.

Finally, rules that chill defendant testimony may serve important needs within the criminal justice system. Defendant testimony has the potential to do at least three explosive things. First, it can raise the possibility of innocence of the crime

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[321] *See* Dodson, *supra* note 20, at 45 ("[T]he true intention [of Rule 609 and similar state rules] is clear—get convictions and get criminals off the street."); Friedman, *supra* note 14, at 676-77.

[322] *See* 120 CONG. REC. 37,078 (1974) (Statement of Sen. Hart) ("[W]e are kidding ourselves if we think that the instruction removes the poison."); *id.* at 37,079 ("We accept much self-deception on this." (quoting Erwin N. Griswold, *The Long View*, 51 A.B.A. J. 1017, 1021 (1965))).

[323] *See, e.g.*, 18 U.S.C. § 3142(f)(1)(D) (2012) (creating the possibility of pretrial detention of those who are charged with a felony and have "two or more" convictions for specified offenses); United States v. Dillard, 214 F.3d 88, 95 (2d Cir. 2000) (quoting the legislative history of the "felon-in-possession provision" and stating that it "confirms that Congress regarded convicted felons as persons 'who pose serious risks of . . . danger to the community'"); Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 507-10 (2012) (explaining that in the context of laws permitting courts to detain or conditionally release defendants determined to be dangerous, "thirty-four states and the District of Columbia allow some degree of review of the defendant's prior convictions in determining dangerousness"); Russell Dean Covey, *Exorcising Wechsler's Ghost: The Influence of the Model Penal Code on Death Penalty Sentencing Jurisprudence*, 31 HASTINGS CONST. L.Q. 189, 214 (2004) (describing the use of prior crimes to indicate future dangerousness in the sentencing context).

[324] *See* Friedman, *supra* note 14, at 676-77 ("The situation would be far different, of course, if we took a more hospitable attitude towards propensity evidence on the merits. And in truth, such an attitude might account for a good deal of the heartiness of the character impeachment rule."); Simon-Kerr, *supra* note 43 (manuscript at 55-60) (outlining several reasons for the persistence of the practice of impeachment by prior conviction).

[325] *See* Simon-Kerr, *supra* note 43 (manuscript at 47-52).

charged.[326] On the surface, such testimony would be right on time: the jury can acquit, a wrongful conviction can be avoided, and an innocent person can fall into his family's arms. But even at the trial stage, to raise the specter of innocence is to make uncomfortable suggestions: not only that law enforcement (both police and prosecution) has made costly mistakes,[327] and that out beyond the courthouse a factually guilty person may be enjoying freedom, but also that an innocent person's life has been harmed or ruined in all the ways that pre-adjudication process can achieve.[328]

Second, defendant testimony can bring to life the defendant as an individual human. Indeed, this should be a goal of an effective direct examination: to paint a picture of the defendant as a human, with the emotions, connections, vulnerabilities, and complexities that that word connotes, and thus to inspire empathy.[329] The problem is that empathy may be a threat. We see this in prosecutorial peremptory strikes explained on the basis of prosecutorial fears that the jurors might empathize with the defendant.[330] It may be that maintenance maintenance of our system of punishment[331]—and of pre-adjudication suffering—relies to a certain extent on blindness to the fact that those subjected to it are human.[332]

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[326] Hornstein, *supra* note 100, at 20 ("[A] defendant frequently remains silent, even though his testimony may be highly relevant to the issue of guilt or innocence." (quoting United States v. Hairston, 495 F.2d 1046, 1050 (D.C. Cir. 1974))).

[327] Carodine, *supra* note 2, at 581-82 (describing how the innocence movement has used DNA tests to exonerate hundreds of wrongfully convicted inmates, casting doubt on the reliability of the criminal justice system).

[328] *See, e.g.*, *Bail in America: Unsafe, Unfair, Ineffective*, PRETRIAL JUST. INST., http://www.pretrial.org/the-problem/ [https://perma.cc/7H4Q-TMZD] (last visited Sept. 20, 2016) (mentioning impact on employment, education, and family).

[329] *See, e.g.*, H. Mitchell Caldwell & Thomas W. Brewer, *Death Without Due Consideration?: Overcoming Barriers to Mitigation Evidence by "Warming" Capital Jurors to the Accused*, 51 HOW. L.J. 193, 241 (2008) (describing how a defendant's testimony, by preempting an attack on his or her credibility, can increase the likelihood that jurors will empathize with the defendant).

[330] *See* Brief in Opposition on Behalf of Respondent at 27, Foster v. Chatman, 136 S. Ct. 1737 (2016) (No. 14-8349) ("As the defense counsel informed the Court before voir dire, they were trying to find jurors who possessed some empathy, or could possess some empathy, for the 'socially, culturally and educationally deprived life-style' of the Defendant. Given this, the prosecutor's strike was sound." (citation omitted)).

[331] *See* Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 113 (2007) ("American punishment has become degrading, indecent, and undeservedly harsher despite a Constitution designed to protect people from infliction of excessive punishment.").

[332] *See* Carodine, *supra* note 2, at 571; Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395, 408 (2009).

Third, defendant testimony can reveal the vulnerabilities and suffering—victimization, even—that a defendant has endured. It may be that the maintenance of the criminal justice system and the hardships that it inflicts depend to a certain extent on the maintenance of the binary of offender and victim, and that the prospect of muddying this binary is a deeply threatening one. For judges and prosecutors who enter and continue their profession in hopes of bringing about justice, protecting the vulnerable and the victimized, remedying unfairness, and upholding the law and the constitution, all under the aegis of the state, how could it not be uncomfortable to hear defendant narratives of vulnerability, victimhood, injustice, and legal and constitutional violations,[333] some perpetrated in the name of the state,[334] and some unremedied by the state?[335] It is far simpler to allow the binaries and the assumptions—of law enforcement correctness, of probable guilt, of defendants who have displayed less than full humanity—to go unchallenged by speech.[336]

III. LEARNING FROM NEGLECTED MODELS OF ABOLITION

Part II laid out a variety of dimensions from which prior conviction impeachment could be criticized, and argued that it is essential for any reform project not only to understand each of them but also to consider why, despite their multiplicity, the practice continues. Indeed, not only does it continue, but also commentators frequently assert that it is impractical to think about its abolition.[337] They cite its widespread and long-standing nature, and the prosecutorial lobby's anticipated opposition to any abolition effort.[338] The literature has largely neglected the details of those three states—Kansas, Hawai'i, and Montana—that either wholly or in large part have abolished this practice. Their details, however, are important: they show that widespread does not mean universal, that something that is long-standing may also be out-of-date,

[333] An example would be unlawful searches and seizures. *See* Al Baker, *City Police Still Struggle to Follow Stop-and-Frisk Rules, Report Says*, N.Y. TIMES, Feb. 17, 2016, at A17.

[334] Examples would include stigmatization, pretrial detention, imprisonment, and loss of employment. *See Bail in America: Unsafe, Unfair, Ineffective*, *supra* note 328.

[335] Uviller, *supra* note 238, at 826 ("I am forced to conclude that judges, well situated as they may be, are frequently drawn into the system over which they preside. Their pride depends in some measure on the faith that their efforts propel this cumbersome system toward a creditable result. In their role, I am sure I would be inclined in the same direction; it would be extremely difficult to live with skepticism concerning the important process in which one is so directly involved.").

[336] *See* Bellin, *supra* note 167, at 894 ("Courts and practitioners have become increasingly callous to the value of hearing from defendants . . . ."). For additional exploration of the question why impeachment rules persist in the face of multiple critiques, see Simon-Kerr, *supra* note 43 (manuscript at 55-60).

[337] *E.g.*, Beaver & Marques, *supra* note 12, at 589; Ladd, *supra* note 12, at 178; Spector, *supra* note 12, at 23.

[338] *See, e.g.*, Spector, *supra* note 46, at 251.

and that prosecutorial opposition has not always blocked such reform efforts. This Part examines the details of each of the three states in question, addressing them in chronological order of abolition, and including a focus on the obstacles that the reform efforts have faced, before drawing together the lessons for future reform efforts.

A. *Kansas*

Kansas enacted its prior conviction impeachment statute in 1963.[339] Its earlier rule had permitted prosecutors to cross-examine defendants about any prior conviction,[340] resulting in "scathing"[341] and "promiscuous"[342] inquiries. The current statute contains two limitations. First, no witness can be impeached with a prior conviction unless said conviction was for a crime "involving dishonesty or false statement."[343] Second, no criminal defendant can be impeached unless the defendant "first introduced evidence admissible solely for the purpose of supporting his or her credibility."[344] In passing this legislation, Kansas adopted wholesale Rule 21 of the Uniform Rules of Evidence.[345] The Model Code of Evidence[346] and English statutory provisions also provide precedent for this approach.[347]

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[339] *See* 1963 Kan. Sess. Laws 675 ("Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility.").

[340] M.C. Slough, *Other Vices, Other Crimes: An Evidentiary Dilemma*, 20 U. KAN. L. REV. 411, 412 (1972).

[341] *Id.* at 415.

[342] State v. Roth, 438 P.2d 58, 62 (Kan. 1968).

[343] KAN. STAT. ANN. § 60-421 (2011).

[344] *Id*.

[345] *See* UNIF. R. EVID. 21 ("Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility. If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility."); Glick, *supra* note 24, at 337-38 ("It is difficult to assess the effectiveness of Uniform Rule 21 and the approach adopted therein since only one state, Kansas, has adopted it . . . .").

[346] *See* MODEL CODE EVID. R. 106 (AM. LAW. INST. 1942) (allowing a defendant to be impeached by convictions "involving dishonesty or false statement" only if "he introduces evidence for the sole purpose of supporting his credibility"); Hornstein, *supra* note 100, at 22 (explaining that the rationale was "the policy of encouraging the accused in criminal cases to take the stand" (quoting MODEL CODE EVID. R. 106 cmt.)).

[347] *See* State v. Burton, 676 P.2d 975, 984 (Wash. 1984) (Brachtenbach, J., dissenting) (stating that the English statute prohibiting impeachment by prior conviction had an exception allowing such impeachment "where the defendant had given evidence of his own good character").

As described by the Kansas Supreme Court, the statute's purpose was to "permit a defendant to testify in his own behalf without having his history of past misconduct paraded before the jury,"[348] or, stated more strongly, "to encourage defendants in criminal actions to take the stand, and to prevent the prosecution from smearing rather than discrediting the witness."[349] The court has since expanded on this goal and its limits:

> [The defendant] is entitled, like any other witness, to let the jury know who he is so that it may properly fit him into the pattern of events brought out at the trial. Of course, when the testimony of either the defendant or any other witness for the defense goes beyond those bounds and attempts to characterize the defendant's past life as blemish-free, or makes reference to specific prior incidents, he foregoes to that extent the protection of the statute.[350]

The Kansas Supreme Court has been careful to clarify that this protection against impeachment does not permit defendants untruthfully to deny the existence of a particular conviction while on the stand.[351] If such a denial were to occur, evidence of the conviction would be permitted—not as impeachment by prior conviction, but to rebut, or contradict, the inaccurate assertion.[352]

The Kansas example is important, not only for showing that a state can implement, and sustain for decades, this kind of protection of testimony against "smearing,"[353] but also for indicating that this kind of legislative drafting cannot solve each of the problems identified in this Article. Scrutiny of the case law reveals three problems with this provision.

First, the provision permits uncertainty about whether a defendant has "introduced evidence admissible solely for the purpose of supporting his or her credibility,"[354] and thus, waived the rule's protections. For example, a defendant who "emphasized to the jury that he knew what it meant to take an oath and to tell the truth and that he was presently telling the truth" was found to have submitted evidence solely to support his credibility,[355] as was a defendant who mentioned that he was an ordained minister and had "donated money to various needy persons and to other charitable good works."[356] On the other hand, a

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[348] State v. Stokes, 523 P.2d 364, 366 (Kan. 1974).

[349] State v. Werkowski, 556 P.2d 420, 423 (Kan. 1976); State v. Minor, 407 P.2d 242, 245 (Kan. 1965) (Fontron, J., dissenting) ("The purpose is to remove the fear of character smearing as an inducement to the defendant to take the stand and tell his story and subject himself to cross examination.").

[350] *Stokes*, 523 P.2d at 366-67.

[351] *See* State v. Burnett, 558 P.2d 1087, 1090-91 (Kan. 1976).

[352] *See id.*

[353] *Werkowski*, 556 P.2d at 423.

[354] KAN. STAT. ANN. § 60-421 (2011).

[355] State v. Johnson, 907 P.2d 144, 146 (Kan. Ct. App. 1995).

[356] State v. DeLespine, 440 P.2d 572, 574 (Kan. 1968).

defendant who testified that he was not like his brother (who had pled guilty to robbery), and responded to a prosecutorial question about his image with "I'm a twenty-four-year-old male . . . getting ready to get married. That's my image," was not found to have done so,[357] nor was a defendant who testified "that he was honorably discharged after serving for twenty years in the United States Air Force."[358]

Second, a rule is only as good as the parties responsible for upholding it. Even with a search limited to published cases, one finds numerous instances of those parties—defense counsel, prosecutors, and judges—failing to accomplish their task. Defense attorneys have repeatedly failed to understand and use the protections that Kansas offers their clients in this area. In *State v. Rice*,[359] in which a defense attorney had advised his client not to testify because the attorney was unaware of Kansas's protections against prior conviction impeachment, the Kansas Supreme Court found counsel's conduct not only ineffective, but "appalling."[360] In reaching this conclusion, the court weighed two of its precedents raising similar issues.[361] While the three cases involved three different permutations of attorney error with regard to prior conviction impeachment, what all three had in common was a defendant "represent[ed] by counsel with a basic lack of understanding of [Kansas's] rules of evidence."[362] The Supreme Court of Kansas even reprimanded the defense counsel in *Rice*, stating that the prohibition on prior conviction impeachment "has been the law in Kansas since January 1, 1964, and is a basic provision of our law of evidence of which any attorney who practices in our courts should be aware."[363]

Judicial opinions show similar signs of frustration with prosecutorial failures in this area. In one case, for example, the Supreme Court of Kansas declared that

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[357] State v. Percival, 79 P.3d 211, 217-18 (Kan. Ct. App. 2004).

[358] *Werkowski*, 556 P.2d at 422 (ruling that when the defendant testified "that he was honorably discharged after serving for twenty years in the United States Air Force" he did not put his character in issue); *see also* State v. Stokes, 523 P.2d 364, 336 (Kan. 1974) ("Character is not put in issue by the kind of background testimony elicited from nearly every witness as to address, occupation, place of employment, marital status, etc. Such testimony serves more to identify the witness rather than show good character. . . . [A] defendant may testify, among other things, to his service in the armed forces and the receipt of an honorable discharge without putting his character in issue.").

[359] 932 P.2d 981 (Kan. 1997).

[360] *Id.* at 1008.

[361] *Id.* at 1007-08 (citing State v. Logan, 689 P.2d 778, 782-83 (Kan. 1984) (describing how a defense attorney mistakenly believed that his client would necessarily be impeached with *crimina falsi*, and therefore elicited his convictions)); State v. Wright, 453 P.2d 1, 3 (Kan. 1969) (quoting portion of transcript in which defense counsel, unaware of Kansas's rule, asked his client about some prior convictions on direct examination at his rape trial, thus opening the door for the prosecution to ask about an additional conviction (for rape) on cross-examination).

[362] *Rice*, 932 P.2d at 1008.

[363] *Id.* at 1006.

"[t]his statute is clear and should be understood by every prosecutor in the state."[364] Even though the prosecutor knew, or should have known, that he was violating it, he "made a studied and deliberate attempt to obtain permission from the trial court to have [an inadmissible] prior conviction brought out in the cross-examination of the accused."[365] In a more recent case, the situation was unimproved. A man charged with burglary testified that he had had no intent to steal and no intent to harm.[366] During cross-examination, the prosecutor posed the following question: "Why don't you tell the jury what convictions you have that involve theft or dishonesty[?]"[367] Defense counsel objected, pointing out that his client "ha[d]n't raised the issue of his veracity or honesty," and asked for a mistrial.[368] The prosecutor responded, without explanation, "He's opened the door wide open, Judge. I'm driving a truck through this one."[369] While the court sustained defense counsel's objection, it rejected the motion for a mistrial, pointing out that the defendant had not answered the question.[370]

Even as recently as 2014, one finds cases in which prosecutor, defense attorney, and judge all failed to honor the rule's protections. In one case, defense counsel erroneously counseled his client that she would expose herself to impeachment with *crimina falsi* merely by getting on the stand;[371] the trial court erroneously confirmed this view;[372] and, even though the defense had offered no evidence to buttress her credibility, the prosecution asked her about her record.[373] The judge gave no limiting instruction,[374] and the defense attorney made no objection to anything.[375] The appeals court compounded the mess by citing the wrong standard for harmless error,[376] but did at least conclude that the evidence should not have been admitted.[377] In a similar case, the trial court permitted the prosecutor's unlawful use of prior convictions.[378] The trial court told the defense counsel, "Your client took the stand. He's subject to cross-

[364] State v. Harris, 529 P.2d 101, 103 (Kan. 1974).

[365] *Id.* at 104.

[366] State v. Ramey, 322 P.3d 404, 410 (Kan. Ct. App. 2014).

[367] *Id.*

[368] Brief of Appellant at 7, *id.* (No. 12-108597-A).

[369] *Id.*

[370] *Id.*

[371] State v. King, No. 109,443, 2014 Kan. App. Unpub. LEXIS 494, at *1 (Kan. Ct. App. June 27, 2014).

[372] *King*, 2014 Kan. App. Unpub. LEXIS 494, at *1.

[373] *Id.*

[374] *Id.* at *2.

[375] *Id.*

[376] *See id.* ("[T]o warrant reversal, we first must be convinced beyond a reasonable doubt that the jury's verdict would have been different had these errors not occurred.").

[377] *Id.*

[378] State v. Armstead, No. 109,160, 2014 WL 1193395, at *9 (Kan. Ct. App. Mar. 21, 2014).

examination and he's entitled to be tested for truth and veracity."[379] To which the defense counsel disastrously responded, "True."[380]

Third, accountability for these errors is elusive. Even when defense attorneys object appropriately to a prosecutorial violation, mistrials are rarely granted,[381] which means that prosecutors seeking convictions have little incentive not to try to get a defendant's prior convictions—or at least a question about them—before a jury.[382] Even if a defendant slogs through the appeals process, the error may well be found harmless and the conviction upheld.[383] Courts also often find judicial and defense counsel errors harmless, and thus rarely issue reversals.[384] Thus, Kansas's legislature took an important first step, but, as discussed below, the lack of oversight regulating violations of this rule and the harm that violations can cause suggest that a blanket ban may be preferable to one with this vague carve-out.

B. *Hawai'i*

Hawai'i's rule banning prior conviction impeachment resulted from a Hawai'i Supreme Court ruling followed by a legislative amendment. The ruling came in the 1971 first-degree murder case, *State v. Santiago*.[385] At the time of Norman Santiago's trial, an 1876 statute appeared to "allow proof of conviction of 'any

[379] *Id.* at *3.

[380] *Id.*

[381] *See* State v. McMullen, 894 P.2d 251, 255 (Kan. Ct. App. 1995) ("In Kansas, our appellate courts have 'adopted the general rule that an admonition to the jury normally cures the prejudice from an improper admission of evidence.' It is only in the extreme case where the damaging effects of an improper admission of evidence cannot be removed by an admonition, should the trial court declare a mistrial." (quoting State v. Chandler, 850 P.2d 803, 806 (1993))); *id.* (finding that the trial court "acknowledged the evidence of [the defendant's] criminal history was improperly admitted, but removed any possibility of its prejudicial effect by admonishing the jury to disregard the question and answer").

[382] *See* Glick, *supra* note 24, at 340-41 ("[V]ery often the mere attempt to impeach, which may be overruled, is often as damaging as actual impeachment, since the jurors will not be able to obliterate the episode from their minds, despite instructions from the trial judge. . . . It is a well-known reality of trial practice that a question once asked cannot really be erased through deletions in the record or instructions to the jury. . . . Since the credibility of the district attorney tends to be rather high in the eyes of the jury, they often assume that he would not ask a question, especially repeatedly, unless he had a sound reason and may view the defense counsel's objections as technical attempts to avoid discovery of the truth." (footnotes omitted)).

[383] Note, *supra* note 155, at 784-85 ("[W]hen there is some question whether the evidence was outcome determinative—either because of the strength of other evidence or the 'efficacy' of judicial instructions—the overwhelming number of courts will do no more than verbally admonish, and will take no action.").

[384] *See, e.g.*, State v. King, No. 109,443, 2014 Kan. App. Unpub. LEXIS 494, at *1 (Kan. Ct. App. June 27, 2014).

[385] 492 P.2d 657, 661 (Haw. 1971).

indictable or other offense' without any limitation whatsoever."[386] The prosecution seized the opportunity that this rule presented and swiftly impeached Santiago after he gave direct testimony in his defense:

[Prosecutor:] Norman, were you convicted in the past of any felonies?
[Santiago:] Yes.
[Prosecutor:] When was this?
[Santiago:] When I was 20 years old but long time ago. It was for burglary.
[Prosecutor:] Burglary?
[Santiago:] Yes.
[Prosecutor:] You remember what degree of burglary.
[Santiago:] First degree burglary.
[Prosecutor:] I have no questions, your Honor.[387]

This brief exchange resulted in the Hawai'i Supreme Court striking down the existing impeachment rule.[388] In its opinion, the court laid out various concerns about impeachment of a criminal defendant by prior conviction. First, the court cited with approval several authorities that had reached the conclusion that this form of impeachment puts criminal defendants at significant risk that the jury will conclude that guilt is likely in the instant case because of the prior convictions.[389] Second, the court expressed skepticism that jury instructions to the contrary could mitigate that risk in any meaningful way.[390] Third, the court mentioned the "tremendous dilemma" that defendants with criminal convictions faced because exercising the right to testify would mean revealing convictions of which the jury would otherwise be unaware and that the jury might use for the purposes of determining guilt, as opposed to credibility.[391]

The court in *Santiago* asserted that "[i]t has long been recognized that every criminal defendant has a right to testify in his own defense," and that this right is "implicitly guaranteed" by the Fourteenth Amendment's Due Process Clause.[392] While the threat of prior conviction impeachment "technically" still leaves one free to testify, this form of impeachment "is a penalty imposed by courts for exercising a constitutional privilege," and it '"cuts down on' the right to testify 'by making its assertion costly.'"[393] Such a burden might pass constitutional muster if there were some countervailing value to the impeachment, but the court found it clear that "prior convictions are of little real

[386] Asato v. Furtado, 474 P.2d 288, 295 (Haw. 1970); *see also* 1876 Haw. Sess. Laws 59 ("A witness may be questioned as to whether he has been convicted of any indictable or other offence; and upon being so questioned if he either denies the fact or refuses to answer, it shall be lawful for the party so questioning to prove such conviction.").

[387] *Santiago*, 492 P.2d at 659.

[388] *See id.* at 659, 661.

[389] *Id.* at 660.

[390] *Id.*

[391] *Id.*

[392] *Id.*

[393] *Id.* (quoting Griffin v. California, 380 U.S. 609, 614 (1965)).

assistance to the jury in its determination of whether the defendant's testimony as a witness is credible."[394] There may be "no logical connection whatsoever" between a conviction and the credibility determination if the conviction is not related to dishonesty,[395] and even if the conviction did involve dishonesty, "in light of the fact that every criminal defendant may be under great pressure to lie, the slight added relevance which even a perjury conviction may carry would not seem to justify its admission."[396]

In a civil case decided one year before *Santiago*, the Hawai'i Supreme Court had limited impeachment by prior conviction to those convictions thought to have a rational connection to the truthfulness of a witness.[397] It used Norman Santiago's case to go further in the criminal context, finding the concerns "even more compelling" when criminal defendants face impeachment in their own trials, because a defendant's fear about a jury's propensity reasoning may compel him to waive his right to testify.[398] In light of the lack of a "compelling reason to impose that burden," the court found that convicting a defendant after his impeachment by prior conviction violated his right to testify, and that provisions permitting this form of impeachment violated the due process clauses of the Hawaiian and federal constitutions.[399]

The court stated that it was not answering the question of whether a prosecutor could impeach using prior convictions "where the defendant ha[d] himself introduced testimony for the sole purpose of establishing his credibility as a witness."[400] Even while not answering that question, the court hinted at concern regarding an exception of that kind, stating that "we would hesitate to erect a trap under which an unwary defense lawyer's introduction of some trivial evidence concerning the accused's credibility may unleash a flood of damaging prior convictions."[401]

This ruling turned out to have been a highpoint for both Norman Santiago and for Justice Abe, the drafter of the opinion. On retrial, Santiago was convicted of first-degree murder.[402] In an unrelated matter, Justice Abe was subsequently

[394] *Id.* at 661.

[395] *Id.*

[396] *Id.* (citing Note, *supra* note 155, at 778).

[397] *See* Asato v. Furtado, 474 P.2d 288, 295-96 (Haw. 1970) (ruling that for a prior criminal conviction to be admissible to impeach a witness the conviction must "bear[] some rational relation to the propensity of the witness for truth and veracity").

[398] *Santiago*, 492 P.2d at 661.

[399] *Id.*

[400] *Id.*

[401] *Id.*

[402] *See* State v. Santiago, 516 P.2d 1256, 1259 (Haw. 1973).

arrested and indicted for a felony,[403] then acquitted,[404] before being rearrested on a trivial misdemeanor charge.[405] Santiago and Justice Abe had played their parts in reshaping the state's law, however. The relevant rule of evidence was subsequently redrafted, and enacted by the legislature,[406] and since 1980 Hawai'i Hawai'i has taken the same approach as Kansas: no witness's convictions are admissible unless they are *crimina falsi*, and, as regards a criminal defendant, no impeachment by criminal conviction is permitted unless the defendant has introduced evidence in order to establish his or her credibility.[407]

Again, as in Kansas, it is important to note that this rule is no panacea and is dependent on those who interpret it: defense counsel, prosecutor, and judge. One recent case, *State v. Pacheco*,[408] provides an example of failure by all three parties.[409] Gilbert Pacheco faced charges of escape and drinking in a public park: under arrest for drinking beer in a Honolulu park on a July afternoon, he allegedly leapt over a wall into a nearby stream and "swam, still handcuffed, in circles, like a 'porpoise,'" until his extraction by the fire department.[410] His defense was that he had fled in fear of the arresting officer, who had threatened him during a previous arrest (which had led to a theft conviction).[411] At his trial, the court accepted the prosecution's argument that the theft conviction was admissible for the purposes of impeachment,[412] and the arresting officer testified about it without objection from the defense.[413] The Supreme Court of Hawai'i catalogued the errors that had occurred: the prosecution's argument that the theft conviction was a *crimen falsi* was incorrect;[414] even if it were a *crimen falsi*, the

[403] *Ex-Hawaii Justice Charged with Theft*, L.A. TIMES, July 7, 1985, at 27 (reporting that retired Justice Abe had been indicted and "arrested on charges of conspiracy and theft in connection with alleged multimillion-dollar fraudulent sales of commodities").

[404] *Former Justice Acquitted*, AP ONLINE, July 31, 1986 ("A former Supreme Court justice [Kazuhisa Abe] was acquitted of theft and conspiracy charges stemming from his role as an attorney for a commodities firm accused of defrauding investors of $37 million.").

[405] *See* USA TODAY, June 19, 1992, at 8A ("Charges that ex-state Supreme Court Judge Kazuhisa Abe, 78, stole a can of lubricant from a store in March were dropped without comment.").

[406] *See* 1972 Haw. Sess. Laws 403-08.

[407] *Id.* The Commission comments reveal that even in the event that a defendant is found to have "opened the door" to this form of impeachment, Rule 403 still applies. HAW. R. EVID. 609 commission's comments.

[408] 26 P.3d 572 (Haw. 2001).

[409] *Id.* at 589-90.

[410] *Id.* at 577.

[411] *Id.* at 578.

[412] *Id*.

[413] *Id*. at 579.

[414] The record failed to establish that the theft was committed "under circumstances that, by their very nature, render [it] relevant to and probative of [the defendant's] veracity as a witness." *Id.* at 589.

trial court should not have ruled it per se admissible, because a defendant's conviction can be admitted only if he attempts to bolster his credibility;[415] and, defense counsel was ineffective in failing to object to the admission of the conviction before Pacheco had given even one word of testimony.[416]

C. *Montana*

Montana's rule goes the furthest of these three. A rule that originated in 1976 now provides that "[f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible."[417] Thus, Montana abandoned its earlier rule, which had provided that a witness could be impeached by evidence of a prior felony conviction,[418] and, unlike Kansas and Hawai'i, the state prohibited the impeachment not only of criminal defendants but of all witnesses.

The Commission responsible for drafting this rule laid out its rationales for diverting from FRE 609.[419] It noted first that under FRE 609(c)(1), evidence of a conviction is not admissible if the conviction "has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated."[420] The Commission noted that because both the Montana Constitution and a state statutory provision provided that "when a person is no longer under state supervision, his full rights of citizenship are restored,"[421] there would be little use to a rule like FRE 609 because it would permit the impeachment of only a small category of people: "those persons serving a sentence in prison, suspended sentence or on parole."[422]

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[415] *Id.* at 590.

[416] *Id.*

[417] MONT. R. EVID 609.

[418] *See* State v. Gafford, 563 P.2d 1129, 1133 (Mont. 1977).

[419] MONT. R. EVID. 609 commission's comments. Montana's Commission on the Rules of Evidence is made up of appointed members, and the Montana Supreme Court adopted its draft of the original version of the Montana Rules of Evidence in 1976. *See* Cynthia Ford, *A Short History of the MT Rules of Evidence*, 38 MONT. L. 14, 14-15 (2012).

[420] FED. R. EVID. 609(c)(1).

[421] MONT. R. EVID. 609 commission's comments; *see also* MONT. CONST. art. II, § 28 ("(1) Laws for the punishment of crime shall be founded on the principles of prevention, reformation, public safety, and restitution for victims. (2) Full rights are restored by termination of state supervision for any offense against the state."); MONT. CONST. CONVENTION commission's comments to Bill of Rights, at 643 (recommending that, once a person who has been convicted has served his sentence, "he should be entitled to the restoration of all civil and political rights"); *id.* at 968 (referencing "full rights" as entailing "all civil and political rights"); REV. CODE MONT. § 95-2227 (1947) ("When a person has been deprived of any of his civil or constitutional rights by reason of conviction for an offense and his sentence has expired or he has been pardoned he shall be restored to all civil rights and full citizenship, the same as if such conviction had not occurred.").

[422] MONT. R. EVID. 609 commission's comments; *see also* MONT. CODE ANN. § 3-15-303 (2015) ("A person is not competent to act as juror: . . . (2) who has been convicted of

Everyone else would have been declared a full person—in the words of the statute, "the same as if such conviction had not occurred"[423]—and thus would no longer be vulnerable to this form of collateral consequence.

Having made its point about the state's redemptive philosophy, the Commission went on to say that it rejected this form of impeachment "not only because of these Constitutional and statutory provisions but also and most importantly because of its low probative value in relation to credibility."[424] The Commission did "not accept as valid the [FRE drafters'] theory that a person's willingness to break the law can automatically be translated into willingness to give false testimony."[425]

The Commission also invoked problems with the then-existing practice in Montana.[426] For example, the ability of cross-examining attorneys to ask witnesses whether they have ever been convicted of a felony "can, in many instances, cause severe embarrassment on the part of the witness."[427] The Commission viewed this embarrassment as a deterrent to testimony.[428]

The protections offered by this rule are not as absolute as they may seem. First, it is possible for a defendant to open the door to admission of convictions if he is found to have made false statements about them.[429] Thus, if a defendant testifies on the stand that he has "never burglarized any place," the rule does not protect him from being asked about his burglary conviction.[430]

Second, it is easy to find violations, even of this apparently clear rule, including prosecutorial violations that courts concluded were intentional, and that were only weakly opposed by defense counsel. In one 1988 trial for alleged theft of a gun, the prosecutor ignored the prohibition on impeachment of all witnesses and improperly brought out in cross-examination of a defense witness

malfeasance in office or any felony or other high crime."); LARRY M. ELISON & FRITZ SNYDER, THE MONTANA STATE CONSTITUTION: A REFERENCE GUIDE 79 (2011) ("In large measure, the state legislature and the Montana Supreme Court have ignored [the constitutional] provision. A variety of legislative acts prohibit the restoration of full civil rights upon termination of state supervision by restricting service and employment in a wide range of public and private activities."); Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 154 n.402 (2003) (citing MONT. CODE. § 3-15-303, and noting that the Montana Attorney General advised that the right to sit on a jury can be restored only by pardon).

[423] REV. CODE MONT. § 95-2227.

[424] MONT. R. EVID. 609 commission's comment.

[425] *Id.* (citing Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 297 (1969)).

[426] *Id.*

[427] *Id.*

[428] *See id.*

[429] *See* State v. Bingman, 61 P.3d 153, 161 (Mont. 2002).

[430] State v. Austad, 641 P.2d 1373, 1383-84 (Mont. 1982); *see also Bingman*, 61 P.3d at 160 (finding that defendant's testimony that "after I drink, I won't drive my vehicle" opened door to evidence of a conviction for driving under the influence, admitted for the purpose of showing that the defendant lied under oath).

that the witness had both a conviction for assault and a conviction—"involving guns"—for intimidation.[431] The defense attorney objected that this was not "within the scope of cross-examination";[432] he was overruled, and a conviction followed.[433] The Montana Supreme Court reversed the conviction, repeatedly pointing out the wrongfulness of the prosecutor's conduct:

> [T]his Court will not condone prosecutorial conduct which is in clear violation of Rule 609, M.R.Evid.
>
> . . . .
>
> The record fails to disclose any appropriate reason for the State's inquiry as to the prior criminal conduct of [the defense witness]. Clearly it was not something inadvertent in nature, as the defendant's attorney objected to the question but was overruled by the trial court. We conclude that the intention on the part of the State was to discredit the witness by showing that he had been engaged in crimes of intimidation and assault, and that the intimidation crime involved guns. We further conclude that the aim on the part of the State was to improperly impugn the character of the defendant and thereby suggest a greater likelihood of guilt of the crimes with which he was charged. We will not tolerate this intentional and significant evasion of our rules.
>
> We conclude that the prosecution's inquiry clearly was improper under Rule 609, M.R.Evid.[434]

Despite all these scornful adjectives, it is unclear that the breach had any consequence for the prosecutor, prosecutorial policy, or trial court practice. Four years later, another such incident made its way up to the court.[435] Once again, the prosecutor had inappropriately brought out a defense witness's conviction on cross-examination;[436] once again, defense counsel had made an anemic objection ("not relevant");[437] and, once again, the objection had been overruled.[438] The appeals court reversed the conviction, saying again that it could find no "appropriate reason" for the prosecutor's questions.[439] Sometimes, even an anemic objection is absent, as in a 1980 case in which the prosecutor

[431] State v. Shaw, 775 P.2d 207, 208 (Mont. 1989).

[432] *Id.*

[433] *Id.*

[434] *Id.* at 208-09.

[435] State v. Bristow, 882 P.2d 1041, 1045 (Mont. 1994) (holding that "state's eliciting of impeachment testimony from defendant's witness, as to witness's prior conviction, was reversible error").

[436] *See id.* at 1043.

[437] *Id.* at 1044.

[438] *Id.*

[439] *Id.*

made an inappropriate inquiry about a defense witness's prior criminal record, and defense counsel said nothing at all.[440]

These snapshots of prosecutorial abuse add a new dimension to the question of what needs to be asked of prosecutors in this area of the law. In an earlier article, I suggested that prosecutors should exercise restraint in proffering convictions, even if the evidence rules may make those convictions admissible.[441] Judges may not have discretion to reject them,[442] and even if they do have that discretion, the prosecutor has an ethical and constitutional duty to ensure that the defendant is afforded procedural and other forms of justice.[443] Thus, where evidence of thirteen different convictions is admitted, we might criticize as "overkill" the prosecutorial decision to proffer them,[444] as well as the judicial decision to admit them. This new data reveals, however, that it is not enough to ask for prosecutorial restraint within what the rules allow; prosecutors first need to be required to obey the rules.

In addition to prosecutorial and defense failings, trial courts are also failing to uphold this unique rule's protections. In at least one case, the trial judge had failed to absorb the change in the state's law, and erroneously instructed the jury that a witness can be impeached "by evidence that he has previously been convicted of a felony."[445]

It is important to note that Montana is the only one of the three states to extend its prohibition on impeachment by prior conviction beyond the context where it is the criminal defendant who is being impeached. The fact that the prohibition encompasses impeachment *by* criminal defendants has led to appellate arguments based on defendants' constitutional rights to confront the witnesses against them.[446] These arguments will be discussed below.

D. *Drawing Lessons from Three Diverse States*

The arguments that persuaded these three states to move toward abolition are still valid and indeed have been strengthened by subsequent developments and discoveries. The belief of the Kansas drafters that the opportunity to "smear"

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[440] *See* State v. Rose, 608 P.2d 1074, 1081 (Mont. 1980) (holding that, though defense counsel "should have objected" to inquiry into a defense witness' prior criminal record, "this failure does not appear as if it prejudiced the defendant").

[441] *See* Roberts, *Unreliable Conviction*, *supra* note 13, at 600 ("Prosecutors should not just comply with judicial inquiries into reliability, but should play a proactive role in conducting their own investigations into reliability.").

[442] *See* FED. R. EVID. 609(a)(2).

[443] Roberts, *Unreliable Conviction*, *supra* note 13, at 600.

[444] *See* Petition for Review, *supra* note 162, at 13 ("Evidence of 14 prior convictions—13 of which were for burglary or attempted burglary [in a burglary prosecution]—to impeach defendant was substantially more prejudicial than probative.").

[445] State v. Sullivan, 595 P.2d 372, 372 (Mont. 1979).

[446] *See* Carodine, *supra* note 2, at 585-86. For an example of a court finding a constitutional right, see United States v. Nevitt, 563 F.2d 406, 408-09 (9th Cir. 1977).

defendants on the stand is one that would both chill defendants and be grabbed by prosecutors has been validated.[447] In addition, the Kansan desire to protect the defendant's ability "to let the jury know who he is"[448] has been given added resonance by the science of individuation, which suggests that letting the jury know who one is can go some way toward tackling the jury stereotypes that otherwise threaten one's chance of a fair trial.[449]

As for Hawai'i, social science has lent support to many of the concerns voiced in *Santiago*: prior conviction evidence does seem to inspire forbidden propensity reasoning, despite judicial instructions to the contrary, and does not contribute usefully to the jury's assessment of the defendant's credibility.[450] Even before the Supreme Court had squarely articulated a constitutional right to testify in one's defense, *Santiago* found support for its ruling in the federal (as well as the Hawaiian) constitution. In the wake of *Rock v. Arkansas*,[451] which made explicit what "must now be considered as one of the most fundamental [defendants' rights] in our jurisprudence,"[452] the federal constitutional argument may be still stronger.

The language used in Montana to justify the state's move to abolition may read as anachronistic—the notion that those with convictions should have the same civil rights and citizenship, once their sentences are completed, "as if the conviction had not occurred,"[453] and should be spared the "severe embarrassment" involved in being asked about felony convictions during testimony.[454] Montana itself has not lived up to the ideal of postsentence restoration of rights,[455] and while the American Bar Association at one point cautioned prosecutors not to cause "unnecessary embarrassment or humiliation"

[447] *See generally* Blume, *supra* note 113.

[448] State v. Stokes, 523 P.2d 364, 366 (Kan. 1974).

[449] *See* Roberts, *Prior Conviction Impeachment*, *supra* note 13, at 874-77 (examining the different ways in which individuation could apply to the "context of defendant testimony and its potential as a means of attempting to combat the threat of implicit fact finder stereotypes").

[450] *See* Dodson, *supra* note 20, at 15 ("[J]uries, in fact, ignore judges' limiting instructions and juries do use prior conviction evidence for impermissible purposes.").

[451] 483 U.S. 44, 44 (1987) (finding several sources for the right to testify: the Compulsory Process Clause, the Due Process Clause, and the Self-Incrimination Clause); *see also* State v. Schnabel, 279 P.3d 1237, 1268 (Haw. 2012) (stating that in *Rock*, the Supreme Court "formally settled into the position that a defendant has a right to testify in his own behalf").

[452] Friedman, *supra* note 14, at 666.

[453] REV. CODE MONT. § 95-2227 (1947).

[454] MONT. R. EVID. 609 commission's comments.

[455] *See* ELISON & SNYDER, *supra* note 422, at 79 ("A variety of legislative acts prohibit the restoration of full civil rights upon termination of state supervision by restricting service and employment in a wide range of public and private activities.").

to witnesses,[456] it is now silent on this point.[457] These goals should be restored, however. A recent National Research Council report on incarceration emphasized the value of being able to obtain full citizenship after prison.[458] As for embarrassment of the testifying defendant, it surely needs to be a concern for those who care about procedural justice,[459] and about the criminal justice system's legitimacy.[460] These concepts are often invoked in support of reforms such as an increase in the amount of defendant testimony,[461] but they require a focus on the *nature* of the experience of testifying, rather than just the *existence* of the experience.[462]

The arguments that motivated these states to move toward abolition, as well as many of the other critiques of prior conviction impeachment laid out above, apply to the basic concept of using a criminal conviction against a criminal defendant for the ostensible purpose of attacking credibility. Thus, while the harms of this practice might be lessened by the reforms that some states have adopted—limiting the types of convictions that are admissible, "sanitizing" the evidence, or setting a firm time limit on admissibility, for example—these

[456] AM. BAR ASS'N, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 123 (1971) (clarifying in commentary that "[t]he scope of examination has always been subject to control in the court's discretion in order to prevent abuse of witnesses").

[457] AM. BAR ASS'N, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 103-04 (3d ed. 1993) ("Witnesses should not be subjected to degrading . . . questioning unless the prosecutor honestly believes that such questioning may prove beneficial to the case.").

[458] COMM. ON CAUSES AND CONSEQUENCES OF HIGH RATES OF INCARCERATION, NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 350 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014) ("The principle of citizenship . . . demands a broad review of the penalties and restrictions faced by the formerly incarcerated in their access to the social benefits, rights, and opportunities that might otherwise promote their successful reintegration following release from prison. In short, the state's decision to deprive a person of liberty temporarily should not lead to permanently diminished citizenship.").

[459] *See* Friedman, *supra* note 14, at 676 ("[C]riminal penalties are more acceptable if they are imposed in a system that comports with ideals of human dignity and, by leaving room for consideration of the defendant's human quality, minimizes room for doubt when he is found guilty.").

[460] *See* Bellin, *supra* note 5, at 335 ("These consequences of the federal courts' over-admission of prior convictions do not inhere solely to criminal defendants, but serve, in particular cases, to undermine the reliability and legitimacy of the criminal justice system itself.").

[461] *See* Ted Sampsell-Jones, *Making Defendants Speak*, 93 MINN. L. REV. 1327, 1329 (2009) (encouraging more defendant testimony "would increase defendants' own participation in the criminal process, which would improve perceptions of legitimacy, thereby aiding rehabilitation and reintegration").

[462] *See* Kozinski, *supra* note 265, at xliii (alluding to the possibility that a prosecutor might paint a defendant "as a monster before the jury").

measures fail to get at the roots of this urgent problem. While no empirical study has yet attempted to define or measure the success of these three regimes, some encouraging assessments exist. Dodson notes that the Montana rule, as implemented by the courts, has "afforded criminal defendants considerable protection from the prejudicial effects of prior conviction evidence."[463] In addition, Blume predicts that a ban on prior conviction impeachment will increase defendant testimony,[464] and he is able to make this prediction in part because he has seen the rates at which factually innocent defendants testify in Montana (and in other settings where prior conviction impeachment is prohibited).[465] States should therefore consider abolition, and the question remains of the means and the model that they should pursue.

The Hawaiian example is valuable because it illustrates that courts, and therefore advocates, can take the lead in bringing about abolition.[466] As suggested by some of the examples above, defense attorneys often fail even to make objections to the use of prior conviction impeachment. When there is no objection, pursuing the argument on appeal becomes harder, even if, as in *Santiago*, there are potential constitutional claims.[467] A variety of federal constitutional hooks have been relied upon in opposition to prior conviction impeachment, in addition to the due process basis in *Santiago*: the right to a fair trial,[468] the right to testify,[469] and the right to an impartial jury,[470] for example. These types of arguments, none of which has been precluded by the Supreme

[463] Dodson, *supra* note 20, at 22.

[464] *See* Blume, *supra* note 113, at 498.

[465] *See id.* at 491. All the defendants from Montana testified, as did all those from West Virginia, where impeachment is limited to prior convictions for perjury, and thus was not available in Blume's case studies. *Id.* All the exonerees from both states had prior convictions, but their convictions could not be used against them. *Id.*

[466] *See supra* Section III.B (noting that the state's move to abolition began with the Hawai'i Supreme Court and ended with a legislative enactment).

[467] *Cf.* FED. R. EVID. 103(e) (allowing courts to "take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved").

[468] *See* State v. Burton, 676 P.2d 975, 986 (Wash. 1984) (Brachtenbach, J., dissenting) ("Furthermore, even if prior convictions were relevant to credibility, I question whether ER 609 can be applied to the defendant in a criminal action without seriously prejudicing his right to a fair trial.").

[469] Petition for Review, *supra* note 162, at 19 ("Since all of defendant's 14 prior convictions were not needed to impeach him, their admission violated defendant's right to testify.").

[470] *See* State v. Minnieweather, 781 P.2d 401, 403 (Or. Ct. App. 1989).

Court, require more consideration and development.[471] So, too, do state constitutional arguments, such as those that triumphed in *Santiago*.[472]

If one turns to legislative models, one needs to consider first whether it is helpful or necessary to follow Hawai'i and Kansas in providing that a defendant waives the rule's protections if he or she introduces evidence to support his or her own credibility. The *Santiago* court showed some wisdom when it voiced a concern that a carve-out like this could create the risk that an unwary defendant might unleash a flood of prejudicial material.[473] This carve-out has, at the least, created an area of uncertainty, so that defendants cannot feel confident that the choice of whether or not they will be impeached with their criminal convictions lies within their control.[474] In addition, the rationale behind this exception seems flawed: the drafters offered no reason why one should not be able to point to credibility in one area of one's life without evidence of a conviction being admitted as a necessary corrective. To be sure, if one were to deny having a conviction the admission of that conviction might well seem to be a necessary corrective, but the rules of impeachment by contradiction already permit that corrective.[475]

Montana's rule omits this unnecessary carve-out, but creates another complication by expanding abolition to all witnesses, and not just criminal defendants.[476] While a full exploration of this issue is beyond the scope of this Article, there are a number of reasons why, despite the many flaws in prior conviction impeachment (only some of which are specific to criminal defendants), extending the ban to cover all witnesses is problematic. First, if what lies behind this extension is a notion of symmetry, that notion is inappropriate: the criminal justice system is filled with asymmetries that

[471] *See* Spencer v. Texas, 385 U.S. 554, 560-61 (1965) (stating that evidence of a defendant's prior convictions is "usually excluded" except in circumstances such as "when the defendant has testified and the State seeks to impeach his credibility"); Petition for Review, *supra* note 162, at 19 (citing *Spencer* for the proposition that "[e]ncroachments on specifically enumerated rights, such as the right to testify, are subject to a higher level of scrutiny than encroachments on the overall fairness of a trial"); Gold, *supra* note 51, at 2315 ("*Spencer* seems to leave open the possibility that the admission of conviction evidence may be unconstitutional where, under a given set of facts, the interest in revealing the accused's character for truthfulness through conviction evidence is clearly outweighed by the danger of unfair prejudice.").

[472] For the unexplored nature of these arguments, see Hornstein, *supra* note 100, at 40.

[473] State v. Santiago, 492 P.2d 657, 661 (Haw. 1971).

[474] *See* Zeigler, *supra* note 115, at 674-75 (describing the disadvantages of litigation uncertainty such as this).

[475] *See* Gainor, *supra* note 7, at 800; *see also* FED. R. EVID. 608 advisory committee's note to 2003 amendment ("By limiting the application of the Rule to proof of a witness' character for truthfulness, the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403.").

[476] MONT. R. EVID. 609.

correspond to the vast difference in situation between the defense and the prosecution.[477] Second, the defendant's rights to cross-examine the witnesses against him—including, in the view of at least some courts,[478] the right to impeach them with their criminal convictions—are constitutionally protected.[479] Third, the prejudice to the impeached party, which forms part of the justification for abolition, is less when the impeached party is someone other than the criminal defendant.[480] Fourth, when the impeached party is not the criminal defendant, he or she does not have constitutional rights,[481] or the risk of conviction, at stake.[482] Fifth, if part of the concern about allowing the prosecution to garner additional convictions using past convictions is that incentives like this have sent us spiraling into a system of mass convictions, one may be less concerned about leaving the state vulnerable to the use of prior convictions against its witnesses.[483] Sixth, the prosecution, unlike the criminal defendant, has a constitutional duty to provide due process when conducting cross-examination.[484] And seventh, whereas Supreme Court precedent in the federal system and at least some of the states has allowed defendants to "remove the sting" from their convictions on direct examination only at the cost of giving

[477] *See* Roberts, *supra* note 190, at 1506.

[478] Supreme Court precedent has left the door open for this type of argument. *See* Jules Epstein, *True Lies: The Constitutional and Evidentiary Bases for Admitting Prior False Accusation Evidence in Sexual Assault Prosecutions*, 24 QUINNIPIAC L. REV. 609, 632 (2006) ("[W]hile strongly supporting the constitutional right to 'general' character impeachment confrontation, *Davis* ultimately leaves the matter unresolved.").

[479] *See* Carodine, *supra* note 2, at 585-86; Gold, *supra* note 51, at 2327 ("[W]here an accused offers conviction evidence to impeach a prosecution witness, exclusion of the evidence raises issues under the Confrontation Clause."); *see also* N.Y. CRIM. PROC. LAW § 60.40 practice cmt. subdiv. 1 (McKinney 2016) (mentioning that one defendant has a constitutional right to confront another defendant that the prosecution lacks).

[480] See Park, *supra* note 142, at 810-11 (listing three sources of prejudice affecting defendants—propensity reasoning, diluting the burden of proof, and deciding to punish the defendant for the prior crime—and indicating that they are less problematic for nondefendant witnesses).

[481] *See* Bellin, *supra* note 167, at 867.

[482] *See* State v. McAboy, 236 S.E.2d 431, 437 (W. Va. 1977) ("With a witness, the use of a prior conviction to impeach credibility may result in some loss of credibility in the eyes of the jury and attendant personal embarrassment. With the defendant, the prejudicial effect of a prior conviction may result in an unwarranted conviction.").

[483] *See* Carodine, *supra* note 109, at 574-75 ("I am far less concerned about the use of [prior conviction impeachment] evidence against ordinary witnesses for the prosecution, because I see no problem with a criminal defendant using the government's unreliable convictions against its own witnesses."); Roberts, *Prior Conviction Impeachment*, *supra* note 13, at 890 (suggesting that adjusting the incentive system operating within prior conviction impeachment may have beneficial consequences for prosecutorial conduct).

[484] *See supra* note 264 and accompanying text.

up their appeal rights,[485] prosecutors can remove their witnesses' sting on direct examination without giving up a thing.

In light of the problems both with the practice of prior conviction impeachment and within those states that have moved toward abolition, legislatures may wish to consider statutory language such as the following:

> In a criminal case where the defendant takes the stand, the prosecution shall not ask the defendant or introduce evidence as to whether the defendant has been convicted of a crime for the purpose of attacking the defendant's credibility. If the defendant denies the existence of a conviction, that denial may be contradicted by evidence that the conviction exists.[486]

Because the Montana example suggests that even a statute whose terms are clear can be violated by defense attorneys, prosecutors, and judges, and that there is little effective policing of such violations, one final recommendation should be added. Courts in states that have moved toward abolition should be required, on the record and before the start of trial, to remind counsel of the prohibition on impeachment by prior conviction, and to define the circumstances under which defendant testimony would open the door to admission of a prior conviction.[487] This should have the effect of lessening the rate of errors by all parties, and if errors do occur, it should make remedies—including sanctions—more attainable.

CONCLUSION

Impeachment of criminal defendants by prior conviction lacks justification. Every one of the assumptions on which it relies has been undermined. So too has the assumption that the practice is so firmly entrenched that abolition is impossible. Abolition in at least some states not only is possible but has been accomplished. To be sure, a rule abolishing this practice will not be a panacea. First, other obstacles to defendant testimony, and to trials, and to fair trials, will remain. Second, examination of those states that have attempted abolition reveals that any rule mandating abolition needs to be carefully drafted and carefully policed. Careful drafting and careful policing, however, are reasonable goals. What is not reasonable is the continuation of a practice that flouts data, jeopardizes evidentiary tenets and constitutional rights, and deprives defendants and decision makers of urgently needed voices.

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[485] Ohler v. United States, 529 U.S. 753, 758 (2000).

[486] The final clause may not be necessary, given the rule of impeachment by contradiction, but a survey of this area of practice reveals that one cannot be too explicit in drafting these rules.

[487] *See* United States v. Cook, 608 F.2d 1175, 1187 (9th Cir. 1979).