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January 2005

## Federalism Gone Far Astray from Policy and Constitutional Concerns: the Admission of Convictions to Impeach by State's Rules - 1990-2004

Dannye W. Holley

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### Recommended Citation

Holley, Dannye W. (2005) "Federalism Gone Far Astray from Policy and Constitutional Concerns: the Admission of Convictions to Impeach by State's Rules - 1990-2004," *Tennessee Journal of Law and Policy*. Vol. 2: Iss. 2, Article 3.

DOI: <https://doi.org/10.70658/1940-4131.1099>

Available at: <https://ir.law.utk.edu/tjlp/vol2/iss2/3>

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#### Citations:

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#### Bluebook 21st ed.

Dannye W. Holley, *Federalism Gone Far Astray from Policy and Constitutional Concerns: The Administration of Convictions to Impeach by State's Rules - 1990-2004*, 2 TENN. J. L. & POL'y 239 (2005).

#### ALWD 7th ed.

Dannye W. Holley, *Federalism Gone Far Astray from Policy and Constitutional Concerns: The Administration of Convictions to Impeach by State's Rules - 1990-2004*, 2 Tenn. J. L. & Pol'y 239 (2005).

#### APA 7th ed.

Holley, D. W. (2005). *Federalism gone far astray from policy and constitutional concerns: The administration of convictions to impeach by state's rules 1990-2004*. *Tennessee Journal of Law & Policy*, 2(2), 239-335.

#### Chicago 17th ed.

Dannye W. Holley, "Federalism Gone Far Astray from Policy and Constitutional Concerns: The Administration of Convictions to Impeach by State's Rules - 1990-2004," *Tennessee Journal of Law & Policy* 2, no. 2 (2005-2006): 239-335

#### McGill Guide 9th ed.

Dannye W. Holley, "Federalism Gone Far Astray from Policy and Constitutional Concerns: The Administration of Convictions to Impeach by State's Rules - 1990-2004" (2005) 2:2 Tenn J L & Pol'y 239.

#### AGLC 4th ed.

Dannye W. Holley, 'Federalism Gone Far Astray from Policy and Constitutional Concerns: The Administration of Convictions to Impeach by State's Rules - 1990-2004' (2005) 2(2) *Tennessee Journal of Law & Policy* 239

#### MLA 9th ed.

Holley, Dannye W. "Federalism Gone Far Astray from Policy and Constitutional Concerns: The Administration of Convictions to Impeach by State's Rules - 1990-2004." *Tennessee Journal of Law & Policy*, vol. 2, no. 2, 2005-2006, pp. 239-335. HeinOnline.

#### OSCOLA 4th ed.

Dannye W. Holley, 'Federalism Gone Far Astray from Policy and Constitutional Concerns: The Administration of Convictions to Impeach by State's Rules - 1990-2004' (2005) 2 Tenn J L & Pol'y 239

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FEDERALISM GONE FAR ASTRAY FROM POLICY AND  
CONSTITUTIONAL CONCERNS: THE ADMISSION OF  
CONVICTIONS TO IMPEACH BY STATE'S RULES—1990-2004

*Dannye W. Holley*

*“Round up the Usual Suspects”  
Claude Rains’ Character in “Casablanca”*

**I. Introduction**

This is a micro study of federalism in action. This study identifies, ranks, and evaluates the current federal and state rules regulating the same issue—whether to admit prior convictions to impeach a witness and the appropriate standards for doing so. Over the last several decades, there has been an almost unanimous chorus of criticism regarding the wholesale admission of convictions, ostensibly only to impeach, especially when prosecutors are authorized by an evidence rule to use convictions to impeach the testimony of an accused in a criminal case.<sup>1</sup>

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<sup>1</sup> Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1 (1999) (observing that the two decades since the enactment of the federal rule proved its standards too liberally admitted convictions to impeach—especially the accused); Richard D. Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!/?] Analysis and a Proposed Overhaul*, 38 U.C.L.A. L. REV. 637, 638 (1991) (proposing the abolition of all character impeachment evidence, including the use of prior convictions to impeach, against the accused); Carl McGowan, *Impeachment of Criminal Defendants By Prior Convictions*, 1 LAW & THE SOC. ORD. 1, 2 (1970) (noting that English jurist characterized the American practice of admitting convictions to impeach when the accused who took the stand, and who had not sought to employ character evidence to bolster his own credibility, as a “barbarous custom”). Later, McGowan also notes that both the 1942 Model Code of Evidence and the 1953 Uniform Rules of Evidence adopted the view of the English Jurist, banning the use of convictions to impeach the accused, unless he had sought to bolster his own credibility. *Id.* at 5. Since 1970, however, the Uniform Rules version of 609 has been

Despite this criticism, this study, and a companion study of how state supreme courts interpret these rules, provide a basis for concluding that this admission avenue persists and results in the admission of, in all probability, thousands of convictions against hundreds of witnesses in the United States each year.<sup>2</sup>

Because this is a study of an important set of evidence rules—rules which provide detailed practice guidelines that form the basis for regulating the crucial trial issue of admissibility—initially one might expect that the

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substantively amended twice; once to conform to the 1974 version of the federal rule to encourage uniformity in federal and state courts, and again in 1999 on the policy premise that twenty-five years of experience demonstrated that the federal rule too liberally admitted convictions against the accused and more generally because of its failure to define the concepts of “dishonesty” and “false statement.”). See also Gene R. Nicol, *Prior Crime Impeachment of Criminal Defendants: A Constitutional Analysis of Rule 609*, 82 W. VA. L. REV. 391 (1980) (arguing that the risk of denying the right to a fair trial is sufficiently great so as to violate the federal right to due process); Abraham D. Ordovery, *Balancing the Presumption of Guilt and Innocence, Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135, 140-41 (proposing an amendment to the federal rules which would require judges to evaluate whether the effect on the jury of admitting prior crime evidence would be its use for an impermissible prejudicial purpose). According to H. Richard Uviller,

Character—an available index of propensity to fabricate testimony—is a complex and dangerous area of evidence law. . . . This confusion in the application of law may reflect the fact that we simply do not understand the role of character in predisposing a witness to perjury and cannot recognize the conduct that implies propensity to render truthful or untruthful testimony. Masking our fundamental ignorance, we promulgate a set of rules—applicable virtually at judicial whim—that neither provides jurors with useful facts nor guarantees to shield defendants from prejudicial inference. Simply put, the credibility factor may be a wild card that could seriously undermine our claims of faith in the adversary adjudicative system of justice.

H. Richard Uviller, *Credence, Character, And The Rule's of Evidence: Seeing Through The Liar's Tale*, 42 DUKE L.J. 776, 827 (1993).

<sup>2</sup> Danyee Holley, *Judicial Anarchy: The Admission of Convictions to Impeach: State Supreme Court Interpretative Standards, 1990-2004* (unpublished manuscript, on file with author).

content of such rules would reflect jurisdiction-specific concerns. This article examines if this expectation is reality. The article then evaluates whether parochial concerns justify this article's core finding that, at the end of 2004, there is more than one distinctive standard for every two states regulating this very important issue. The first purpose of this article is to report the results of the study of the fifty states' rules and statutory standards regulating the admission of convictions to impeach. This study evaluates the current state standards using the federal rule and its evolution as its focal point. The current federal rule is the focal point for the identification and evaluation of the standards in the states because, since its enactment in 1975, most state rule makers have reviewed the federal rule and the standards reflected during its evolution in considering revision of their standard for admitting convictions to impeach.<sup>3</sup>

Part I of this article discusses in detail the original standards of the federal rule and tracks the evolution of that rule during the first three decades of its existence.<sup>4</sup> The discussion includes the identification of the policy decisions, and the lack thereof, reflected in the legislative history leading to the enactment of the original 1975 federal rule, and the single subsequent substantive amendment in 1990. This section also evaluates the United States Supreme Court's interpretation of the federal rule.<sup>5</sup>

Part II of this article tracks the evolution during the same three decades of changes in state evidence law to determine the degree to which state statutes or rules emulated the federal rule, as well as the degree to which state evidence codes mimicked the 1990 amendment to the federal rule.<sup>6</sup> As a result of this evaluation, this article organizes the fifty states' standards into three categories:

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<sup>3</sup> See *infra* notes 10-21, 24-26 and accompanying text.

<sup>4</sup> See *infra* notes 10-31 and accompanying text.

<sup>5</sup> See *infra* notes 22-23 and accompanying text.

<sup>6</sup> See *infra* notes 32-163 and accompanying text.

(1) those identical to the federal rule; (2) those more restrictively admitting convictions to impeach; and (3) those more liberally admitting convictions to impeach.<sup>7</sup> The bedrock finding of this study is that currently states use twenty-eight different rules or statutory standards to regulate the admission of convictions to impeach, and that in forty-one states these standards are different, sometimes drastically different, than the federal rule.<sup>8</sup>

The second purpose of this article, undertaken in the third and final part, is to evaluate the merits of this large array of rules regulating the admission of convictions to impeach. Achievement of this goal is premised first on the acknowledgement that a bedrock virtue of federalism is—except for those standards to which uniform adherence is required by the national constitution, fifty-one legislatures including the national Congress, or legislatively authorized decision-makers—subject to each state’s constitution to resolve the same issue differently based on history, hunch, policy, politics, or parochialism. This authority exists even when, as is the case with regard to the issue of admitting convictions to impeach, the federal standard was a known and potentially unifying standard. In this final part, the article evaluates whether it is “good federalism” when the result of this freedom of choice is the existence of twenty-eight different evidence standards with respect to the same issue of admitting convictions to impeach a witness.

This final part of the article first identifies and comments upon the most significant consequences of the existence of so many standards and then focuses upon the identification and evaluation of the plausible reasons for the existence of so many state standards regulating the admission of convictions to impeach.<sup>9</sup> Constitutional and policy bases for evaluating the possible reasons for this

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<sup>7</sup> See *infra* notes 39-40, 41-125, 126-163 and accompanying text.

<sup>8</sup> See *infra* notes 41-163 and accompanying text.

<sup>9</sup> See *infra* notes 164-232 and accompanying text.

diversity of standards are identified and evaluated. The article concludes with a recommendation that most states, as well as the federal government, should and must modify their current standard regulating the admission of convictions to impeach.

## II. Federal Rule of Evidence 609: Enactment, Official Commentary, and Evolution

When the federal rule regulating admission of convictions to impeach was proposed, revised, and finalized between 1969 and 1975, the national Congress and most states permitted the use of prior convictions of serious crimes, i.e., felonies, and misdemeanors involving dishonesty or false statements to impeach any witness.<sup>10</sup> By the time the federal rule was considered, the Advisory Committee noted that a modification to this standard, which required trial judges to balance exclusionary policies versus the probative value of the specific “felony” to prove a propensity to lie, had been adopted by the District of Columbia Court of Appeals and had received a great deal of scholarly and judicial attention.<sup>11</sup> During points in the

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<sup>10</sup> FED. R. EVID. 609, advisory committee’s note to 1972 Proposed Rules. The advisory committee commentary noted that both the Uniform Evidence and Model Evidence Rules only authorized the admission of convictions for crimes involving “dishonesty or false statement.” The advisory committee acknowledged that the selection of the standard expressed in the text was not the result of a policy evaluation examining the merits of alternative standards, but rather a decision to adopt current congressional policy as reflected in a District of Columbia statute, in which Congress adopted this standard. For a thorough review of the history of the enactment of the federal rule, see *Green v. Bock Laundry*, 490 U.S. 504, 511-21 (1989).

<sup>11</sup> FED. R. EVID. 609, advisory committee’s note to 1972 Proposed Rules. In *Luck v. United States*, 348 F.2d 763 (D.C. Cir. 1965), the court held that trial judges should balance the probative value of the conviction with regard to credibility against the unfair prejudice it would cause. *Id.* at 769. The decision allocated the burden of persuasion to the opponent of the conviction, most crucially the accused, to prove that prejudice far outweighed probative value. *Id.* The *Luck* court also identified guidelines that the trial judge should use

enactment process, both houses of Congress adopted standards that placed significantly greater restrictions on the admission of convictions to impeach than even the potential limits that would result from the balancing standard of the District of Columbia Court of Appeals.<sup>12</sup> The initial House version of the rule banned use of convictions to impeach any witness, except those for crimes of dishonesty or false statements, and the original Senate standard was almost as restrictive.<sup>13</sup> The Senate amended its standard, however, reverting back to the liberal majority admission standard of the times. The conference committee ambiguously modified that standard, to require a balancing evaluation when the conviction only qualified to impeach because it was punishable by more than one year in prison.<sup>14</sup> As the Advisory Committee recognized,

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in conducting the balancing evaluation including the age of the conviction, whether the conviction was relevant to prove dishonesty, and whether it was for the same or similar crime as the crime for which the accused is currently on trial. *Id.* The court also suggested that when exclusionary concerns, such as similarity, were present the trial judge should consider admitting only one conviction, or admitting such a conviction only if it was strongly probative of dishonesty. *Id.* at 768, n.8.

<sup>12</sup> FED. R. EVID. 609, advisory committee's notes to 1974 enactment of the federal rule. Additionally, the judge who wrote the *Luck* opinion sharply criticized the advisory committee's 1970 proposed draft, which authorized the admission of convictions for all felonies and all crimes of dishonesty or false statement. McGowan, *supra* note 1, at 7-13. While acknowledging that the broad balancing approach he asserted in *Luck* may not be the best approach, Judge McGowan noted that the advisory committee's approach on the merits was far worse because it was a potential violation of the most fundamental evidence principal that only relevant evidence should be admitted on an issue. *Id.*

<sup>13</sup> FED. R. EVID. 609, advisory committee's note to 1974 enactment of the federal rule. The Senate standard, if the accused was the witness, was the same as the House standard, but it also authorized the admission of other convictions against other witnesses. To qualify against such witnesses, a felony conviction had to undergo a balancing evaluation that evenly weighted and pitted against each other relevance to prove a propensity to lie versus the unfair prejudice that would result if the conviction was admitted.

<sup>14</sup> *Id.* The conference committee adopted a balancing scale that gave the same weight to the results of a probative value to prove a propensity to lie evaluation, and to an unfair prejudice evaluation, expressly pitting



however, implicit in this compromise is the unproven assumption that all records of convictions for crimes punishable by more than one year are relevant to prove a propensity to lie.<sup>15</sup>

As a result of this course of adoption, the federal rule that became effective in 1975 was so ambiguous, courts and commentators contended that it established either two or three standards to regulate the admission of convictions to impeach.<sup>16</sup>

The two standards interpretation read the rule to authorize the per se admission of evidence of a conviction for any "crime" of "dishonesty" or "false statement" to impeach a witness. These standards also excluded all other convictions for crimes punishable by a maximum term less than one year in prison. The rule as enacted failed to specifically define the concepts "crime," "dishonesty," or "false statement."<sup>17</sup> The second standard under the two

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them against each other, and also expressly stating that the balancing evaluation applied to the impeachment of any witness. In a non-sequential, subsequent paragraph, however, the advisory committee's note asserted that the Conference Committee concluded that the balancing protection was only warranted to protect the accused because only then was it even arguable that unfair prejudice would be greater than the loss of relevant evidence. The Conference Committee, without evidence that it was conscious of this decision and without reference to logic or empirical evidence to support its crucial assumption, decided that every conviction for every crime punishable by more than one year in jail was relevant to prove a propensity to lie. The Conference Committee therefore concluded that the balancing evaluation need only be undertaken when the witness was the accused or one of the accused's witnesses. Inexplicably, however, the Conference Committee failed to use the word "accused" in the final version of the rule it adopted, and the word that the committee used, "defendant," was also not defined in the rule.

<sup>15</sup> See discussion *infra* notes 192-99 and accompanying text.

<sup>16</sup> FED. R. EVID. 609(a) (1975).

<sup>17</sup> *Id.* In December 2006, the federal rule will be substantively amended. The amended rule will limit the evaluation of whether the underlying crime involved "dishonesty" or "false statement" to an analysis of the elements of the crime as charged and tried. FED. R. EVID. 609 (2006). The proponent of the conviction to impeach must prove that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness. *Id.*

standards interpretation of the federal rule as enacted authorized the admission of a conviction for a crime punishable by more than one year in prison against any witness, but only if the “crime”—perhaps also considering the circumstances surrounding the commission of the particular crime—made it relevant to prove a propensity to lie, and then only if exclusionary concerns did not outweigh its probative value.<sup>18</sup>

The three standards interpretation of the federal rule as enacted split this second standard. The first sub-standard was that any conviction for a crime punishable by more than one year in prison was per se admissible to impeach any witness, except criminal and civil defendants, or alternatively only the accused, criminal case defendant, and perhaps defense witnesses in a criminal case.<sup>19</sup> As to defendants, or perhaps just the accused, and arguably his witnesses, such convictions were only admissible when the crime—or perhaps circumstances surrounding the commission of the specific crime—made it relevant to a prove propensity to lie, and then only if exclusionary concerns did not outweigh its probative value.<sup>20</sup> These differences in interpreting the enhanced federal rule were caused by the fact that the standard concluded with a specific reference to the “defendant”—a concept not defined by the rule. Examined in context, the specific reference to the defendant suggested only that category of witnesses were protected by the sequential relevance and exclusionary balancing evaluations.<sup>21</sup>

In 1989, the United States Supreme Court resolved the ambiguity in a five to three decision. The Court

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<sup>18</sup> *Id.* FED. R. EVID. 609 advisory committee’s note to 1972 Proposed Rules. The advisory committee noted that the rule adopted a functional definition of serious crime based on congressional views of what was a serious crime, rather than using the term “felony,” which the committee noted was defined differently in various states.

<sup>19</sup> FED. R. EVID. 609(a)(1) (1975).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

adopted the most liberal admission of the three standards view of the enacted federal rule's regulation of convictions to impeach—limiting the balancing evaluation protection to only the accused, and perhaps witnesses of the accused.<sup>22</sup> In adopting the three standards interpretation, the Court placed the most emphasis on its review and evaluation of the five year legislative history of the rule. The Court concluded that the majority standard in state and federal practice prior to 1969 was even more liberal in admitting convictions to impeach.<sup>23</sup>

Just one year later, however, Congress modified the Court's interpretation of the rule.<sup>24</sup> Although the Court's interpretation was modified, the amended rule retained a three standards approach. The amended rule kept what this article has referred to as standard one, shared by both interpretations of the enacted rule, which per se admitted convictions for crimes of “dishonesty” or “false statement” to impeach any witness. The amended rule also retained the Court's second standard which provided more protection to the accused and arguably his witnesses by imposing the equally weighted balancing evaluation before admitting convictions to impeach solely because the underlying crime was punishable by more than a year in prison. The amendment changed the third standard as interpreted by the Supreme Court. The amendment adopted a balancing evaluation tilted towards admission for all other witnesses when the sole basis for offering the conviction to impeach was the fact that the underlying crime was punishable by more than a year in prison.<sup>25</sup> This

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<sup>22</sup> *Green v. Bock Laundry*, 490 U.S. 504, 527-30 (Scalia, J., concurring); *Id.* at 530-35 (Blackmun, Marshall, and Brennan J.J., dissenting).

<sup>23</sup> *Id.* at 511-24.

<sup>24</sup> FED. R. EVID. 609 (1990).

<sup>25</sup> *Id.* But see Uviller, *supra* note 1, at 817 (surveying federal trial judges and concluding that the “apparent textual difference” with regard to the specific balancing standard for the accused in Rule 609 and the Rule 403 balancing standard for all other witnesses does not

revised third standard expressly incorporated by reference the overall generic admissibility balancing standard of the evidence rules, which requires a finding that the injury to enumerated exclusionary policies, including unfair prejudice, does not substantially outweigh the probative value of the proffered evidence.<sup>26</sup>

Several perspectives should be identified concerning the federal rule regulating the admission of convictions to impeach, including its enactment history and content before tracking the standards maintained, enacted, and revised by the state legislatures and supreme courts since 1975. First, Federal Rule of Evidence 609, as revised in 1990, is still the current three standards scheme for regulating the admission of convictions to impeach in federal court.<sup>27</sup>

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establish a meaningful difference in the evaluation of admissibility of a prior conviction as proof of a propensity to lie as perceived or applied).

<sup>26</sup> FED. R. EVID. 609. In the federal rules, and in many state evidence rules, the generic policy-balancing rule is numbered 403. *See, e.g.*, FED. R. EVID. 403.

<sup>27</sup> *But see* discussion of the first substantive amendment of the standards since 1990, effective December 2006, *supra* note 17. As enacted and retained to date, the federal rule included four additional subordinate admission guidelines that come into play once a conviction first qualifies under one of the three basic admission standards. First, the rule excludes otherwise qualified convictions when there is a form of official recognition of rehabilitation provided the accused was not subsequently convicted of a felony, or there was a form of official recognition that in fact the accused was innocent of the crime for which he was convicted. FED. R. EVID. 609(c). Second, the rule excludes otherwise qualified convictions if they are in fact juvenile adjudications, unless the constitution mandates their admission. FED. R. EVID. 609(d). Third, the rule presumptively excludes otherwise qualified convictions which were entered ten years prior to the current trial if no jail time was imposed, or ten years after release if jail time was imposed. The proponent can overcome this presumption only if he gives notice and shows that, in the interest of justice, the probative value of such an old conviction substantially outweighs its prejudice based on specific facts and circumstances. FED. R. EVID. 609(b). Finally, the rule provides that the pendency of an appeal does not bar the use of an otherwise qualified conviction, but the fact that the appeal is pending is also admissible. FED. R. EVID. 609(e).

The rule has never addressed two important related procedural issues. First, it does not address the issue of whether the opponent of

Second, the legislative history of the rule, at least by implication, acknowledged that its significance depended upon the liberality of the rule admitting convictions substantively.<sup>28</sup>

Third, inexplicably, with regard to the per se admission standard, the federal rule drafters and reviewers have never seen fit either to define “dishonesty” or “false statement,” as those two terms are used in Federal Rule of Evidence 609, or to explain why they employed two terms rather than employing a single concept. This omission has endured despite the fact that the congressional Conference Committee in finalizing the rule expressly stated a more precise set of qualifying criteria when it identified, by crime example and residuary language, an intent to limit

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the admission of such a conviction, especially the accused, must testify at trial to preserve his right to appeal a decision to admit a conviction to impeach. A majority of states authorize the use of a motion in limine or comparable pre-trial hearing procedure to test the admissibility of a conviction to impeach prior to trial, in order to facilitate sound trial strategic decisions including which key witnesses, especially the accused, will testify at trial. In *United States v. Luce*, 469 U.S. 38 (1984), the Supreme Court placed the federal legal system in the minority of state systems by holding that an accused could not appeal the denial of a motion in limine which sought to exclude admission of a prior conviction to impeach, unless the accused takes the stand and is impeached with that conviction. This decision enhanced that the likelihood the accused will choose not to testify. In 1999, however, the federal rules of evidence were amended (specifically FED. R. EVID. 103) making it clear that the loser of a properly preserved pre-trial evidentiary ruling need not revisit that issue during trial in order to preserve the right to appeal the pre-trial ruling. The advisory committee’s note to the amendment, however, claimed that it was not an attempt to codify or overrule *Luce*. Second, when a conviction is admitted to impeach, the opponent is entitled in most jurisdictions to an immediate limiting instruction—the jury must be told that the conviction cannot be used to decide the merits of the case.

<sup>28</sup> During its consideration of the rule in 1970, the Senate made specific reference to the companion substantive rule (FED. R. EVID. 404) and the possibility that a conviction could be admitted to convict in a criminal case if it qualified under the exceptions to the normal substantive exclusionary principle. The Senate also referred to the possibility of admitting a conviction for specific impeachment purposes when a witness “opened the door” by denying the existence of such a conviction.

per se admission to a narrow range of crimes whose elements made the conduct—if not the record of conviction—relevant to prove a propensity to lie.<sup>29</sup> The committee identified specific offenses satisfying the definitions including: perjury, subordination of perjury, false pretense, false statement, fraud, embezzlement, and other crimes the commission of which per se involves *crimen falsi*—the accused engaged in an untruth, a falsehood, or deceit.<sup>30</sup>

Fourth, and most importantly to this study of federalism, the federal standard has been the only pervasive benchmark referred to by state lawmakers in considering or reconsidering the appropriate standard to adopt since 1975.<sup>31</sup> The next section of this article reports on what the state rule makers have decided, bearing in mind, that each state had the option of retaining their pre-1975 rule, or adopting, modifying, or rejecting each of the three federal rule standards for admitting convictions to impeach.

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<sup>29</sup> FED. R. EVID. 609, advisory committee's note to 1974 enactment of the federal rule. *But see* discussion of the December 2006 amendment of this standard *supra* note 17. This amendment is designed to finally provide textual recognition of the advisory committee's position.

<sup>30</sup> *Id.*

<sup>31</sup> Evidence authorities have asserted that as many as forty-three states have modeled their evidence rules after the federal rules. *Preface to* MICHAEL H. GRAHAM, *FEDERAL RULES OF EVIDENCE* (NUTSHELL) (West 2003). Numerical evidence that the federal evidence rules, and at least its numbering of the federal rule regulating the admission of convictions to impeach, is illustrated by the fact that twenty-seven of the thirty-one states with the same substantive standard, or with a more restrictive standard, have numbered their rule regulating this issue with an identical or a very similar number. *See infra* notes 39, 41.

**III. State Evidence Rules Regulating the Admission of Convictions To Impeach—A Conceptual Ranking of the Liberality of Their Admission Standard(s) Organized in Three Categories Based on Whether the States' Standard(s) are Identical To, More Restrictive, or More Liberal Than the Standards of the Federal Rule**

**A. The Premises and the Bases for the Premises for Ranking the State Rules**

In this section the fifty states' standards are organized into three categories: (1) those identical to the federal rule; (2) those more restrictively admitting convictions to impeach; and (3) those more liberally admitting convictions to impeach. Within the latter two categories—in order to accurately present the full magnitude of the diversity of the states' rules regulating the admission of convictions to impeach—the article groups similar, more liberal, or more restrictive state rules and discusses them sequentially beginning with the most liberal and most restrictive state rules, and ending with the states whose standards are only slightly more restrictive or more liberal than the federal rule.

The primary premise for ranking rules on the continuum from most restrictive to most liberal with regard to admission of convictions to impeach is the quantity of convictions they authorize for automatic admission. In identifying the quantity of convictions, this article recognizes that the rules most often make reference to broad crime categories in authorizing automatic admission of convictions to impeach, and that overall data is available only to determine the quantity of convictions by relatively broad crime categories rather than by individual crime. What we do know, for example, is that several state rules do automatically authorize admission to impeach with

convictions for “felonies,” a broad category of crimes most frequently defined as those crimes punishable by imprisonment for more than one year. We also know that state courts collectively convict approximately one million persons each year of such offenses.<sup>32</sup>

Second, this article employs the following assumption about one of the most frequent categories of convictions—those involving crimes of “dishonesty” or “false statement” for which many state rules authorize automatic admission to impeach. Many of the state rules, following the pattern in the federal rule described in Part I, authorize such admission, without defining “dishonesty” or “false statement.” In ranking the state rules, it was necessary to provide a definition for these concepts in order to quantify the number of convictions which automatically be admitted to impeach any witness. The most appropriate definition is found in the official commentary and

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<sup>32</sup> In 2002, the most recent year for which national data is available, state courts convicted about 1,051,000 adults of a felony. Although each state’s definition of the term felony varies, most states define it as a crime punishable by a minimum term of more than one year in prison. This is the same way that felony is defined in Federal Rules of Evidence in determining what types of convictions can be used to impeach a witness. In 2000, state courts convicted an estimated 924,700 adults of a felony. In 1998, state courts convicted an estimated 930,000 adults of a felony. U.S. Dept. of Justice, Office of Justice Program, Bureau of Justice Statistics, Bulletins, *Felony Sentences in State Courts* (2000, 2002, 2004). Every two years, the federal Bureau of Justice Statistics conducts a survey of state “felony” convictions. The survey also reports the number of felony convictions in the federal system for that same year. In conducting the survey, however, the OJS does not require or even suggest that the sampled state counties adhere to a uniform definition of the word “felony” in reporting their data. There is some variation on how that term is defined in the states. See *infra* note 82 and accompanying text. At the end of 2004, there was still no systematic collecting and reporting of the number of convictions for crimes punishable by a maximum term of imprisonment of less than one year, although the National Center for State Courts has begun a project to collect such data, which they hope to report sometime in 2005. Based on data from individual states, the number of convictions, if not the number of adults convicted for such offenses, is at least two and one-half to three times as great as the number of “felony” convictions.



legislative history of the federal rule.<sup>33</sup> Based on this definition, at most, ten percent of all convictions for crimes punishable by any term of imprisonment are properly characterized as involving “false statements” or “dishonesty.”

The third, and sequential, premise for ranking states’ rules on a continuum from most restrictive to most liberal is the quantity of convictions they authorize for possible discretionary admission, and the degree to which the rule standards tilt the exercise of that discretion towards admission. A state rule could employ one of three progressively more restrictive balancing standards, pitting exclusionary policies, especially unfair prejudice, against the relevance of the conviction to prove a propensity to lie.<sup>34</sup> Of course, convictions, which under a state’s standards do not qualify for either automatic or discretionary admission are subject to per se exclusion, and the evaluation scheme also must account for the percentage of convictions in a given state that are in this third category. The scheme must assign weight to the significance of the automatic admission and exclusion categories as well as to the three incremental discretionary admission standards. The automatic categories were given more weight because such rules eliminate the exercise of judicial discretion in most states. Further support for this weighting decision comes from the study of state supreme court cases for this same fifteen year period.

The next major premise for ranking states’ rules on the continuum from most restrictive to most liberal is that the standards for admitting convictions to impeach the accused are as important as the standards regulating the

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<sup>33</sup> See *supra* notes 29-30 and accompanying text.

<sup>34</sup> The federal rule employs both the discretionary standard tilted towards admission and the neutral standard. See *supra* notes 20, 25-26 and accompanying text. For an analysis of state rules that employ the discretionary standard tilted towards exclusion, see *infra* note 79 and accompanying text.

admission of convictions to impeach all other witnesses, and therefore both categories of witnesses were given independent and equal weight in determining the degree of liberality of each state's rule. The basis of this premise is that during the period of this study the substantial majority of state supreme courts' decisions on this issue involved the propriety of admitting convictions to impeach the accused.<sup>35</sup> In addition, empirical research findings include those in which the verdicts of "jurors" and "juries" were significantly influenced by the admission of convictions to impeach the accused, as well as findings that the influence on jurors was greater when convictions were admitted against the accused as compared to other types of witnesses including civil parties.<sup>36</sup> As already discussed, the federal rule and a majority of state rules, reflect the rule makers' decision to consider the admission of convictions to impeach the accused separately from the standards for other witnesses.<sup>37</sup>

The final related, but less significant premise, is that impeachment rules are specifically applicable only to the parties to civil litigation, and are as important as those rules that regulate the examination of non-party witnesses in civil and criminal cases. Therefore, when a state rule has a different standard for civil parties than for non-parties, the two sets of rules are given equal weight in determining the degree of liberality of each state's rule in admitting convictions to impeach. The basis of this premise is twofold. First, cases such as *Green*, demonstrate the grave

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<sup>35</sup> See Holley, *supra* note 2.

<sup>36</sup> For a study usually referred to as the most comprehensive study of the effect of the admission of convictions on actual juries, see HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY*, (Little Brown 1966) (reviewing study of the performance of actual juries and concluding that the introduction of an accused's prior record for any purpose increased the likelihood of conviction by 27%). For a discussion of other studies reaching similar conclusions, see *infra* notes 209-18 and accompanying text.

<sup>37</sup> See *supra* notes 20, 25 and accompanying text; *infra* notes 39, 44, 52, 59, 70, 102, 105-07, 161 and accompanying text.

consequences that can result when convictions are admitted to impeach the testimony of a party witness. Second, empirical research reveals that when convictions are admitted against civil parties, as compared to non-party witnesses, there is a greater likelihood the outcome will be influenced.<sup>38</sup>

<sup>38</sup> See discussion of *Green*, *supra* notes 22-23 and accompanying text. With regard to empirical evidence, see *infra* notes 209-18 and accompanying text. Mississippi, *infra* note 123, is the only state which in fact has a completely separate standard for civil parties, but Louisiana, *infra* note 137, has a separate rule for all civil witnesses including the parties, in comparison to the rule for all criminal witnesses including the accused. In addition, Virginia, *infra* note 154, has by court decision applied its criminal trial standard for admitting convictions only to civil party witnesses. When these premises are taken together they produce an evaluation scheme that could be represented by the following "scale":

Conceptual Outline – Chart-Numerical Format  
Justifying The Hierarchy and the Respective Rankings  
MOST POINTS = MOST RESTRICTIVE

| Cvs of crimes for which max penalty is less than one year | Cvs of crimes for which max penalty is more than one year |
|---|---|
|---|---|

Note: Assumption crimes of "Dishonesty or False Statement"

10% or less of all convictions in both of above categories

| Auto Admit |           | Auto Exclude | Auto Admit |           | Auto Exclude |
|------------|-----------|--------------|------------|-----------|--------------|
| 1          | 2         | 3            | 4          | 5         | 6            |
|            | Balancing |              |            | Balancing |              |
|            | a b c     |              |            | a b c     |              |

Point allocation for each of above 10 categories

|   |        |    |   |        |    |
|---|--------|----|---|--------|----|
| 0 | 6 8 10 | 16 | 0 | 6 8 10 | 16 |
|---|--------|----|---|--------|----|

FRE Score = 41.4

|          |         |            |         |           |
|----------|---------|------------|---------|-----------|
| FRE Acc" | 0 (10%) | 14.4 (90%) | 0 (10%) | 7.2 (90%) |
| FRE AOW" | 0 (10%) | 14.4 (90%) | 0 (10%) | 5.4 (90%) |

The next subsection identifies the states whose current rules mimic the federal rule. This subsection is followed by the ranking of states which more restrictively admit convictions to impeach than the federal rule, and a subsection ranking the states which more liberally admit convictions to impeach than the federal rule.

### **B. States with Rules That Employ the Same Standard as the Federal Rule's Standard for Admitting Convictions to Impeach**

By 2004, nine of the fifty states by rule admitted convictions to impeach using the same three standards as the federal rule.<sup>39</sup> The rules in most of these states reflect

**State Scores**

|               |                                     |                                   |                        |
|---------------|-------------------------------------|-----------------------------------|------------------------|
| Mont. = 64    | W. Va. = 51.6                       | Ark., Del., Minn., & Wash. = 43.2 | Va. = 28               |
| Haw. = 62     | Vt. = 50.6                          | Miss. = 42.3                      | Or. = 27.2/28          |
| Alaska = 60.8 | Idaho = 48                          | Ill. = 42                         | R.I. & Wis. = 24       |
| Kan. = 60.8   | Ariz., Me., Md., S.D., & Tex = 46.2 | <b>FRE = 41.4</b>                 | La. = 14.6             |
| Pa. = 57.6    | Conn. = 46                          | N.H. = 36                         | N.J. = 12              |
| Mich. = 56.65 | Ga. = 44.8                          | Ca., Colo., Ky., & Nev. = 32      | N.C. = 9.6             |
| Ind. = 52.4   | Tenn. = 44.2                        | Fla. & Neb. = 28.8                | Mass., Mo., & N.Y. = 0 |

<sup>39</sup> ALA. R. EVID. 609 (2004) (adopted effective January 1, 1996); IOWA R. EVID. 609 (2004) (using the same definition of "felony" after substantive amendments in 1996 aligned it with the definition used in the post 1990 federal rule); N.M. R. EVID. 11-609 (2004) (emulating the federal rule amendment pattern by revision in 1991 to reflect 1990 amendment of FED. R. EVID. 609(a)); N.D. R. EVID. 609 (2004) (originally modeled after 1974 version of the Uniform Rules of Evidence, but with subsequent amendments this amendment substantively tracks the 1990 amendment of federal rule); OHIO R. EVID. 609 (2004) (enacted in 1980, amended in 1991, the effect of which was to make the state rule, for the first time, identical to the federal rule); 12 OKLA. STAT. ANN. § 2609 (2004) (original rule effective in 1978, and amended effective 1991); S.C. R. EVID. 609 (2004) (enacted and effective in 1995); UTAH R. EVID. 609 (2004) (enacted in 1980); WYO. R. EVID. 609 (2004) (requiring a 403 balancing evaluation for witnesses other than the accused with the

an enactment process that closely compared the states' rules to the federal rule, and were either enacted after 1991 or amended during the 1990s to track the amendment to the federal rule following the Supreme Court's decision in *Green*.<sup>40</sup> Like the federal rule they mirror, these rules originally failed to define and continue to fail to define which crimes involve "dishonesty" and "false statement."

### **C. States With More Restrictive Rules Regarding Admission of Convictions to Impeach Than FED. R. EVID. 609**

By 2004, twenty-four of the fifty states by rule, statute, court decision, or a combination thereof placed greater overall restrictions than the federal rule on the admission of convictions to impeach.<sup>41</sup> The rules of these

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substantive amendment effective in 1992).

<sup>40</sup> ALA. R. EVID. 609 (2004); IOWA R. EVID. 609 (2004) (defining "felony" in the same way as the federal rule); N.M. R. EVID. 11-609 (2004) (enacted in 1976, and emulating the FED. R. EVID. amendment pattern by revision in 1991 to reflect the 1990 amendment of the federal standard); N.D. R. EVID. 609 (2004); OHIO R. EVID. 609 (2004) (enacted in 1980 and requiring even balancing of probative value for lying against unfair prejudice, confusion of the issues, or misleading the jury if the witness is the accused in a criminal case. The original 1980 rule did not include a balancing reference because the Staff Notes asserted that the federal rule at that time could be interpreted to require policy evaluation for only the defendant in a criminal case. The intent was to make the admission more restrictive by requiring a Rule 403 balancing analysis with regard to all witnesses.); OKLA. STAT. ANN. § 2609 (2004) (original rule effective in 1978. The 1991 amendment aligned the Ohio rule with the 1990 change in the federal rule to require balancing for all witnesses except the accused); UTAH R. EVID. 609 (2004) (amended in 1992 to track the 1990 amendment to the federal rule); WYO. R. EVID. 609 (2004) (employing identical language as the federal rule, and a key substantive amendment with regard to requiring a standard of balancing for witnesses in civil cases was added around 1992 which resulted in the Wyoming rule constituting the same standard as the post-1990 federal rule).

<sup>41</sup> ALASKA R. EVID. 609 (2004) (effective 1979, amended effective 1994); ARIZ. R. EVID. 609 (2004) (originally enacted in the mid-1970s); ARK. R. EVID. 609 (2004); CONN. R. EVID. § 6-7 (2003) (enacted after 1995); DEL. CODE ANN., UNIFORM R. EVID. 609 (2004) (enacted in

twenty-four states employ seventeen distinct standards. In the following discussion, similar, more restrictive state rules will be grouped and discussed sequentially beginning with the most restrictive rules, and proceeding to the states' rules whose standards are only slightly more restrictive than the federal rule.

States which by rule impose greater restrictions than the federal rule on the admission of convictions to impeach include Montana, which bans the use of convictions to impeach.<sup>42</sup> This blanket prohibition of the use of convictions to impeach was based on several policy reasons. The most important of these reasons to the drafters of the Montana rule was their evaluation that the mere existence of a conviction has low probative value to prove a propensity to lie, and in those instances where conduct underlying the conviction is probative of lying,

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1980); GA. STAT. ANN. §§ 24-9-20, 24-9-84 (2004) (combining substance of FED. R. EVID. 608 and 609); HAWAII R. EVID. 609 (2004) (effective 1981); IDAHO R. EVID. 609 (2004) (rule adopted and became effective in 1985 and the amended rule became effective in 1998); IND. STAT. REV. R. 609(a) (2004) (enacted in 1994); KAN. STAT. ANN., § 60-421 (2004) (effective 1964); ME. R. EVID. 609 (2004) (amended effective 1978, 1985, 1990, and 1992); MD. R. EVID. 5-609 (2004) (adopted 1994) (overriding the conflicting statutory provision contained in MD. CODE ANN. § 10-905); MICH. R. EVID. 609 (2004) (enacted in 1978, and amendments effective in 1980 and 1988); MINN. R. EVID. 609 (2004) (enacted between 1978 and 1980); MISS. R. EVID. 609 (2004) (as amended in 2002); MONT. CODE ANN. § 26-10-6, Rule 609 (2004) (originally effective in July 1, 1977, and then amended by Supreme Court Order on June 7, 1990); PA. R. EVID. 609 (2004) (effective 1998); S.D. CODIFIED LAWS § 19-14-12, Rule 609 (2004) (effective date around 1980); TENN. R. EVID. 609 (2004) (effective 1990); TEX. R. EVID. 609 (2004) (effective 1998); VT. R. EVID. 609 (2004) (current restrictive substantive form of the rule, as discussed *infra* notes 74-80, is the result of an amendment in 1989. The amendment eliminated the historical standard of qualifying convictions to impeach because they qualified as crimes of "moral turpitude."); WASH. R. EVID. 609 (2004) (originally effective in 1979, and 1988 amendment requires a balancing evaluation for all witnesses, not just the accused, in a criminal case); W. VA. R. EVID. 609 (2004) (effective 1985); *People v. Montgomery*, 268 N.E.2d 695 (Ill. 1971).

<sup>42</sup> MONT. CODE ANN. § 26-10-6, Rule 609 (2004).

another evidence rule allowed admission of such conduct.<sup>43</sup>

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<sup>43</sup> Mont. Code Ann. § 26-10-6, Rule 609 (2004) cmt. The Montana Evidence Commission Comments following the rule stated:

This rule is unlike either the FED. R. EVID. 609 or Uniform Rules of Evidence Rule 609 in that they both provide that evidence of conviction of a crime is admissible for the purpose of attacking credibility. However, both rules place substantial limitations upon the admissibility of this type of evidence including: (a) the discretion of the court; (b) a time limit; and (c) a pardon, annulment, or certificate of rehabilitation making such evidence inadmissible.

FED. R. EVID. 609(a), (b), (c); UNIFORM R. EVID. 609(a), (b), (c) (1974). The latter subdivision also provides an "other equivalent procedure" and makes conviction inadmissible; while Montana does not have a certificate of rehabilitation, MONT. CONST. art. II § 28; Section 95-2227(3), R.C.M. 1947 46-18-801. However, both provide that when a person is no longer under state supervision, his full rights of citizenship are restored. Adoption of this provision would mean that only those persons serving a sentence in prison, serving a suspended sentence, or on parole could be impeached by this method, which would severely limit the usefulness of the rule.

The Commission rejected the rule allowing impeachment by evidence of conviction of a crime, not only because of these Constitutional and statutory provisions, but also, and most importantly because of its low probative value in relation to credibility. The advisory committee does not accept as valid the theory that a person's willingness to break the law can automatically be translated into a willingness to give false testimony. FED. R. EVID. 609, advisory committee's note to 1969 Proposed Rule). The advisory committee believed that being convicted of a certain crime is probative of a person's credibility; however, the committee believed that the specific act of misconduct underlying the person's conviction is relevant, not whether his or her conduct has led to a conviction. Allowing the admission of a conviction for impeachment purposes merely because it is a convenient method of proving the act of misconduct is not acceptable to the advisory committee, particularly in light of FED. R. EVID. 608(b), which admits acts of misconduct if they relate to credibility. Furthermore, the advisory committee felt that, in addition to the reasons for rejecting the rule stated above, the present Montana practice could lead to one of two undesirable results. First, the mere fact that a witness can be asked whether he has been convicted of a felony can, in many instances, cause severe embarrassment to the witness. This is particularly uncalled for where the conviction has no relation to credibility, such as manslaughter caused by an automobile accident. This could cause many witnesses to decide not to testify at all or, when the witness is a party, not to present or defend his side of the case at all. The fact that the witness can explain his conviction can

Hawaii has the second most restrictive rule among those states whose rules admit convictions to impeach more restrictively than the federal rule. The Hawaii rule establishes two standards, one limits admission to only convictions of crimes involving “dishonesty” for all witnesses except the accused, and the other bans the use of convictions to impeach the accused, unless she first offers evidence to bolster her own credibility.<sup>44</sup> “Dishonesty” is not defined in the Hawaii Rule.<sup>45</sup>

This standard therefore protects all witnesses, including the accused, to a much greater extent than the federal rule. First, it removes the discretion afforded to judges to balance the unfair prejudice against the probative value of a conviction as proof of a propensity to lie based solely on the hunch that a maximum punishment of over a year for that offense per se means that such a conviction is minimally relevant on this issue. In effect, Hawaii has limited the admissibility of convictions to impeach by rule, except for the accused, to only a portion of those convictions that are automatically admitted against all witnesses under the federal rule. The reasons for adopting this significantly more restrictive approach include references to state constitutional provisions and

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simply add to the embarrassment and is not helpful. Second, when the witness answers that he has been convicted of a crime, no further inquiry is permitted. This can lead to confusion by jury members who see no connection between the conviction of a crime and the case or to undue prejudice, particularly when the witness is a defendant testifying on his own behalf. *Id.*

<sup>44</sup> HAWAII R. EVID. 609 (2004).

<sup>45</sup> HAWAII R. EVID. 609 cmt. (asserting that rule is meant to encompass crimes involving false statement and giving “perjury” as a specific example of such a crime). Like the federal rule, this is another instance in which the drafters of the Hawaii rule would have done a better job if they had either defined a crucial concept in the rule, here “dishonesty,” in accord with their commentary, or eliminated the concept completely. If the drafters eliminated the concept and simply inserted one concrete qualifying crime in the rule or simply added the language “and other crimes whose elements require proof of a false statement,” the rule would provide guidance to which crimes come within the scope of the rule.



interpretations thereof which have resulted in banning the use of prior convictions to impeach the accused.<sup>46</sup> Even more significantly, one of the reasons given for the broader exclusionary rule, which makes the rule even more exclusionary than it appears on its face, is the policy finding that the mandatory admission of any conviction is wrong because it displaces, without adequate policy justification, the pervasively applicable evidence policy balancing rule—Federal Rule of Evidence 403—and its state equivalents.<sup>47</sup> The commentary explains that the rule was drafted with the intent that when convictions for crimes of “dishonesty” were offered to impeach witnesses other than the accused, they should only be admitted if their probative value as proof of a propensity to lie was not substantially outweighed by exclusionary policy concerns, including unfair prejudice.<sup>48</sup>

Alaska has the third most restrictive rule among those states whose rules admit convictions to impeach more restrictively than the federal rule. This rule limits admissibility to convictions of crimes which involve “dishonesty” or “false statement” for all witnesses, but only if the probative value of such convictions to prove a propensity to lie outweighs the prejudicial effect.<sup>49</sup> The Alaska rule is therefore, in contrast to the federal and most state rules, a single standard rule. In contrast to the federal rule, the Alaska rule eliminates the admission of convictions based solely on the maximum sentence proscribed for the underlying crime, as well as differential treatment of the accused. Crimes of “dishonesty” and “false statement” are not defined in the Alaska rule.<sup>50</sup>

Kansas has the fourth most restrictive rule. This rule limits admissibility to convictions involving

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> ALASKA R. EVID. 609 (2004).

<sup>50</sup> *Id.*

“dishonesty” or “false statement” to impeach all witnesses except the accused, but requires the automatic admission of such convictions without consideration of prejudice and other exclusionary policies.<sup>51</sup> The Kansas rule adopts a two standards approach, eliminating the federal rule’s authorization of the potential admission of convictions to impeach based solely on the fact that the maximum sentence authorized for the underlying crime was for more than one year. This rule mirrors the focus of the federal rule’s first standard of admission, but excludes the accused. Overall, the Kansas rule is a hybrid of the Hawaii and Alaska standards. It is less restrictive than the Alaska standard because it does not require consideration of exclusionary concerns before any crime deemed to be one involving dishonesty or false statement can be admitted to impeach a witness other than the accused. With regard to the accused, this standard employs the same standard as that of Hawaii—banning use of convictions to impeach unless the accused first introduces evidence for the sole purpose of bolstering his credibility.<sup>52</sup>

The Kansas standard restricts the use of convictions to impeach one class of witnesses—the accused—more than the Alaska standard, but more liberally admits convictions to impeach all other witnesses than the Alaska standard. It is ranked fourth despite the fact it received the same “score” as Alaska because, while protection of the accused is co-equal with the need to protect the aggregate of all other witnesses for the purposes of this article, the Alaska standard is comparatively more protective of the accused than the Kansas statute is of all other witnesses.<sup>53</sup> The Kansas rule also fails to define “dishonesty” or “false statement.”

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<sup>51</sup> KAN. STAT. ANN. § 60-421 (2004).

<sup>52</sup> *Id.*

<sup>53</sup> For a discussion of the basis for the co-equal “ranking” of the accused with all other witnesses, see *supra* notes 35-37 and accompanying text.

Pennsylvania has the fifth most restrictive rule. This rule limits admissibility for all witnesses to only those convictions which are for crimes that involve “dishonesty” and “false statement” and does not have an express exception in the text of the rule for the accused.<sup>54</sup> The Pennsylvania standard is more restrictive than the federal rule because it eliminates the admission of convictions to impeach for all witnesses based solely on the maximum length of potential punishment for the crime. However, the rule is more liberal than some component of the preceeding four state standards because it admits all convictions for crimes of “dishonesty” and “false statement” against all witnesses without a balancing evaluation.<sup>55</sup> As such, the Pennsylvania rule is like the Alaska rule because it adopts a single standard of admissibility for all witnesses. In fact, it is almost identical to that Alaska standard except it eliminates the protection provided by the balancing of exclusionary policy concerns against the probative value for impeachment purposes of a conviction for a crime involving “dishonesty” or “false statement.” The Pennsylvania rule also does not define which crimes involve “dishonesty” and “false statement.”<sup>56</sup>

Michigan has the sixth most restrictive rule among those states whose rules admit convictions to impeach more restrictively than the federal rule. This rule applies to all witnesses, including the accused and is like the federal rule because it authorizes the per se admission of convictions for crimes which contain an element of “dishonesty” or “false statement.” The Michigan rule, however, is more restrictive than the federal rule because it only authorizes the admission of felony convictions, which have a theft

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<sup>54</sup> PA. R. EVID. 609 (2004) (making a cross-reference to a statute which prohibited the use of otherwise qualified convictions to impeach the accused in a criminal case during cross-examination, but authorized admission during rebuttal).

<sup>55</sup> *Id.*

<sup>56</sup> The official commentary to the rule does not define these concepts.

element for all witnesses other than the accused.<sup>57</sup> With regard to these theft felonies, a Michigan judge is only authorized to admit such a crime to impeach if she finds “significant” probative value on the issue of credibility, but she does not then have to evaluate whether that probative value outweighs unfair prejudice or other exclusionary policies.<sup>58</sup> With regard to the accused, the Michigan rule restricts the admission of felony theft convictions to impeach to those that not only satisfy the “significant” probative value to prove a propensity to lie requirement, but also requires that once that level of probative value is found by the trial judge, she must then determine that the probative value outweighs the prejudicial effect that will result from its admission.<sup>59</sup> Michigan is one of the few states whose rule includes express guidelines for how to evaluate “probative value” and “unfair prejudice.”<sup>60</sup>

The Michigan rule, like the federal rule, adopts a three standards basis for considering the admission of convictions to impeach, but is more restrictive than the federal rule with regard to the standards authorizing the admission of convictions based in whole or in part on the maximum punishment for the crime. Michigan is also the first state in this discussion of progressively less restrictive rules to potentially admit convictions to impeach against all kinds of witnesses based on a particular crime (felony theft) which is not within the rule’s definition of “dishonesty” or “false statement.” Although the Michigan rule does not define which crimes involve “dishonesty” or “false

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<sup>57</sup> MICH. R. EVID. 609 (2004).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> MICH. R. EVID. 609(b) (“The court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction’s similarity to the charged offense and the possible effects on the decisional process, if admitting the evidence causes the defendant to elect not to testify. The court must articulate on the record, the analysis of each factor.”)

statement,” by logical implication the rule takes the position that theft, even felony theft crimes, do not qualify as crimes of “dishonesty” or “false statement.”<sup>61</sup>

Indiana has the seventh most restrictive rule.<sup>62</sup> This rule authorizes the admission of evidence that any witness including the accused was convicted of nine specified serious crimes or attempts of those crimes, as well as all crimes of “dishonesty” or “false statement.”<sup>63</sup> For some reason, probably historical, “perjury” is included among the laundry list of specified offenses despite the fact that it is obviously a crime of “false statement.”<sup>64</sup> Significantly, perjury is the only crime among those listed which by element analysis satisfies even the minimum admission standard of being logically relevant to prove of a propensity to lie.<sup>65</sup> Moreover, the Indiana rule continues the almost universal pattern of failing to define “dishonesty” or “false statement.”<sup>66</sup>

The Indiana rule adopts a two standards approach in contrast to the federal rule’s three standards. The Indiana and federal rules are identical for all witnesses with respect to the standard for admitting convictions to impeach based on crimes punishable by less than a year in jail, *per se* excluding the vast majority of such convictions as impeachment evidence. The Indiana rule, however, *per se* excludes a much higher percentage of all convictions for crimes punishable by more than a year in prison for all

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<sup>61</sup> *Id.* No mention is made of the definition of these concepts in the official commentary to the rule.

<sup>62</sup> IND. R. EVID. 609(a) (2004).

<sup>63</sup> *Id.* The specific crimes identified in the rule are arson, burglary, criminal confinement, kidnapping, murder, perjury, rape, robbery, and treason. *Id.* Including attempts of these crimes does not expand the number of qualified crimes to possibly include misdemeanors because the Indiana Penal Code provides that attempts are graded the same as the completed crime; IND. CODE § 35-41-5-1 (2004).

<sup>64</sup> *Id.* The Committee Commentary expressly asserted that the rule reflected an express policy decision to preserve prior Indiana law.

<sup>65</sup> *Id.* See discussion *infra* notes 197-99 and accompanying text.

<sup>66</sup> IND. CODE § 35-41-5-1.

witnesses.<sup>67</sup> This large percentage of per se exclusions for most convictions of serious crimes more than offsets the fact that the Indiana rule authorizes a higher percentage of per se admissions of such crimes than the federal rule, but only a relatively small percentage of convictions for the nine crimes specifically identified in its rule.<sup>68</sup> Overall, the Indiana rule admits convictions to impeach more liberally than the Michigan rule because, while the two states have the identical standard for all witnesses with regard to the admission of convictions for crimes punishable by a year or less in prison to impeach, Michigan per se excludes an even higher percentage of convictions for crimes punishable by more than a year in prison.<sup>69</sup>

West Virginia has the eighth most restrictive rule among these states. This rule is identical to the federal standard with regard to the impeachment of all other witnesses except the accused, but provides much greater protection to the accused by restricting admission to impeach the accused to only convictions for two crimes—“perjury” and “false swearing.”<sup>70</sup> “Perjury” and “false swearing” are specific crimes with specific definitions in the West Virginia Penal Code.<sup>71</sup> Under the West Virginia

<sup>67</sup> *Id.* The Indiana Rule Advisory Committee commentary accompanying the rule, expressly asserted that the rule reflected an express policy decision to reject the approach taken in the federal rule. IND. CODE § 35-41-5-1 advisory committee cmt. Recent statistical compilation of Indiana convictions, for example, provide conclusive evidence that convictions for the nine identified felonies in the Indiana rule accounted for no more than fifteen percent of all felony convictions in Indiana in 2003. Ind. Supreme Court, Div. of St. Ct. Admin. Court Mgmt. and Statistics, 2003 Trial Court Disposition Statistics, <http://www.in.gov/judiciary/admin/courtmgmt/stats/2003.html> (last visited Apr. 1, 2006).

<sup>68</sup> See *supra* notes 17, 25 and accompanying text.

<sup>69</sup> See *supra* note 57 and accompanying text.

<sup>70</sup> W. VA. EVID. 609.

<sup>71</sup> W. VA. CODE §§ 61-5-1, 61-5-2. Perjury is graded as a felony—punishable potentially by a maximum of more than one year in prison, and false swearing is graded as a misdemeanor, punishable potentially by a maximum of less than one year in prison.

rule, a perjury or false swearing conviction is per se admissible against the accused.<sup>72</sup>

The West Virginia rule, like the federal rule, employs three standards to regulate the admission of convictions to impeach. The two standards that mimic the federal rule with regard to all other witnesses except the accused more liberally admit convictions against such witnesses than the rules of all the states ranked overall as having a more restrictive standard. These two standards are more liberal because they either more easily admit convictions involving dishonesty or false statement against such witnesses or more easily admit convictions based solely on the fact that the maximum punishment for the underlying crime exceeds one year. This rule also fails to expressly define the crimes of “dishonesty” and “false statement.”<sup>73</sup>

Vermont has the ninth most restrictive rule. This rule applies to all witnesses, without an express exception in the text of the rule for the accused. It authorizes the admission of convictions to impeach when the crime has an element of “untruthfulness” or “falsification,” unless its probative value to establish a propensity to lie is substantially outweighed by its unfair prejudicial effect.<sup>74</sup> According to the Reporter’s Notes to the 1989 amendment, the rule committee substituted “untruthfulness” for “dishonesty,” and “falsification” for “false statements” to embody an express policy decision.<sup>75</sup> The policy goal was to avoid the possibility that the Vermont courts would broadly interpret the terms “dishonesty” and “false statements,” especially the term “dishonesty” as courts in other jurisdictions had done.<sup>76</sup> The Reporter’s Notes made express reference to decisions from other jurisdictions

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<sup>72</sup> W. VA. EVID. 609.

<sup>73</sup> *Id.*

<sup>74</sup> VT. R. EVID. 609.

<sup>75</sup> *Id.*

<sup>76</sup> VT. R. EVID. 609 reporter’s cmt.

which had held that “dishonest” crimes included such offenses as burglary, drug offenses, shoplifting, larceny, and other offenses which are inadmissible to impeach under Vermont’s amended concept of “untruthfulness.”<sup>77</sup> Although the text of the rule does not define “untruthfulness” or “falsification,” it does expressly limit the determination of whether a crime is within either of these concepts to an examination of the statutory elements of the crime.<sup>78</sup>

The Vermont rule’s second standard for admitting convictions to impeach also applies to all witnesses, and authorizes admission of Vermont felony convictions which includes crimes punishable by more than two years of imprisonment under Vermont law and crimes punishable by more than one year in jail under the law of other jurisdictions provided that the probative value to establish a propensity to lie substantially outweighs its unfair prejudicial effect.<sup>79</sup> Collectively, the two Vermont standards restrict the admission of convictions to impeach the accused and all other witnesses more than the federal rule both with regard to crimes punishable by a maximum sentence of more than one year, as well as those punishable by one year or less. The greatest difference in the restriction on use of convictions to impeach is with regard to other witnesses and the attempt to admit convictions based on the fact that the underlying crime is punishable by more than one year in prison. The federal rule’s balancing standard is tilted towards admission, while the Vermont standard is tilted towards exclusion. On the other hand, the Vermont rule is not as restrictive as the West Virginia rule, because the difference in the latter’s greater protection of the accused exceeds the difference in the former’s greater protection of all other witnesses. Finally, the Vermont rule

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<sup>77</sup> *Id.*

<sup>78</sup> VT. R. EVID. 609.

<sup>79</sup> *Id.*



is also potentially more restrictive than the federal rule and most other state rules on its face because of its requirement that the trial judge expressly state the factors used in making the admissibility balancing evaluation.<sup>80</sup>

Idaho has the tenth most restrictive rule among those states whose rules admit convictions to impeach more restrictively than the federal rule. This rule applies to all witnesses, without an express exception in the text of the rule for the accused, and authorizes the potential admission of all “felonies.”<sup>81</sup> The Idaho rule is the first rule in this progression which only makes reference to the generic concept of “felonies.” Under the Idaho rule, however, felony convictions are only admissible to impeach a witness if the trial judge determines that the conviction is relevant to prove a propensity to lie, and that when weighed on an evenly balanced scale, the probative value is greater than the prejudicial effect to the party offering the witness.<sup>82</sup> On the other hand, Idaho is one of the few states whose rule does not independently authorize even the potential admission of convictions for “misdemeanors” crimes—punishable by a maximum prison term of one year or less—that involve “dishonesty” or “false statements.”<sup>83</sup>

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<sup>80</sup> *Id.*

<sup>81</sup> IDAHO R. EVID. 609.

<sup>82</sup> *Id.* (specifically requiring that the judge must establish that the fact and the nature of the felony are relevant with regard to the issue of the witnesses’ credibility).

<sup>83</sup> See *supra* notes 29-30, 32-33 for a discussion of the appropriate definition of “dishonesty” and “false statement” as surrogates for relevance to prove a propensity to lie, as well as the current available data on the annual number of persons convicted of a felony—for the most part, crimes punishable by a maximum term of imprisonment of more than one year. Unfortunately, while the National Center for State Courts has begun a project to systematically collect data about the number and types of annual convictions for misdemeanors in the states, the first reporting date is not until the second half of 2005. Telephone conversation with Matthew J. Durose, BJS Staff Statistician (Fall 2004). Mr. Durose is the co-author of all three of the reports on Felony Convictions in State Courts, 1998, 2000, 2002, *supra* note 32. In the few states which did report their total misdemeanor convictions, the dimension of those convictions may be evidenced by the fact that in

Idaho is the third state potentially admitting convictions to impeach, which employs a single standard for making that determination in contrast to the federal rule's three standards.<sup>84</sup>

The Idaho standard, like the Vermont standard, restricts the admission of convictions to impeach the accused and all other witnesses more than the federal rule both with regard to crimes punishable by a maximum sentence of more than one year, as well as those punishable by one year or less. The greatest difference between the Idaho rule and the federal rule is in the degree of restriction on the use of convictions to impeach with regard to other witnesses and the attempt to admit convictions based on the fact that the underlying crime is punishable by more than one year in jail. The federal rule's balancing standard is tilted towards admission, while the Idaho standard is an evenly balanced scale evaluation, weighing probative value to prove a propensity to lie against the likely unfair prejudice that will result if the conviction is admitted.

The Idaho rule's classification as being more restrictive than the federal rule must be qualified, however, because it expressly authorizes the admission of both the "fact" of and the "nature" of a felony conviction or both if their relevance to prove a propensity to lie outweighs their prejudicial effect.<sup>85</sup> Although the rule does not define it, the "nature" of the crime does expressly distinguish between the "nature" of the crime and the "circumstances of the conviction."<sup>86</sup>

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2002 alone there were more than 276,000 misdemeanor convictions in the state of Florida. Fla. Trial Courts, Summary Reporting System, 2002 *available at* [http://www.flcourts.org/gen\\_public/stratplan/tcpanda.shtml](http://www.flcourts.org/gen_public/stratplan/tcpanda.shtml) (last visited May 24, 2006).

<sup>84</sup> *Id.* See discussion *supra* notes 50, 56 and accompanying text.

<sup>85</sup> IDAHO R. EVID. 609.

<sup>86</sup> *Id.* If only the fact of the conviction is introduced to impeach a party, the party can introduce the nature, but not the circumstances of that conviction.

On the other hand, the Idaho rule is not as restrictive as the Vermont rule, because the latter's greater protection of the accused and all other witnesses with respect to the admission of convictions based upon fact that the underlying crimes are punishable by more than one year in prison, exceeds the former's slightly greater protection of all witnesses with regard to the per se exclusion of convictions for crimes punishable by a year or less in jail.<sup>87</sup>

Arizona, Maine, Maryland, South Dakota, and Texas share the eleventh most restrictive rule among those states whose rules admit convictions to impeach more restrictively than the federal rule. These five states have two standards rules, which admit convictions for crimes involving "dishonesty" or "false statement" or those relevant to a prove propensity to lie, as well as convictions for crimes which are within a broad qualifying concept against all witnesses. This includes the pervasive reference to crimes punishable by more than one year in prison in three state rules, and also to alternative references including "infamous crimes" and crimes of "moral turpitude."<sup>88</sup> To

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<sup>87</sup> See *supra* notes 32-35 and accompanying text.

<sup>88</sup> ARIZ. R. EVID. 609 (mimicking the language of the federal rule and making no reference to "felony," instead identifying crimes whose punishment provides for the possibility of imprisonment for more than one year and any crime of dishonesty or false statement); ME. R. EVID. 609 (identifying crimes with punishments of one year or more and any crime of dishonesty or false statement); MD. R. EVID. 5-609 (admitting convictions for "infamous" crimes or other crimes relevant to credibility). By using the generic reference to relevance, the Maryland rule opens the door to the admission of a broader category of misdemeanors than those within this article's relatively narrow definition of crimes of "dishonesty" or "false statement." While purporting to reflect some study of the federal rule, the rule, in fact, was virtually identical to the prior Maryland rule. MD. R. EVID. 1-502 (1992). See also S.D. CODIFIED LAWS § 19-14-12 (2004) (allowing the admission of crimes punishable by imprisonment in excess of one year and crimes of dishonesty or false statement); TEX. R. EVID. 609 (felonies and moral turpitude misdemeanors potentially qualified as admissible conviction). Like the Maryland rule, the Texas rule also lends itself to possibly admitting a broader range of misdemeanor convictions to impeach.

be admitted, however, once a conviction of a crime deemed to fall within one of these categories, it must then undergo a similar balancing evaluation. A trial judge is required to determine the probative value of the conviction as proof of a propensity to lie, and then weigh it on an evenly balanced scale against the prejudicial effect to any party opponent except the prosecution in a criminal case.<sup>89</sup> Under the federal rule, not even the accused that chooses to testify is protected by this evenly weighted balancing evaluation against the admission of the complete range of convictions authorized to impeach.<sup>90</sup>

On the other hand, the overall effect of the two standards of these states is to more liberally admit convictions to impeach than the proceeding ten standards, because a broader range of convictions are qualified for admission than in all of the proceeding states with respect to the accused, all other witnesses, or both. The balancing standard employed in these five states is also tilted more towards admission than the Vermont rule, ranked ninth. For example, “infamous crimes” and “moral turpitude” are not defined by the rules employing these terms. The term seems to be a vestige of these states’ common law standard for admitting convictions to impeach.<sup>91</sup> Like the federal rule, and the rules in many of the states with even more restrictive admission standards, crimes involving

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<sup>89</sup> ARIZ. R. EVID. 609 (mimicking the federal rule and making no reference to “felony” instead identifying crimes whose punishment provides for the possibility of imprisonment for more than one year, and any crime of dishonesty or false statement); MD. R. EVID. 5-609 (allowing convictions for “infamous” crimes, and crimes of dishonesty and false statement); S.D. CODIFIED LAWS § 19-14-12 (2004) (admitting evidence of convictions for crimes punishable by imprisonment in excess of one year and crimes of dishonesty or false statement); TEX. R. EVID. 609 (qualifying moral turpitude misdemeanors as admissible convictions).

<sup>90</sup> See *supra* notes 17-18 and accompanying text.

<sup>91</sup> MD. R. EVID. 5-609 (admitting convictions for “infamous” crimes or other crimes relevant to credibility); TEX. R. EVID. 609 (qualifying “moral turpitude” misdemeanors as admissible convictions).

“dishonesty” or “false statement” are specifically mentioned in three of these rules, but these terms are not defined.<sup>92</sup> The commentary to the Arizona rule, however, does provide a guideline stating that the determination of whether a crime qualifies as a crime of dishonesty or false statement should be made by reference only to the elements of the crime.<sup>93</sup>

Next, Connecticut has the twelfth most restrictive rule.<sup>94</sup> The Connecticut rule mimics the standard that evolved in its state supreme court, which identified three policy factors to be used by trial judges in determining the admissibility, against all witnesses, of the single category of eligible convictions—those for which the underlying crime was punishable by more than one year in prison.<sup>95</sup> The three policy factors identified in the rule are: (1) the extent of the prejudice likely to arise; (2) the significance of the particular crime in indicating untruthfulness; and (3) the remoteness in time of the conviction.<sup>96</sup> The Connecticut rule does not expressly direct the judge to balance these three factors, nor specify the relative weight to be given each factor. It also does not identify the balancing standard trial judges should employ in determining the ultimate issue of admissibility by using these three factors. Connecticut does have a generic admissibility balancing rule, which, if held applicable to this standard, would require admission, unless concerns raised with regard to exclusionary policies substantially outweigh the probative value of the crime

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<sup>92</sup> ARIZ. R. EVID. 609; ME. R. EVID. 609; S.D. CODIFIED LAWS § 19-14-12 (2004).

<sup>93</sup> ARIZ. R. EVID. 609 cmt.

<sup>94</sup> CONN. CODE EVID. § 6-7 (2004).

<sup>95</sup> *Id.* Connecticut also has a statute, CONN. GEN. STAT. § 52-145 (2004), the text of which conflicts with the evidence rule, and more permissively admits convictions to impeach than the federal rule. Prior to the enactment of the evidence rule, however, the Connecticut Supreme Court had placed the same limits on admissibility under the terms of the statute that were enacted into the express language of the evidence rule.

<sup>96</sup> CONN. CODE EVID. § 6-7 (2004).

underlying the conviction to prove a propensity to lie.<sup>97</sup>

The Connecticut standard's ambiguities make it unclear if it is less restrictive than the federal rule with respect to its authorization of the admission of convictions to impeach when the underlying crime was punishable by more than one year in prison. In giving consideration to both the two-to-one ratio of exclusionary concerns to admissibility concerns and to the possibility that the generic balancing standard is employed, it is arguable that it more liberally admits convictions for such crimes against the accused than the federal rule, but more restrictively admits such convictions against all other witnesses. It is clear, however, that the Connecticut rule is significantly more liberal in admitting convictions to impeach for this large category of crimes than almost all of the state rules that are more restrictive than the Connecticut rule. Connecticut is the fourth state admitting convictions to impeach that employs a single standard for making that determination in contrast to the federal rule's three standards. Connecticut, like Idaho, is only the second state whose rule does not independently authorize even the potential admission of convictions for misdemeanor crimes of "dishonesty" or "false statement." Therefore, the Connecticut rule is more restrictive than the federal rule with regard to such crimes, as well as a substantial majority of the states with more restrictive rules. As explained in the earlier discussion of the Idaho rule, its rank is attributable to the fact that there are far more convictions for crimes punishable by more than one year in prison, than for misdemeanors appropriately characterized for impeachment purposes as involving "dishonesty" or "false statements."<sup>98</sup>

Georgia has the thirteenth most restrictive rule among those states whose rules admit convictions to

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<sup>97</sup> CONN. CODE EVID. § 4-3 (2004).

<sup>98</sup> See *supra* note 73 and accompanying text.

impeach more restrictively than the federal rule.<sup>99</sup> Georgia has two statutes which the Georgia Supreme Court historically interpreted to authorize the admission of any conviction of a crime punishable by a maximum term of more than one year in prison and all crimes of “moral turpitude” to impeach any witness, except the accused.<sup>100</sup> The Georgia standards do not define “moral turpitude,” a common law concept, but the Georgia Supreme Court has narrowly defined the term for this purpose.<sup>101</sup> Additionally, one of the statutes expressly bars impeachment of the accused, unless that person first puts his or her credibility at issue.<sup>102</sup>

Overall, the impeachment standards of the Georgia rule are more restrictive than the federal rule. The Georgia standards include a blanket exclusionary policy with regard to the accused that is much more restrictive than that of the federal rule, which mandates the admission of convictions for any crime characterized as involving “dishonesty” or “false statement” to impeach the accused. It also authorizes the admission of convictions for all crimes punishable by a maximum of more than one year in prison against the accused following a balancing evaluation. This difference more than compensates for the fact that the Georgia standards much more liberally admit convictions for crimes punishable by a maximum sentence of more than one year in prison against all other witnesses than the federal rule, and to a lesser extent more liberally admit convictions for crimes punishable by a maximum term of imprisonment of one year or less against all other witnesses.<sup>103</sup>

<sup>99</sup> GA. CODE ANN. §§ 24-9-20, 24-9-84 (2004).

<sup>100</sup> *Id.* (combining the substance of FED. R. EVID. 608 and FED. R. EVID. 609).

<sup>101</sup> *Hawes v. State*, 470 S.E.2d 664, 667 (Ga. 1996) (restricting convictions for moral turpitude crimes for impeachment purposes to the gravest offenses, including felonies, infamous crimes, and those that are *malum in se* and disclose a depraved mind).

<sup>102</sup> GA. CODE ANN. § 24-9-20 (2004).

<sup>103</sup> *See supra* notes 25, 26 and accompanying text. The federal rule

On the other hand, the Georgia rule more liberally admits convictions to impeach than the Connecticut standard. Connecticut's exclusionary standards with regard to all other witnesses are much stronger than Georgia's standards for all types of convictions, particularly for crimes punishable by more than one year in prison. It more than compensates for the fact that the Georgia standards' blanket exclusionary policy with regard to the accused is more restrictive than Connecticut's, which employs the same exclusionary standards with regard to the accused as it does for all other witnesses.

Tennessee has the fourteenth most restrictive rule among those states whose rules admit convictions to impeach more restrictively. Tennessee employs the same language to identify qualifying crimes as the federal rule, and appears in its text to adopt a two, rather than a three, standards approach.<sup>104</sup> Like the federal rule, one standard focuses solely upon the accused as a witness, but unlike the federal rule, provides for a single standard to determine whether a conviction should be admitted, notwithstanding whether it qualifies because the crime was punishable by more than one year in prison or was properly characterized as involving "dishonesty" or "false statement."<sup>105</sup> The rule requires that the trial judge undertake a balancing evaluation, comparing the probative value of the conviction for any qualifying crime as proof of a propensity to lie with a likely unfair prejudice that notice of the conviction will cause with regard to distorting the jury's resolution of the substantive issues in the case.<sup>106</sup> Only when the probative value of the conviction outweighs the likelihood of unfair

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does authorize the admission against all other witnesses of convictions for another forty percent of all crimes, if the probative value of such a conviction to prove a propensity to lie is not substantially outweighed by exclusionary concerns, a balancing standard which is tilted toward admission.

<sup>104</sup> TENN. R. EVID. 609(a).

<sup>105</sup> TENN. R. EVID. 609(a)(3).

<sup>106</sup> *Id.*



prejudice is the conviction admissible.<sup>107</sup> Hence, the Tennessee rule regulating the admission of convictions to impeach the accused is clearly more restrictive than the federal rule, which would automatically admit convictions for crimes of dishonesty or false statement.

The Tennessee standard is also more restrictive than the Pennsylvania and Michigan rules with regard to convictions involving crimes of dishonesty and false statement because those states' rules also authorize the *per se* admission of such convictions against the accused.<sup>108</sup> The rules in these two states, however, disqualify all or almost all convictions punishable by more than one year in prison as an independent basis to impeach.<sup>109</sup> The Tennessee rule continues the pattern begun by the federal rule, which is followed by all the states rules evaluated so far, of not defining the terms "dishonesty" or "false statement" when those terms are used to identify those convictions which qualify for admission to impeach.

On its face, the Tennessee rule provides less protection to witnesses other than the accused than the federal rule because it not only appears to authorize automatic admission of convictions involving crimes of dishonesty or false statement, but also any conviction which potentially qualifies for admission based solely on the fact it was punishable by more than a year in prison.<sup>110</sup> The Advisory Committee Comment, however, asserts that the intent of the rule for such witnesses is to integrate the rule within the core evidence admissibility rule, which is pervasively applicable throughout these comprehensive evidence codes, and which requires that admissibility of

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<sup>107</sup> *Id.*

<sup>108</sup> See *supra* notes 55, 57 and accompanying text. The seventh most restrictive overall ranked rule is more restrictive than the Tennessee rule with regard to crimes involving "dishonesty" or "false statement" because it eliminates these characterizations as a basis for an independent admission to impeach.

<sup>109</sup> See discussion *supra* notes 55, 57 and accompanying text.

<sup>110</sup> TENN. R. EVID. 609(a)(2).

any item of evidence is conditioned upon its proponent proving that its probative value is not substantially outweighed by exclusionary policy concerns.<sup>111</sup> The Committee's comments do not suggest an exception to the application of this balancing policy evaluation for crimes involving dishonesty or false statement, and this interpretation of the Tennessee rule would make it more restrictive than the federal rule with regard to witnesses, other than the accused.<sup>112</sup>

Overall, the Tennessee rule is slightly more liberal in admitting convictions to impeach than the Georgia standard. Georgia's blanket exclusionary policy with regard to the accused is much more restrictive than that of the Tennessee exclusionary standards with regard to the accused for all grades of crime, but especially those whose admission is premised on a crime punishable by more than one year in prison. The difference is slightly greater than the difference between the more restrictive standards of Tennessee with regard to all other witnesses when compared to the standards of Georgia for such witnesses.

Arkansas, Delaware, Minnesota, and Washington share the fifteenth most restrictive rule among those states whose rules admit convictions to impeach more restrictively than the federal rule.<sup>113</sup> The rule these four states share is slightly more restrictive than the federal rule because it requires a balancing evaluation for all witnesses, not just the accused, which equally weighs the probative value of the convictions for crimes punishable by a maximum term of imprisonment of more than one year as proof of a propensity to lie, and the countervailing prejudicial effect the admission of such a conviction will cause to the parties or the witness.<sup>114</sup> Like the federal rule,

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<sup>111</sup> TENN. R. EVID. 609 advisory commission's cmt.

<sup>112</sup> *Id.*

<sup>113</sup> ARK. R. EVID. 609; DEL. R. EVID. 609; MINN. R. EVID. 609; WASH. R. EVID. 609.

<sup>114</sup> ARK. R. EVID. 609; DEL. R. EVID. 609; MINN. R. EVID. 609; WASH.

the rules of these states mandate admission of all convictions for crimes involving “dishonesty” or “false statement” against any witness.<sup>115</sup> The rules in these four states also fail to expressly define crimes of “dishonesty” or “false statement.”<sup>116</sup> However, the commentary to the Minnesota rule asserts that crimes of “dishonesty” are only those crimes which involve untruthful conduct.<sup>117</sup>

The rule in these four states, as in nine of the eighteen states which are ranked as more restrictive, embodies a two standards approach to the evaluation of the admissibility of convictions for the purpose of impeachment.<sup>118</sup> Overall, the standards embodied in the Arkansas, Delaware, Minnesota, and Washington rules are slightly more liberal in admitting convictions to impeach than the Tennessee standard. The Tennessee standard for all witnesses with regard to the potential admission of convictions for crimes punishable by less than a year in prison is slightly more restrictive because it requires some form of a balancing evaluation, even for such offenses properly characterized as involving “dishonesty” or “false statement,” while the Arkansas, Delaware, Minnesota, and Washington standards mandate admission of the small percentage of such offenses properly characterized as involving “dishonesty” or “false statement.” With regard to convictions for crimes punishable by a maximum term of more than one year in prison, these four states and Tennessee employ the same even balancing standard for the accused for all such offenses, except that these four states mandate the admission of a small percentage of such offenses characterized as involving “dishonesty” or “false

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R. EVID. 609.

<sup>115</sup> ARK. R. EVID. 609; DEL. R. EVID. 609; MINN. R. EVID. 609; WASH. R. EVID. 609.

<sup>116</sup> ARK. R. EVID. 609; DEL. R. EVID. 609; MINN. R. EVID. 609; WASH. R. EVID. 609.

<sup>117</sup> MINN. R. EVID. 609.

<sup>118</sup> See *supra* notes 41, 50, 67, 88, and 103 and accompanying text.

statement.” For all other witnesses, however, the standards of these four states are more restrictive because the Tennessee standard adopts a balancing standard tilted towards admission, while the Arkansas, Delaware, Minnesota, and Washington standards employ the same evenly balanced scale standard to such witnesses with the exception that their rules mandate admission of the small percentage of such offenses properly characterized as involving “dishonesty” or “false statement.”<sup>119</sup>

Finally, Mississippi has the sixteenth most restrictive rule.<sup>120</sup> The Mississippi rule is identical to the federal rule with regard to the impeachment of all non-party witnesses and the accused, but provides greater protection to civil plaintiffs and defendants when they testify. This rule requires that the same beginning weight be given to the probative value of convictions for crimes punishable by a maximum term of imprisonment of more than one year as proof of a propensity to lie, as to the countervailing prejudicial effect that the admission of such a conviction will cause to that testifying party.<sup>121</sup> Mississippi is the first state, among the twenty-four states with more restrictive rules than the federal rule, to adopt a four standards approach.<sup>122</sup> Although this rule also fails to expressly define crimes of “dishonesty” and “false statement,” the official comments to this rule indicate that the intent was to narrowly define these concepts.<sup>123</sup>

Overall, the Mississippi rule is slightly more liberal in authorizing the admission of convictions to impeach than the standards shared in the rules of the four states—

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<sup>119</sup> ARK. R. EVID. 609; DEL. R. EVID. 609; MINN. R. EVID. 609; WASH. R. EVID. 609.

<sup>120</sup> MISS. R. EVID. 609.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> MISS. R. EVID. 609 cmt (“dishonesty or false statement” means crimes such as perjury or subordination of perjury, false statement, fraud, forgery, embezzlement, false pretense, or other offense in the nature of *crimen falsi*).

Arkansas, Delaware, Minnesota, and Washington—ranked just above it as more restrictive. The sole difference is with regard to non-party witnesses who have a conviction for a crime punishable by more than one year in jail. The Mississippi standard employs a balancing standard tilted towards admission while the standard of the four states employs an evenly weighted balancing evaluation. Illinois has the seventeenth and therefore most liberal rule among those states whose rules admit convictions to impeach more restrictively than the federal rule. Among these rules, therefore, it is the state whose standards are closest to the federal rule. This rule was adopted by the Illinois Supreme Court.<sup>124</sup> The court adopted what it characterized as the proposed federal rule, which provides greater protection to all witnesses than the enacted or current federal rule by requiring a balancing evaluation, albeit one tilted towards admission, for crimes of “dishonesty” and “false statement.”<sup>125</sup> The Illinois Supreme Court did not generally define crimes of “dishonesty” or “false statement” in its decisions. The rule provides for the same standard for convictions to impeach for crimes potentially punishable by a maximum of more than one year in prison for all witnesses including the accused. Hence, Illinois is the fifth state to adopt a one standard approach. The Illinois standard provides greater protection to the accused and all other witnesses with regard to the small percentage of convictions for crimes appropriately characterized as involving “dishonesty” or “false statement.” The Illinois rule requires a balancing evaluation, while the federal rule automatically admits such convictions. The Illinois standard provides less protection than the federal rule to the accused with regard to the admission of convictions to impeach solely because they are punishable by a maximum sentence of more than one year in prison. It requires a

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<sup>124</sup> *People v. Montgomery*, 268 N.E.2d 695 (Ill. 1971).

<sup>125</sup> *Id.*

balancing evaluation tilted towards admission, rather than the evenly weighted balancing evaluation required by the federal rule. The rule employs the same standard as the federal rule with regard to this category of convictions for all other witnesses.

Overall, the Illinois rule is only slightly more liberal than the Mississippi rule with regard to its standards on the admission of convictions to impeach. The Mississippi rule is more restrictive than the Illinois standard with regard to the admission of convictions to impeach the accused and civil party witnesses based upon the underlying crime having a maximum term of imprisonment of more than a year. While both require a balancing evaluation, the Illinois rule is tilted towards admission. Because this evaluation is premised on evidence that the admission of convictions to impeach is more significant when the admission is against party witnesses than other witnesses, the Mississippi rule is a more restrictive rule. This determination was made though the Mississippi standard is more liberal than the Illinois standard with regard to admitting convictions to impeach civil witnesses other than party witnesses for such offenses, and all witnesses of convictions for crimes punishable by a maximum prison term of one year or less.

#### **D. States Whose Rules More Liberally Admit Convictions to Impeach Than the Federal Rule**

Seventeen of fifty states, by rule or statute, more liberally admit convictions to impeach than the federal rule.<sup>126</sup> These seventeen states employ ten distinct

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<sup>126</sup> CAL. EVID. CODE § 788 (2004); COLO. REV. STAT. ANN. § 13-90-101 (2004); FLA. STAT. ANN. § 90-610 (2004) (The Florida Evidence Code was enacted in 1976.); KY. R. EVID. 609 (effective 1990, amended in 1992); LA CODE EVID. ANN. arts. 609, 609.1 (2004) (effective 1989, and amended 1994); MASS. GEN. LAWS ANN. ch. 233,

standards which are overall more liberal in admitting convictions to impeach than the federal rule. In the following discussion, similar state rules will be grouped and discussed sequentially, beginning with the most liberal admission rules, and proceeding to the states' rules whose standards are only slightly more liberal than the federal rule.

Three states, Massachusetts, Missouri, and New York, have rules which authorize the admission of any criminal conviction to impeach.<sup>127</sup> This standard does not appear among a series of evidence rules in two of these states, but rather among the general statutes of these states reflecting a long-standing state policy unaffected by the enactment or evolution of the federal rule.<sup>128</sup>

North Carolina has the second most liberal admission rule among those states whose rules admit convictions to impeach more liberally than the federal rule.<sup>129</sup> The North Carolina rule employs a single standard authorizing the impeachment of any witness with a conviction of any crime punishable by confinement for

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§ 21 (West 2004) (authorizing even the use of traffic offenses to impeach); MO. REV. STAT. § 491.050 (2004); NEB. REV. STAT. ANN. § 27-609 (LexisNexis 2004) (rule enacted in 1975); NEV. REV. STAT. ANN. § 50.095 (2004); N.H. R. EVID. 609 (LexisNexis 2004) (effective 1985); N.J. R. EVID. 609; N.Y. C.P.L.R. § 4513 (McKinney 2004) (first enacted on or before 1920); N.Y. CRIM. PROC. LAWS § 60.40(1) (2004); N.C. GEN. STAT. § 8C-1, Rule 609 (2004) (enacted in 1983); OR. REV. STAT. § 40-355 (2004) (enacted in 1981); R.I. R. EVID. 609 (adopted in 1987); VA. CODE ANN. § 19-2-269 (2004) (containing rule for criminal trials, while *Payne v. Carroll*, 461 S.E.2d 837 (Va. 1995), announced the rule for civil trials); WIS. STAT. ANN. § 906.09 (West 2004) (Wisconsin Supreme Court enacted the rule in 1973 and it became effective in 1974).

<sup>127</sup> MASS. GEN. LAWS ANN. ch. 233, § 21 (2004) (authorizing even the use of traffic offenses to impeach.); MO. REV. STAT. § 491.050 (2004); N.Y. C.P.L.R. S 4513(2003), N.Y. CRIM. PROC. LAWS § 60.40(1) (2004).

<sup>128</sup> Massachusetts originally enacted its statute in 1836, and enacted its last significant substantive amendment with regard to all crimes except traffic offenses in 1950. Similarly, the current New York statutes derived from statutes antedating 1930.

<sup>129</sup> N.C. GEN. STAT. § 8C-1, R. 609 (2004).

more than sixty days.<sup>130</sup> The official commentary to this rule makes reference to its departure from the federal rule and the historic North Carolina rule, which admitted any conviction to impeach any witness.<sup>131</sup> The current North Carolina rule is much closer to its historical rule than the federal rule. Most convictions are admitted against all witnesses without evaluating if they are even relevant to prove a propensity to lie, and therefore, trial judges are never required to make the next sequential evaluation of exclusionary concerns.

New Jersey has the third most liberal admission rule.<sup>132</sup> The New Jersey rule employs a single standard authorizing the admission of convictions for any crime to impeach all witnesses. The rule gives the trial judge generic discretion to exclude for other causes, and identifies “remoteness” as the only specific exclusionary cause.<sup>133</sup> The New Jersey rule does not expressly direct the judge to balance “remoteness” or any other identified exclusionary policy against the probative value of the conviction to prove a propensity to lie, nor does it specify the relative weight to be given identified factors, or the balancing standard the trial judge should employ in determining the ultimate issue of admissibility.

The New Jersey rule establishes a standard far more liberal than the federal rule in admitting convictions to impeach. The New Jersey rule authorizes the admission of convictions for all crimes punishable by a maximum term of imprisonment of one year or less against all witnesses, including the accused, subject only to the possibility that a judge might find that the conviction is too remote. The federal rule, however, presumptively excludes the

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<sup>130</sup> *Id.* (referring to term “felony” without defining it, as well as to certain categories of misdemeanors which encompass all of those crimes punishable by more than sixty days confinement).

<sup>131</sup> *Id.*

<sup>132</sup> N.J. R. EVID. 609 (enacted in 1993).

<sup>133</sup> *Id.*



substantial majority of such convictions to impeach any witness.<sup>134</sup> The New Jersey rule also authorizes the admission of convictions for all crimes punishable by a maximum of more than one year in prison against all witnesses, including the accused, subject to the same possibility of discretionary judicial balancing, while the federal rule requires some level of balancing of an array of identified exclusionary concerns against the probative value of such a conviction to prove a propensity to lie.<sup>135</sup>

Overall, the New Jersey standard is less liberal in admitting convictions to impeach than that of North Carolina. Unlike the North Carolina rule, the New Jersey rule places some potential restraint on the admission of all convictions to impeach, regardless of their proscribed maximum term of imprisonment.

Louisiana has the fourth most liberal admission rule among those states whose rules admit convictions to impeach more liberally than the federal rule.<sup>136</sup> Louisiana has two rules, one authorizing the admission of convictions to impeach in civil cases, and the other authorizing the admission of convictions to impeach in criminal cases.<sup>137</sup> The civil rule has two standards authorizing the admission of all convictions against all civil litigation witnesses for crimes punishable by imprisonment of more than six months, provided that their probative value outweighs the unfair prejudice caused. The second rule appears to mandate the admission of all convictions for crimes of “dishonesty” and “false statement.”<sup>138</sup> Like the federal rule, this rule—and the rules of almost all the states employing these concepts—does not define “dishonesty” or “false statement.”<sup>139</sup> The criminal rule, in contrast to the

<sup>134</sup> See *supra* text preceding note 17.

<sup>135</sup> See *supra* notes 25, 26 and accompanying text.

<sup>136</sup> LA. CODE EVID. ANN. art. 609, 609.1 (2004).

<sup>137</sup> LA. CODE EVID. ANN. art. 609, 609.1 (2004).

<sup>138</sup> LA. CODE EVID. ANN. art. 609 (2004).

<sup>139</sup> *Id.*

federal and most state rules, more liberally admits convictions to impeach in criminal cases than in civil cases—authorizing the admission of any conviction to impeach any criminal witness including the accused.<sup>140</sup>

Overall, the Louisiana standards are less liberal than the New Jersey standard. The primary reason for the ranking is that the Louisiana standard has a much more exclusionary and potentially exclusionary standard with regard to all civil witnesses. Louisiana, for example, requires exclusion of most offenses punishable by a maximum term of a year or less in prison against all civil witnesses including party witnesses, while the uniform New Jersey standard is fairly characterized as significantly tilted towards the admission of convictions for such offenses against such witnesses. In the evaluation protocol, this difference more than compensates for the fact that the Louisiana standards mandate the admission of convictions for all offenses, regardless of their proscribed maximum period of imprisonment, against all witnesses including the accused at criminal trials, while the single standard New Jersey rule is only significantly tilted towards admission of all convictions at criminal trials.

Rhode Island and Wisconsin have the fifth most liberal admission rules among those states whose rules admit convictions to impeach more liberally than the federal rule.<sup>141</sup> Both states have adopted the same one standard rule which authorizes the possible admission of any conviction to impeach any witness provided that the trial judge, in the exercise of her discretion, finds that the probative value of the conviction, as proof of a propensity to lie, is not substantially outweighed by the unfair prejudicial effect caused by its admission.<sup>142</sup> This standard potentially authorizes the admission to impeach the accused

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<sup>140</sup> LA. CODE EVID. ANN. art. 609.1 (2004).

<sup>141</sup> R.I. R. EVID. 609; WIS. STAT. ANN. § 906.09 (West 2004).

<sup>142</sup> R.I. R. EVID. 609; WIS. STAT. ANN. § 906.09 (West 2004).

and all other witnesses with a much greater percentage of convictions for crimes punishable by a year or less than does the federal rule. It provides slightly less protection to the accused and slightly more protection to all other witnesses than the federal rule with regard to the admission to impeach with convictions for crimes punishable by more than one year in prison.<sup>143</sup> Rhode Island and Wisconsin currently employ this considerably more liberal standard because of an express policy choice—rejecting merely mimicking the federal rule and opting instead to embody an earlier federal approach as their standard.<sup>144</sup>

Overall, the monolithic standard of Rhode Island and Wisconsin is less liberal than that of Louisiana. Primarily, the Louisiana criminal trial standard mandates admission of conviction for all offenses against all witnesses including the accused at criminal trials, regardless of their proscribed maximum period of imprisonment. Therefore, the Louisiana criminal trial standard is significantly more liberal in criminal cases than the rule of these two states. This difference is more than enough to outstrip the fact that the uniform Rhode Island and Wisconsin standard is tilted toward the admission of convictions to impeach regardless of their proscribed maximum period of imprisonment at civil, as well as criminal trials. The uniform Rhode Island and Wisconsin standard more liberally admits convictions at civil trials than the Louisiana standard, which requires of a majority of offenses punishable by a maximum term of a year or less in prison exclusion from use as impeachment for any witness, and an even balancing evaluation as the basis for admitting convictions to impeach when the underlying crime was

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<sup>143</sup> R.I. R. EVID. 609; WIS. STAT. ANN. § 906.09 (West 2004).

<sup>144</sup> Both the comment to the Rhode Island rule and the comment to the Wisconsin rule demonstrate a careful evaluation of the federal rule and proposed federal rule on the admission of convictions to impeach. The Rhode Island Evidence Advisory Committee Notes compared and contrasted each sub-section of its rule with the position taken on the same issue under the federal rule.

punishable by more than a year in prison.

Next, Oregon has the sixth most liberal admission rule among those states whose rules admit convictions to impeach more liberally than the federal rule.<sup>145</sup> Oregon has revised its rule several times in the past fifteen years, and currently employs a two standards approach. The first standard authorizes the admission of any conviction to impeach any witness if the underlying crime is punishable by a maximum term of more than one year in prison, and the second standard authorizes the admission of a conviction for a crime of “dishonesty” or “false statement” no matter how it is graded for punishment purposes.<sup>146</sup> Additionally, the Oregon rule continues the almost universal pattern of failing to define “dishonesty” or “false statement.”<sup>147</sup>

The Oregon rule more liberally admits convictions than does the federal rule because its first standard admits any conviction if the underlying crime is punishable by a maximum term of more than one year in prison without requiring an evaluation of the probative value of the conviction to prove a propensity to lie against the exclusionary concerns it implicates. Like the Louisiana rule, the Oregon rule authorizes a broader admission than the federal rule for criminal trials, but only against the accused even if to a more limited degree.<sup>148</sup>

The Oregon legislature has made a conscious decision to pervert its convictions for purposes of the

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<sup>145</sup> OR. REV. STAT. § 40-355(1) (2004).

<sup>146</sup> *Id.* The Oregon legislature, in combination with ballot initiatives, has produced a rather frenetic rate of amending the state’s rule; amendments were enacted in 1987, 1993, 1999, and 2001. The legislature amended the rule for a fifth time in 2003, a change which became effective January 1, 2004. The effect of the 2004 amendments was to add an additional misdemeanor assaultive type of crime to the list of those which can be used for impeachment purposes. Now there are twenty-two serious assaultive crimes that can be introduced into evidence to impeach the credibility of a witness.

<sup>147</sup> *Id.*

<sup>148</sup> OR. REV. STAT. § 40-355(2) (2004).

impeachment rule by adopting a policy that seeks to enhance the likelihood that a person accused of a serious assault crime, who testifies, can be convicted based on propensity evidence, under the guise of authorizing the impeachment with prior convictions for misdemeanor assault against a family or household member.<sup>149</sup> The Oregon rule seeks to achieve this goal by authorizing the admission of prior assault convictions punishable by a maximum period of imprisonment of less than one year in prison, if committed by the accused against a family or household member.<sup>150</sup> Overall, the Oregon rule less liberally admits convictions to impeach than the prior five standards because it is the first rule in the sequence of rules categorized as more liberal than the federal rule, which automatically excludes the substantial majority of all convictions of crimes punishable by a maximum term of imprisonment of one year or less.

Florida and Nebraska have the seventh most liberal admission rule among those states whose rules admit convictions to impeach more liberally than the federal rule.<sup>151</sup> These states employ a two standards rule, which authorizes the admission to impeach any witness of any conviction for crimes potentially punishable by imprisonment for more than one year, and for any conviction of a crime involving “dishonesty” or “false statement.”<sup>152</sup> These statutes also fail to define “dishonesty” or “false statement.”<sup>153</sup>

These states, like Oregon, more liberally admit convictions than does the federal rule. They admit criminal convictions solely because the maximum punishment

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> FLA. STAT. ANN. § 90-610 (West 2004); NEB. REV. STAT. ANN. § 27-609 (LexisNexis 2004).

<sup>152</sup> FLA. STAT. ANN. § 90-610 (West 2004); NEB. REV. STAT. ANN. § 27-609 (LexisNexis 2004).

<sup>153</sup> FLA. STAT. ANN. § 90-610 (West 2004); NEB. REV. STAT. ANN. § 27-609 (LexisNexis 2004).

exceeds one year without weighing the probative value of proving a propensity to lie against the exclusionary policies violated if the conviction is admitted. The Oregon rule is slightly more liberal because the Oregon legislature has authorized a larger percentage of convictions for crimes punishable by a maximum of less than one year in jail to impeach the accused.

Virginia has the eighth most liberal admission rule. The criminal trial rule that its supreme court adopted to apply to party witnesses in civil cases. The rule authorizes the admission to impeach with the fact but not the name of any felony conviction, except that the proponent can identify by name that a conviction was for perjury.<sup>154</sup> The implication of this rule is that for any non-party civil witness, convictions of any crime, including misdemeanor convictions, could be used to impeach without a balancing evaluation. The inference to be drawn from the Virginia Supreme Court decision is that even the name of the crime underlying any conviction of such a witness could be referenced.

Like the Florida, Nebraska, and Oregon standards, the Virginia standard more liberally admits convictions to impeach than does the federal rule because it admits, against any witness, convictions for crimes solely because the maximum punishment exceeds one year without weighing its probative value as proof of a propensity to lie against the exclusionary policies violated if the conviction is admitted. The Virginia rule also more liberally admits misdemeanor convictions to impeach than the federal rule with respect to non-party civil witnesses. The Virginia rule is almost as liberal as the rule shared by Florida and Nebraska in admitting convictions to impeach. It is ranked as being less liberal in this analysis because it prohibits

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<sup>154</sup> VA. CODE ANN. § 19-2-269 (2004) (stating standard for criminal trials, while *Payne*, 461 S.E.2d 837, states the standard for civil trials). The Virginia code provision employs the word “felony” without defining that term.

reference to the specific name of the crime underlying the conviction, unless the conviction was for perjury.

California, Colorado, Kentucky, and Nevada share the ninth most liberal admission rule among those states whose rules admit convictions to impeach more liberally than the federal rule.<sup>155</sup> The one standard rule of these states mandates admission to impeach any witness with convictions for any crime punishable by more than one year in prison.<sup>156</sup> These states are categorized as more liberally admitting convictions to impeach than the federal rule because—while both the standard employed in these four states and the federal rule exclude most misdemeanor convictions to impeach—the standard of these four states mandates the admission of any conviction for a crime punishable by more than one year in prison against any witness. The federal rule, in contrast, requires some form of a balancing evaluation before such convictions are admitted against the accused or all other witnesses.<sup>157</sup> However, the standards shared by these four states, place more restrictions on the admission of convictions to impeach overall than the Virginia rule ranked just above them as more liberally admitting convictions to impeach. While the standards of these four states and that of Virginia are identical with regard to admitting convictions to impeach the accused, criminal defense witnesses, and civil

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<sup>155</sup> CAL. EVID. CODE § 788 (West 2004); COLO. REV. STAT. ANN. § 13-90-101 (West 2004); KY. R. EVID. 609; NEV. REV. STAT. ANN. § 50.095 (LexisNexis 2004).

<sup>156</sup> CAL. EVID. CODE § 788 (West 2004) (making express reference to the term “felony” rather than the functional and uniform length of authorized punishment approach taken in the text of the rules in most states); COLO. REV. STAT. ANN. § 13-90-101 (2004) (referencing the term “felony” and shortening the admissible period to the prior five years in civil cases); KY. R. EVID. 609 (defining “felony” as in FED. R. EVID. 609 and prohibiting the identification of the specific felony for which the person was convicted, unless the witness denies the conviction); NEV. REV. STAT. ANN. § 50.095 (LexisNexis 2004) (defining “felony” as it is defined in FED. R. EVID. 609).

<sup>157</sup> See *supra* notes 25, 26 and accompanying text.

parties as witnesses, the Virginia rule sanctions the admission of at least the fact of convictions for crimes punishable by a year or less in prison against all other civil witnesses.

Finally, New Hampshire has the tenth most liberal admission rule among those states whose rules admit convictions to impeach more liberally than the federal rule.<sup>158</sup> Therefore, the New Hampshire rule, among the rules of these seventeen states, has adopted standards that are closest to the federal rule. The New Hampshire rule authorizes the admission to impeach any witness, except the “defendant,” with a conviction for any crime punishable by a maximum sentence of more than one year in prison and of all convictions for crimes of “dishonesty” or “false statement” against all witnesses.<sup>159</sup> This New Hampshire rule continues the almost universal pattern of failing to define “dishonesty” or “false statement.”<sup>160</sup> Convictions for crimes punishable by a maximum term of more than one year can only be admitted against the accused if the probative value of the conviction to prove propensity to lie outweighs its prejudicial effect.<sup>161</sup>

Like the federal rule, New Hampshire has adopted a three standards rule. This rule more liberally admits convictions to impeach than the federal rule because its language is identical to that of the federal rule prior to 1990. The United States Supreme Court interpreted the old federal rule to authorize admission of all “felony” convictions to impeach any witness, except criminal defendants, without requiring an evaluation that balances the crime’s probative value to prove a propensity to lie against its prejudicial effect.<sup>162</sup> The reporter’s notes to the

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<sup>158</sup> N.H. R. EVID. 609.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Green*, 490 U.S. 504. See discussion *supra* notes 22, 23 and accompanying text.



New Hampshire rule, however, make express reference to its generic balancing standard, and imply that it is applicable to the issue of admitting convictions to impeach based solely on the fact the underlying crime is punishable by more than a year in prison when the witness is anyone other than the accused.<sup>163</sup> The rule, as modified by the reporter's notes, would make the New Hampshire rule similar to the current federal rule.

Overall, the New Hampshire rule does not admit convictions to impeach as liberally as the rules of California, Colorado, Kentucky, or Nevada. The New Hampshire rule more liberally admits a small percentage of convictions for crimes punishable by a year or less in prison against all witnesses, if the convictions are properly characterized as involving crimes of "dishonesty" or "false statement." However, it is much more restrictive than those states with regard to admitting convictions to impeach the accused, and the admission of convictions for crimes punishable by more than a year in prison.

#### **IV. Evaluation and Perspectives On Establishing that Twenty-Eight Different Rule Standards Regulate the Identical Issue in 2005 —The Admissibility of Convictions to Impeach**

##### **A. Significant Consequences of Twenty-Eight State Rule Standards Regulating the Admission of Convictions to Impeach**

This section of the article begins by identifying two significant consequences of the current reality that our federalism has resulted in twenty-eight different state rule standards regulating the admission of convictions to impeach. This section next identifies possible reasons that might account for and justify a different standard for every

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<sup>163</sup> N.H. R. EVID. 609, reporter's notes.

1.9 of the fifty states. Thereafter, this section examines whether any of the arguably evidence-based reasons among those identified are reality, and even if true, justify one or any of the array of current rules. The evaluation also provides the basis for making recommendations for reform which are identified and discussed in the final section of the article.

The fact that there are twenty-eight different rule standards regulating the admission of convictions to impeach has significant implications for lawyers and the legal system. First, even among evidence experts, there is confusion about the current state of the law on this issue.<sup>164</sup> For example, evidence experts assert that

only five states (unspecified) have identical rules to FRE 609, while twenty-one other states and the Texas Criminal Evidence Rules have rules similar to FRE 609, while ten states and Texas Civil Evidence Rules are different or significantly modify FRE 609. Colorado is stated to have no Rule comparable to FRE 609, while Montana is asserted to have a rule “opposite” to that of FRE 609.<sup>165</sup>

Second, and even more significant, having twenty-

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<sup>164</sup> See, e.g., MCCORMICK ON EVIDENCE § 42 (John W. Strong ed., West 5th ed. 1999) [hereinafter MCCORMICK] (implying that convictions of all types are widely available to impeach the accused in a criminal case, and that convictions in any state or federal court can be used to impeach); ROTHSTEIN ET AL., EVIDENCE IN A NUTSHELL: STATE AND FEDERAL RULES 167 (3d ed. 1997) (“Below is the current version of F.R.E. 609(a) not identical to what is found in the states, even those with F.R.E. based codes, because of recent Congressional changes, and also because of the greater policy disagreement here than in some other evidence areas.”); JACK B. WEINSTEIN & MARGARET A. BERGER, 4 WEINSTEIN’S FEDERAL EVIDENCE § 609.02 (Joseph M. McLaughlin ed., LexisNexis 2d ed. 2006).

<sup>165</sup> RICHARD O. LEMPERT ET AL., A MODERN APPROACH TO EVIDENCE 187 (West 2000).

eight different standards is an invitation for further parochialism or for the “regression to the mean” principle to operate when state supreme courts’ interpretations of these diverse standards are factored in to determine the current array of standards being employed by state criminal and civil trial judges each year.<sup>166</sup> The twenty-eight standards lead to state supreme court decisions that further balkanize the status of the law on this issue, and open the door for state supreme courts to interpret these 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.<sup>167</sup>

### **B. Identifying Possible Reasons for the Twenty-Eight Standards**

What are the possible reasons that account for this highly balkanized federalism with regard to the use of convictions to impeach, expert ignorance of this phenomenon, and the risk of even greater atomization in the wake of state supreme courts’ interpretations of such disparate rules? First, based on the collective legislative histories of the state rules, it can be argued that in several instances history prevailed, rather than policy evaluation, when the current state standards continued to reflect

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<sup>166</sup> Approximately 150,000 trials are conducted each year in the United States. See Dennis J. Devine et al., *Jury Decision-Making: 45 Years of Empirical Research on Deliberation Groups*, 7 PSYCH. PUB. POL’Y & L. 622 (2001) (explaining that “regression to the mean” is the statistical principle that the more trials that test the outcome of a phenomena, the more likely is it that overall trials that have produced the most extreme results will be ameliorated by trials that converge the overall result of all the trials to the mean). See also DAVID L. FAIGMAN ET AL., SCIENCE IN THE LAW: STANDARDS STATISTICS AND RESEARCH ISSUES 141 (West 2002).

<sup>167</sup> I document that each of these very significant risks have in fact occurred in the decisions of the state supreme courts in a pending article. See *Holley*, *supra* note 2.

historical assumptions or heuristics.<sup>168</sup> State rule proposers, enactors, and reviewers for the most part followed the course of the federal rule enactors and stuck with past policies. They demonstrated little concern for study of the standards and policies of other states with an eye toward achieving uniformity.<sup>169</sup>

Second, state rule proposers, enactors, and reviewers must have expressly or implicitly concluded that no national or shared state constitutional provisions prevented them from making any of the twenty-eight choices they made.<sup>170</sup> In fact, state supreme courts during the period of this study made decisions expressly, albeit for the most part cursorily, holding that neither the constitutional right of the accused to testify, nor the right of the accused to an impartial jury, prevented adoption or application of the standards to admit convictions to impeach challenged in their respective states.<sup>171</sup>

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<sup>168</sup> See *supra* notes 10, 128 and accompanying text.

<sup>169</sup> With regard to the federal rule's adherence to current policy, see *supra* notes 10, 11 and accompanying text. After the enactment of the federal rule in 1975, the drafters of the Uniform Rules of Evidence abandoned their rule regulating the admission of convictions to impeach and substituted the federal rule in the hope that this would enhance the likelihood of a uniform standard in the states by encouraging the states to adopt the standards of the federal rule. This strategy, in light of the findings of the prior section, failed.

<sup>170</sup> In *Green*, 490 U.S. 504, no member of the court made reference to constitutional concerns in the enactment history of the federal rule. See also MCCORMICK, *supra* note 164 § 42 ("The suggestion has been made that impeachment of the accused by showing prior convictions is unconstitutional, but to date, no federal or state court has embraced the suggestion.").

<sup>171</sup> *State v. Busby*, 844 P.2d 897, 901 n.7 (Or. 1991). In this case, the jury convicted the defendant of first degree sexual assault. However, the defendant did not testify during the trial. On appeal, he alleged that he did not testify because the trial judge had ruled he could be impeached with his prior conviction for sexual assault. The defendant argued that this ruling violated both his constitutional right to testify on his own behalf and his right to an impartial jury. The Oregon Supreme Court did make an evaluation of whether the defendant's right under the state's constitutional provision assuring a right to an impartial jury was violated. The court concluded that the jury did not hear about the conviction for the same offense since the accused did not testify.

Third, these same participants in the state rule-making and review process must have assumed the existence of, or actually were aware of, and relied upon empirical or other evidence which proved that at least conviction records for one or more specific crimes were relevant to prove a propensity to lie.<sup>172</sup> Fourth, the participants in the state rule-making and review process must have been satisfied that the standard they adopted for admitting convictions to impeach was consistent with other related evidence rules, policies, and trends.<sup>173</sup> Finally, participants in the state rule-making and review process must have been unaware of or ignored empirical or other evidence which would compel consensus with regard to the appropriate standard for regulating the admission of convictions to impeach.<sup>174</sup>

While history and particularly history-based legal rules are by definition not necessarily rational or synonymous with policy, the four other reasons for the existence of twenty-eight state standards can be evaluated to determine if they are rational or at least supported by empirical or other evidence. The next subsection undertakes this evaluation.

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Therefore, of course, it could not have been prejudiced by that information. The court asserted that the accused's theory was that anytime that a jury heard that the defendant was previously convicted of sexual abuse, and he was currently charged with sexual abuse, it would convict the accused. The court expressly declined to assume that the accused was denied an impartial jury. *See also* State v. Ihnot, 575 N.W.2d 581, 583 (Minn. 1998). In *Ihnot*, the Minnesota Supreme Court sanctioned this outcome, even when a lower appellate court had ruled that admitting a same crime conviction, which would prevent the accused from testifying, violated the defendant's right to testify in his own defense under both the national and state constitutions.

<sup>172</sup> *See infra* notes 192-99 and accompanying text.

<sup>173</sup> *See infra* notes 200-08 and accompanying text.

<sup>174</sup> *See infra* notes 209-18 and accompanying text.

**C. Evaluating the Projected Reasons for the  
Existence of Twenty-Eight State  
Standards Regulating the Admission of  
Convictions to Impeach**

**1. Evaluating Possible Reason One  
for Twenty-Eight State  
Standards: No National or State  
Constitutional Rights Are  
Threatened or Injured By the  
Choices the States Have Made**

The United States Supreme Court has held that the Sixth Amendment right to an impartial jury is a right incorporated into the basic protection provided by the Due Process Clause of the Fourteenth Amendment, and therefore is applicable to regulate state jury trial procedures.<sup>175</sup> A critical element of this right is the accused's right to an adequate voir dire that gives him a chance to identify prospective jurors who are actually partial to conviction or a capital sentence before they are seated on the petite jury.<sup>176</sup> Significantly, given the eventual findings in this article, the Court has held that the presence of even a single juror on the petite jury, who admits or is otherwise proven to be so partial to conviction because of racial prejudice in a case significantly implicating racial considerations or to imposing the death penalty, once the accused is convicted in a capital punishment case, that she can not decide guilt or innocence or whether to impose capital punishment based on the evidence and law presented during the trial, violates the

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<sup>175</sup> *Morgan v. Illinois*, 504 U.S. 719, 727 (1992); *Taylor v. Louisiana*, 419 U.S. 522, 525 (1975); *Groppi v. Wisconsin*, 400 U.S. 505, 509 (1971); *Turner v. Louisiana*, 379 U.S. 466 (1965); *Irvin v. Dowd*, 366 U.S. 717 (1961).

<sup>176</sup> *Morgan*, 504 U.S. at 729 (authorizing only the trial judge to conduct voir dire, but allowing the attorneys to request lines of inquiry).

Due Process Clause.<sup>177</sup> The Court held that the accused therefore has a right to devote at least a segment of voir dire specifically to questions asking prospective jurors about such actual partiality so that such a prospective juror may be eliminated for cause.<sup>178</sup> In the case of questioning prospective jurors about how the introduction of conviction evidence might influence their eventual verdict vote, voir dire interrogation is, first, unlikely to result in accurate self-assessments of the likely influence of conviction evidence, and second, likely to prompt the very unfair prejudice it would be designed to detect.<sup>179</sup>

The Court has also held that the right to an impartial jury requires courts to evaluate two situations in which the potential for partial petite jurors is significantly increased: (1) when pre-trial publicity makes it unlikely that the jury pool will have enough persons who are impartial; and (2) when the skewing of the jury panel from which the petite jury is drawn by state law requires or results in the exclusion of cognizable community groups, such as women or racial minorities.<sup>180</sup> The Court has relied in part on

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<sup>177</sup> See *infra* notes 209-18 (identifying and discussing empirical studies proving jurors are made partial towards conviction by the introduction of conviction records ostensibly admitted for impeachment purpose only); *Morgan*, 504 U.S. at 728-29, 734 n.8 (stating that the constitutional measure of a jury is taken by reference to the impartiality of each, individual juror). At the time of *Morgan*'s trial, Illinois law provided that the same jury which decided the guilt or innocence of the accused would also decide whether to impose the death penalty. *Id.* at 721. See also *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981); *Ham v. South Carolina*, 409 U.S. 524 (1973) (concluding that interracial conflict was a significant substantive element of the theory of the case).

<sup>178</sup> *Morgan*, 504 U.S. at 733 (recognizing that with regard to qualifying an impartial jury to decide whether the death penalty should be imposed, it was constitutional for the government to be authorized to make such a specific inquiry).

<sup>179</sup> See *infra* note 211 (discussing studies documenting that jurors are made partial towards convicting the accused in the current trial once prior conviction evidence is introduced ostensibly only to impeach, even though they often claim that the evidence did not influence their decision).

<sup>180</sup> *Groppi v. Wisconsin*, 400 U.S. 505 (1971) (noting that pretrial

empirical evidence from social science studies to find that the risk of a difference in the deliberation process and verdicts was real when these groups were excluded.<sup>181</sup> The Court also relied upon statistical evidence to cast doubt on the rationality of the state's key proffered policy reason for systematically excluding women from its jury pools.<sup>182</sup> In this context, the Court characterized the right to an impartial jury as an essential and fundamental element of the Sixth Amendment's guarantee of the right to a fair jury trial.<sup>183</sup> The Court also held that this right prevents state law from creating even certain types of significant risk of a partial juror, and therefore jury.<sup>184</sup>

The Court endorsed the idea that the constitutional right to an impartial jury is violated whenever one or more jurors are in fact warped by prejudice or biased by any influence that poisoned their judgment.<sup>185</sup> In a subsequent section of this article, empirical evidence from social science studies is presented and discussed to support the

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publicity can possibly infect any jury pool, even if the crime charged is only a misdemeanor). Therefore, the Court held that the Wisconsin Supreme Court's interpretation of its statute creating a per se merit bar to a claim that pre-trial publicity in a misdemeanor prosecution was unconstitutional because it created the likelihood that an impartial jury could not be drawn from a community exposed to such publicity. *See also* *Taylor v. Louisiana*, 419 U.S. 522, 525 (1975) (stating that women jurors can be infected by pre-trial publicity); *Peters v. Kiff*, 407 U.S. 493 (1972) (noting that "Negroes" can also be affected by pre-trial publicity).

<sup>181</sup> *Taylor*, 419 U.S. at 532 n.12 (citing four studies which found that women jurors make such differences).

<sup>182</sup> *Id.* at 535 n.17 (explaining Louisiana's reality hypothesis that women must opt into jury duty because most were needed to be the center of family home life, including the rearing of young children). The Court cited U.S. labor statistics in detail to demonstrate that most women were in the workforce, and that even a significant minority of woman with children under the age of three were working.

<sup>183</sup> *Id.* at 528, 530.

<sup>184</sup> *Id.* at 538 (Rehnquist, J., dissenting) (criticizing the majority opinion because it did not require any showing that the state policy in fact had produced a partial jury, or that the accused had been unfairly treated by the actual jury or injured by unfair prejudice of an all male jury).

<sup>185</sup> *Gropi*, 400 U.S. at 511 n.12.



conclusion that conviction evidence creates a grave risk of a difference in the deliberation process and verdicts, and also casts grave doubt on the only asserted reality claim used to justify the admission of convictions to impeach.<sup>186</sup>

Almost all state constitutions have an express provision guaranteeing a right to an impartial jury, and in recent years, several state supreme courts have characterized the right as fundamental, independent of the national constitutional right, and an independent component of minimal standards of due process.<sup>187</sup> A state supreme court asserted that a right as fundamental as the right to an impartial jury cannot be compromised by even the hint of possible bias or prejudice.<sup>188</sup> Another state supreme court recently held that the right to an impartial jury is so essential to the state's conception of a fair trial that its violation cannot be deemed harmless error.<sup>189</sup> That state supreme court asserted that the presence of even one partial juror on the petite jury violates the right.<sup>190</sup>

In addition to the components of the right to an impartial jury recognized in United States Supreme Court decisions, recent state supreme court decisions have recognized various elements of the right, including: (1) the right to be free of partisan commentary by the trial judge during the course of the trial; (2) the right to review

<sup>186</sup> See *infra* notes 196-98, 209-18 and accompanying text.

<sup>187</sup> *State v. McDougal and Ruffin*, 699 A.2d 872, 881 (Conn.1997) (asserting that a state constitutional right was independent of a federal constitutional right); *People v. Olinger*, 680 N.E.2d 321, 335 (Ill. 1997); *Jenkins v. State*, 825 A.2d 1008, 1017 (Md. 2003) (holding that the right to an impartial jury is one of the most fundamental rights under both the federal and Maryland constitutions); *State v. Rhines*, 548 N.W.2d 415, 430 (S.D. 1996); *State v. Davis*, 10 P.3d 977, 994 (Wash. 2000) (recognizing an independent due process component).

<sup>188</sup> *Jenkins*, 825 A.2d at 1028-29 (explaining that an improper contact by a single juror with a prosecution-police officer witness may constitute unfair bias or prejudice).

<sup>189</sup> *State v. Herman*, 70 P.3d 738, 742 (Mt. 2003).

<sup>190</sup> *Id.* (evaluating whether the accused received ineffective assistance of counsel by not adequately pursuing disqualifying potentially partial jurors during voir dire).

whether a prospective juror was partial and lied to prevent disclosure of the basis of the partiality during voir dire; and (3) the right to review whether there was deliberate, prejudicial contact and conversations between a juror and a prosecution witness.<sup>191</sup> In summation, the national and state constitutions guarantee the right of the accused to an impartial jury, a right that the national and state supreme courts have characterized as fundamental.

Some of the current components of the right were established by reliance in part on empirical evidence. The right, as stated in the constitutions and restated by the courts, does not contain an exception for persons who were previously convicted of a crime prior to their current jury trial. Hence, the first reason, of the possible four plausible reasons for twenty-eight state standards—most of which admit in some form convictions to impeach—is not reality. At least two fundamental constitutional rights are arguably injured by the willy-nilly admission of convictions to impeach.

## **2. Evaluating Possible Reason Two for Twenty-Eight State Standards: A Criminal Conviction Record is Relevant Proof of a Propensity to Lie**

The fundamental admissibility requirement for all evidence is that it must be relevant to prove or disprove the

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<sup>191</sup> *State v. Coltherst*, 820 A.2d 1024, 1043 (Conn. 2003) (concluding that commentary during trial deprives defendants of the very essence of their constitutional right to a fair trial by an impartial jury and holding that jury instructions were not partisan); *Olinger*, 680 N.E.2d at 335 (stating that a juror who lied during voir dire to avoid disclosure of partiality, provides a basis for a new trial if the lie is revealed after the trial); *Jenkins*, 825 A.2d at 1017-18 (criticizing juror and police prosecution witness for attending retreat together and having multiple conversations)

issue for which the proponent offers it.<sup>192</sup> There is a universal consensus that no legislature, court, or judge should, by fiat, be able to override this most fundamental of evidence admissibility rules.<sup>193</sup> The consensus is based on the logic that admitting irrelevant evidence is irrational. Consequently, the proponent of any item of evidence must be able to first prove that the item has the probability of being a fact, and second, that the fact has the probability of actually helping prove her theory of the case, or disproving her opponent's. A record of conviction of a crime is a provable fact, but there is no evidence that it has the probability of proving that the person whose credibility is

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<sup>192</sup> FED. R. EVID. 402 (excluding all irrelevant evidence). Most states have an express rule comparable to this federal rule. *See, e.g.*, FLA. STAT. ANN. § 90-402 (LexisNexis 2004); GA. CODE ANN. § 24-2-2 (2004); HAW. R. EVID. 402; IND. R. EVID. 402 (2004); LA. CODE EVID. ANN. art. 402 (2004); MD. R. EVID. 5-402.

<sup>193</sup> FED. R. EVID. 103 (requiring the proponent of evidence to prove its admissibility by showing that there is at least a possibility that the evidence is factually what the proponent purports it to be, and that there is at least a possibility that the evidence assists her theory of the case or hurts that of the opposing party). In *Green v. Bock Laundry*, the Supreme Court asserted that Congress had the authority to abrogate the presumptive applicability of the overall rule's general balancing requirement prior to admission embodied in FED. R. EVID. 403. Hence, exclusionary policies identified in that balancing rule need not be considered. But what the United States Supreme Court did not and could not assert is that Congress has authority to authorize the admission of irrelevant evidence. First, Congress in FED. R. EVID. 402 expressly asserted that all irrelevant evidence is inadmissible. Even if that provision was not adopted, however, no legislative authority has the power to declare the world is flat, and hence all logical consequences that flow there from when a litigant can show they could help prove her case or disprove her opponent's case are admissible. In other words, Congress has the authority to subordinate the generic requirement of policy evaluation prior to admissibility, to a rule requiring per se admission, but only of relevant evidence. In federal rule terms, FED. R. EVID. 403 can be subordinated by Congress, but not FED. R. EVID. 401 and FED. R. EVID. 402. *Id.* at 524-26. *See also* Michael J. Saks & Robert F. Kidd, *Human Information Processing And Adjudication: Trial by Heuristics*, 15 L. & SOC. REV. 123, 156 (1980) (stating that the legal system will better employ base line probabilities and other empirical evidence to learn that truth is not merely anything a court asserts).

attacked has a greater propensity to lie.<sup>194</sup> If, on the other hand, there is proof that the conduct that was the basis for the conviction included lying under oath, in legal documents, or in other serious settings and is therefore relevant to prove, if not propensity, at least demonstrated willingness to lie in situations comparable to testifying, there is still no rational reason to refer to the conviction, and that conduct may be the basis for cross-examination.<sup>195</sup> The historical heuristic, which is the longest historical proffered “proof” of this reality hypothesis—that

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<sup>194</sup> Anthony N. Doob & Hershi M. Krishenbaum, *Some Empirical Evidence on the Effect of S. 12 of the Canada Evidence Act Upon an Accused*, 15 CRIM. L.Q. 88, 88-89 (1973). The section of the Canadian Evidence Code refereed to in the title of this article was to that country’s version of a rule, which, like FED. R. EVID. 609, authorized the admission of convictions to impeach. The article’s authors immediately noted that the first premise of such a provision is that persons who commit crimes are more likely to have a propensity to lie. Making reference to an article that reviewed thirty-five years of research on this subject, the authors paraphrased the article’s finding that little or no evidence existed to support such an assumption. For example, the authors asserted that the data indicated that a person who would be likely to steal something in one situation would not be more likely to tell lies in a second situation than would someone who would not steal in the first instance. In the following discussion, *infra* notes 196-98, 209-17, this article documents that in the three decades since this study, the empirical and other evidence continues to provide no basis to establish that this assumption has a probability of being reality.

<sup>195</sup> FED. R. EVID. 609, advisory committee’s notes (beginning with the acknowledgement that the fact of a conviction of a crime is itself irrelevant as proof of a propensity to lie). The note asserts that the conviction’s actual function is proof. *Id.* But proof of what? Proof that, in fact, the witness engaged in conduct with the requisite culpability, under circumstances, and with possible results that which by element analysis alone, or by reference to the specific facts is logical evidence of propensity to lie. *See also infra* note 210 (reporting on confirming empirical evidence of the intuition that jurors will be highly skeptical of the truth of the testimony of any criminal defendant); *infra* note 260 (demonstrating that while many jurisdictions, including the federal rule, currently ban employment of extrinsic evidence to prove such specific conduct, given the existence of record evidence, a rule could be crafted to obtain a judicial admission of the conduct prior to trial, which would only be admitted, if for some bizarre reason, the witness on the stand denied the underlying conduct relevant to prove propensity to lie).

disobedience to law is logical evidence of a greater propensity to lie—is “junk science” at its worst.<sup>196</sup> There is not a shred of empirical evidence to support this inference, and the evidence that does exist is to the contrary.<sup>197</sup>

<sup>196</sup> There are sociological empirical studies which have found, for example, that over the course of several years, youths who self-report that they drink excessively also report that they use contraband drugs, engage in crime, and drive dangerously all more frequently than do members of their peer group at the same time. D. Wayne Osgood et al., *The Generality of Deviance in Late Adolescence and Early Adulthood*, 53 AM. SOC. REV. 81 (1988). These studies did not even purport to link such anti-social behavior to greater frequency of lying. Indeed, the very premise of such a self-reporting study is that all subjects must be deemed as equally as likely to be telling the truth when they self-report. It is possible to find disciples of almost any “junk science” proposition including this proposition. See SAMUEL YOCHELSON & STANTON E. SAMENOW, 1a CRIMINAL PERSONALITY 348-57 (Aronson, Inc. 1976). The authors were talking about their definition of “criminals.” Their definition was psychological, and broader than persons who were convicted of crime. The authors began with a self-damning universal assertion, that “without exception,” lying is incorporated into every criminal’s basic make-up and is a nutrient of criminal patterns.” *Id.* at 348. As authority for this proposition, the only authority cited was a 1915 publication, which was a study of pathological liars and could be taken as supporting by inference that such persons also engaged in other anti-social behavior. See WILLIAM HEALY & MARY T. HEALY, *PATHOLOGICAL LYING, ACCUSATION, AND SWINDLING* (Little Brown 1915). The reciprocal, but obviously not necessarily logical inference, that those who engage in anti-social behavior are therefore more likely to be liars. Thereafter the authors make a multitude of universal statements about criminals as liars.

<sup>197</sup> J.A. BARNES, *A PACK OF LIES* 148, 165, 167 (Cambridge Univ. Press 1994) (explaining that lying in humans is ubiquitous, ancient, and diverse, and that there is a lack of any empirical evidence proving that any particular behaviors or character traits increase or decrease propensity to lie). The author also calls for more empirical research on lying. *Id.* See also Allen A. Bartholomew, *Psychiatric Evaluation of Lying*, THE AUSTRALIAN J. OF FORENSIC SCI., 174, June, 1983, at 184-185 (citing a lack of experts and a lack of empirical or other reliable evidence to credibly identify personality traits or behaviors as indicators of lying and liars). The article hypothesizes that law provides no answers to a prove propensity to lie. *Id.* It also provides that neither religious study, nor psychiatry proves a propensity to lie—the kind of empirical research suggested in some of the reported studies. One kind of study that is needed is that in which lying under controlled experimental conditions is tested. See, e.g., Michael Lewis, *The Development of Deception*, in LYING AND DECEPTION IN EVERYDAY LIFE (Michael Lewis & Carolyn Saarni eds., Guilford Press

Judges, evidence rule writers, legal commentators, and participants in empirical research have admitted that the mere existence of a criminal record is irrelevant to prove a propensity to lie.<sup>198</sup> The admission of convictions to prove a propensity to lie, when records of a criminal conviction are irrelevant to prove a propensity to lie, should also be held to violate both the constitutional rights of an accused to an impartial jury, as well as the right of all litigants to due process. Legislatures and supreme courts lack a rational basis to justify risking substantial injury to the liberty and property interests of the accused and the

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1993). Controlled studies reported in this anthology provide a basis for gathering comparative demographic data on the subjects, and the correlation of that data to whether the subject lied. The reported controlled studies of lying by children, for example, indicated that children of lower IQ were significantly less likely to lie than children with higher IQs. Such a finding is in conflict with the idea reflected in the traditional rule allowing felony convictions to impeach that persons convicted of a felony, a group with a lower average IQ than the population as a whole, has a greater propensity to lie. *Id.* at 98. More studies of adults are needed to determine if this pattern continues as children mature. Studies that have been conducted on lying by adults, have produced findings that some persons lie more easily and with greater success, but most significantly for the rule that authorizes convictions to impeach on the premise they prove propensity to lie, is that these persons did not differ from other people on their scores on objective personality tests. Hence, the studies indicate that there is no evidence to support the rule's premise that measurable personality traits or behaviors signal a greater likelihood of lying. Paul Ekman, & Mark G. Frank, *Lies that Fail, in LYING AND DECEPTION IN EVERYDAY LIFE* 188-89 (Michael Lewis & Carolyn Saarni eds., Guilford Press 1993).

<sup>198</sup> FED. R. EVID. 609, advisory committee note (beginning with the acknowledgement that the fact of a conviction of a crime is itself irrelevant as proof of a propensity to lie); *Green*, 490 U.S. at 509 n.4 (noting that for almost one hundred years, including after the enactment of the federal rule in 1975, multiple commentators, including Justice Holmes, questioned the relevance of a conviction as proof of a propensity to lie. *See also supra* note 1 (discussing critical views of commentators including those whose views included great skepticism of whether there was any evidence that records of convictions generally were relevant to prove propensity to lie); *supra* note 43 (endorsing the Montana rules whose drafters expressly acknowledged that convictions are irrelevant for this purpose); *infra* note 206 (discussing empirical studies which have included findings that simulated jurors and juries do not regard conviction records as proof of a propensity to lie).

property interest of other litigants.<sup>199</sup>

Because convictions are irrelevant to prove propensity to lie, their admission for that purpose violates this most basic evidence admissibility requirement. Therefore, the second reason of the four evidence-based

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<sup>199</sup> See discussion *supra* note 185 and accompanying text. In making an evaluation of an alleged injury to the right of an accused to an impartial jury, the court evaluated the proffered rational basis of the challenged statute. With regard to substantive due process, the consensus of scholars and court opinions agree that even when maximum respect is paid to the principal of judicial restraint, legislation is reviewable to determine if it at least has a rational relation to a legitimate governmental interest. See generally JOHN E. NOWAK & RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW 447-59 (West 2004) (discussing the evolution of substantive due process); *Lawrence v. Texas*, 539 U.S. 558 (2003). In *Lawrence*, the Court noted:

Legislation whose only purpose is vindication of the particular moral code, beliefs, or interests of a segment of the population may not be a legitimate government goal, particularly when it injures or significantly risk injury to the liberty interests of those who are not members of that segment of the population. . . . History and tradition are the starting point but not necessarily ending point of substantive due process evaluations.

*Lawrence*, 539 U.S. at 571-72. For a recent state supreme court decision endorsing the same standard for state as well as the federal constitution's substantive due process protection, see *Caviglia v. Royal Tours of America*, 842 A.2d 125 (N.J. 2004). In *Caviglia*, the court observed that

A legislative enactment is presumed to be constitutional and the burden is on those challenging the legislation to show that it lacks a rational basis. . . . The State, however, was not obligated to present statistical evidence to prove the soundness of the legislation. In the absence of a "sufficient showing" that the legislature lacked factual support for its judgment, this Court will assume that the statute is based on "some rational basis within the knowledge and experience of the Legislature."

*Id.* at 134-35. With regard to the risk of substantial injury to property interests that can result from the admission of convictions to impeach in civil cases, see *supra* notes 22-23 and accompanying text; see also *infra* notes 227-32 for a more detailed argument that it is unconstitutional to admit records of conviction to impeach.

hypothesized reasons for the twenty-eight state standards—most of which admit in some form convictions to impeach—is not reality.

### **3. Evaluating Possible Reason Three for The Twenty-Eight Standards: Multiple Standards are Consistent with Other Evidence Rules, Policies, and Trends**

In 1993, the United States Supreme Court held that judges should prohibit the use of so called “junk science” as the basis for “authenticating” an expert, as well as the methods, instrumentalities, and studies relied upon by persons who do qualify as experts.<sup>200</sup> Hence, even an

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<sup>200</sup> *Daubert v. Merrill Dow*, 509 U.S. 579 (1993) (citing the relevance rule, FED. R. EVID. 401, along with FED. R. EVID. 403 and FED. R. EVID. 702). The Court held that this sequence of admission standards gave judges sufficient discretion to determine if experts were experts, and whether the scientific and technical innovation and “well established” theories or methods warrant admission to assist the trier of fact by looking at its likelihood of providing such assistance. The Court noted that the exclusionary policies implicated must also be evaluated. The degree to which the instrumentalities or methods employed by the person as the basis of her expert opinion were “established” in that person’s field of expertise, particularly for the use for which they were employed by the person testifying, was an element in that evaluation. The Court went on to identify a non-exhaustive list of factors to evaluate, under the rubric of the exclusionary policy of reliability, but that exclusionary policy under the present evidence rule scheme is the sole basis for excluding evidence when there is a significant risk of evidence fabrication. The majority opinion in *Daubert* pointed to the fundamental requirement to qualify as “science” that the theory, hypotheses, instrumentality, or method and its use and the resulting data is testable and has in fact been tested. In addition, the Court identified whether the theory, instrumentality, or methodology was previously published and peer reviewed in appropriate publications. The Court also identified as an evaluation factor, if there are required governmental or non-governmental reviewing agencies, whether appropriate governmental and private agencies have conducted such reviews, have reached favorable conclusions, and that the instrumentality or methodology has successfully passed one or more



acknowledged expert's basis for testifying must be proven by the proponent of the expert to have the possibility of being fact.<sup>201</sup> Commentators reflecting on the significance of *Daubert* and its progeny, have viewed its primary directive to judges is to take more care in determining that the reality hypothesis and its basis offered by a person seeking to testify as an expert are more likely fact than fiction. Or, in basic evidence law policy terms, that the reality hypotheses with regard to the expert and her instrumentalities, as employed in the proponent's theory of the case, have a realistic chance of being and doing what the proponent of the evidence says they are and can do.<sup>202</sup> Thus understood, scrutinizing science to root out "junk science" is not simply a mantra for well-heeled defense attorneys working for well-heeled clients in tort litigation, but simply a subset of the general evidence law core concern that neither individual case decisions nor eventually the policy reflected cumulatively in decisional law be based on reality hypotheses—in legal profession parlance-theory of the case—that are not provable as fact; i.e., are contra to fact, or at odds with the empirical

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steps towards approval by the appropriate regulatory agency.

<sup>201</sup> Erica Beecher-Monas, *Heuristics, Biases and the Importance of Gatekeeping*, 2003 MICH. ST. L. REV. 987, 990-91 (2003) (evaluating the significance of *Daubert* with regard to the appropriate role of the judge as gatekeeper). According to Beecher-Monas,

This framework for justice is the inspiration for the rules of evidence, and a fundamental tenet is that only facts having relevance-rational probative value should be admissible in the search for truth. . . . Although the meanings of truth and rationality are subject to debate in an open society, ultimately truth is empirical, and what we understand as rationality consists of structured reasoning process relating perception to an explanation about how the world works.

*Id.* at 990-91.

<sup>202</sup> *Id.* at 1001. See David L. Faigman, *The Law's Scientific Revolution: Reflections and Ruminations on the Law's Use of Experts in Year Seven of the Revolution*, 57 WASH. & LEE L. REV. 661, 672-73 (2000).

evidence required to establish as fact(s) the assumptions or allegations contained therein.<sup>203</sup>

Decades before *Daubert*, social scientists, working with lawyers, produced empirical evidence whose import was used as proof that several evidence rules were based upon anti-science or “junk science”; their policy premises were not reality.<sup>204</sup> At a recent national symposium entitled “Visions of Rationality in Evidence Law,” several evidence scholars critiqued certain current exclusionary rules by focusing on whether there was empirical or other evidence to support the premise that the evidence targeted for exclusion would prompt juror decision making on

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<sup>203</sup> Commentators reviewing aspects of the impact of *Daubert* and its progeny on federal court decisions have concluded that it has resulted in more frequent exclusions of at least certain experts and expert evidence. See, e.g., Faigman, *supra* note 202 at 667-68 (identifying more frequent exclusion of prosecution proffered experts seeking to qualify primarily on experience). These commentators’ views, however, were not apparently based on a systematic study of how these experts and this expert evidence fared in all cases in all federal courts since the *Daubert* decision. Studies of outcomes, based on federal and state appellate decisions, concluded that there was not a significant difference in the admission of expert testimony in criminal cases, in the five and one-half years following the *Daubert* decision, when compared to the five and one-half year period proceeding *Daubert*. Jennifer L. Groscup et al., *The Effects of Daubert On The Admissibility of Expert Testimony in State and Federal Criminal Cases*, 8 PSYCHOL. PUB. POL’Y & L. 339 345 (2002) (“basic rates of admission of expert testimony at the trial and appellate court levels did not change significantly after *Daubert* in criminal cases”). In addition, surveys of federal trial judges indicated that more rather than fewer experts testified per trial in 1998 than testified in 1991. Sanja Kutnjak Ivkovic & Valerie P. Hans, *Jurors’ Evaluation of Expert Testimony: Judging the Messenger and the Message*, 28 LAW & SOC. INQUIRY 441, 444 (2003).

<sup>204</sup> Jeremy A. Blumenthal, *Law and Social Science in the Twenty-First Century*, 12 S. CAL. INTERDISC. L. J. 1, 12 (2002). This series of articles included three which questioned the assumptions underlying evidence rules regulating consciousness of guilt, competency of witnesses, and spontaneous exclamations. *Id.* at n.73. Dr. Blumenthal cited to other authors who had asserted that the collaborative effort of these authors failed to have the impact that the authors apparently sought—experimental testing of the assumptions underlying those rules and possible reform in light of the results of that test. *Id.*

irrational bases.<sup>205</sup> With due respect to the conference participants; however, the more fundamental rationality issue with regard to evidence rules was not nearly as central to the discussion. That issue is whether there is empirical or other actual proof that current evidence rules that authorize admission, including the rule authorizing convictions to impeach, can pass this fundamental test.<sup>206</sup> Other commentators have endorsed the exclusion of character evidence or any evidence based on predicting litigation behavior by reference to prior supposedly similar or analogous conduct as “junk science.”<sup>207</sup> Surely in 2005, state evidence rule makers and state supreme courts should hold their own heuristic hunches, which serve as the sole basis for asserting that an enactment authorizing admission of evidence is relevant, to the same scrutiny; i.e., to evaluate if that heuristic is simply “junk science”.<sup>208</sup>

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<sup>205</sup> *Visions of Rationality in Evidence Law Symposium*, 2003 MICH. ST. L. REV. 837-1364. See also Eleanor Swift, *Aspirational Optimism About Evidence Law: An Implicit Theme of the Visions of Rationality Symposium*, 2003 MICH. ST. L. REV. 1337, 1348 (summarizing elements of the symposium by categorizing seven of the articles focused on evaluating the rationality of exclusionary evidence rules).

<sup>206</sup> See discussion *supra* notes 193-98 and accompanying text.

<sup>207</sup> Beecher-Monas, *supra* note 201, at 1003, 1004, 1017-19 (illustrating how future dangerousness predictions should be carefully evaluated for likelihood of accuracy before admission because irrelevant evidence dilutes relevant evidence); Saks & Kidd, *supra* note 193, at 136 (observing that, based on the law of probabilities, evidence law is correct in excluding character evidence as proof of the theories of a party's case).

<sup>208</sup> It should be noted, however, that in the fifteen year period of this study, 1990-2004, while state supreme courts made over two hundred decisions evaluating whether state legislation had a rational basis to defeat a substantive due process challenge, in none of these decisions did they refer to “empirical evidence” or “legislative facts,” and only one of these decisions made reference to the “Brandeis Brief.” *Alabama Power Co. v. Citizens of State*, 740 So. 2d 371, 382 n.11 (Ala. 1999). Overall, during this period, only eighteen state supreme court decisions made express reference to all three concepts: (1) rational basis, (2) empirical evidence or data, and (3) legislative fact. With regard to state constitutional substantive due process provisions, see Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review* 112 HARV. L. REV. 1131, 1136-38 (1999)

Therefore, the third reason of the four possible reasons for twenty-eight state standards, most of which admit in some form convictions to impeach, is also invalid. This admission rule is inconsistent with one of the most significant evidence law trends—closer scrutiny of reality hypotheses claims that serve as justification for admitting or excluding evidence.

The constitutional and policy case against admitting convictions to impeach is further strengthened if upon review of the available empirical evidence, it is determined that jurors and simulated jurors do regard conviction records as irrelevant for credibility purposes. The case is even stronger if the empirical evidence also supports a finding that the admission of a conviction record to impeach creates a significant risk that the subsequent civil or criminal verdict will be the product of the deliberation and vote of one or more partial jurors. This article next examines this evidence as possible rational reason number

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(discussing Thayer's view that a rationality review reflects a judicial posture that the constitution does not impose a particular choice on the legislature, but only that the choice reflected in the statute is rational). But Professor Hershkoff also referred to Justice Stevens' comment that rational basis standard has in effect no review at all. *Id.* at 1136. Neither reference, however, included a consensus definition of the term "rational" in this context. *Id.* at 1136-37. Professor Hershkoff proposed that state supreme courts should provide closer scrutiny of state legislative enactments to determine more than if they are just rational under some possible scenario, but whether the enactments have minimally protected express state rights. *Id.* at 1137. While Professor Hershkoff's focus was on express state welfare rights, her advocacy would equally apply to the fact that most state constitutions expressly recognize a right to an impartial jury. *Id.* See also Randall T. Shepard, *A New Generation: The Maturing Nature of State Constitutional Jurisprudence*, 30 VAL. U. L. REV. 421, 441 (1996) (identifying fundamental differences between the states and the federal constitution that justify closer state supreme court scrutiny of the rational basis and reality hypotheses underlying state legislative enactments); Sandra J. Ware, *Developments in State Constitutional Law: 1996*, 28 RUTGERS L.J. 909, 1003 (1997) (identifying a state supreme court decision which struck down a state drunk driving statute as violative of due process in part because the statute's reality premise was faulty when it did not require proof that the accused was intoxicated during the time he was driving).

four for admitting convictions to impeach, and for the existence of twenty-eight different standards in the states, all but one authorizing such admission.

#### **4. Evaluating Possible Reason Four for Twenty-Eight State Standards: No Empirical Evidence Exists to Support Consensus with Regard to the Appropriate Standard for Regulating the Admission of Convictions to Impeach**

Studies of actual jury behavior, as well as studies of simulated juror reaction to the introduction of conviction evidence of the accused, have almost universally reported two findings highly relevant to this study. First, jurors simply do not believe or act upon a belief that conviction records, even perjury conviction records, are proof that such convicted persons have a greater propensity to lie.<sup>209</sup>

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<sup>209</sup> Valerie P. Hans & Anthony N. Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 Crim. L.Q. 235, 247 (1976) (noting that “juries” who were informed of the prior conviction were not significantly more likely to even make reference to the credibility of the accused). Ironically, in these studies, the only time prior conviction disclosure influenced jurors to significantly doubt the accused’s credibility was when the conviction’s specific purpose admission was not for that purpose, but as substantive proof of guilt. See also Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 L. & HUM. BEHAV. 67, 75-76 (1995) (indicating when directly asked, mock jurors did not believe the prior conviction evidence was probative on the only issue for which it was admissible); Kerri L. Pickel, *Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation Does Not Help*, 19 L. & HUM. BEHAV. 407, 415 (1995) (hypothesizing that the credibility of the accused is not significantly negatively effected in the views of the subjects of the study, even when the prior conviction was for perjury and was admitted in one of four scenarios in the study); Roselle L. Wissler & Michael L. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Credibility Evidence to Decide on Guilt*, 9 L. & HUM. BEHAV. 37, 41 (1985) (stating that although forty of one hundred sixty subjects were told that accused has a prior conviction for perjury, and

On the other hand, as most trial lawyers would agree based on their experience and as an intelligent lay person might surmise, jurors are inherently skeptical of the credibility of the accused whether or not a prior conviction of the accused is introduced to impeach him.<sup>210</sup>

Second, juror studies provide highly probative evidence that jurors and juries do, whether they acknowledge it or not, use prior conviction evidence to prejudice their substantive evaluation of the guilt or innocence of the accused.<sup>211</sup> Each study's findings

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that the conviction could be used only to evaluate the credibility of the accused who testified, these subjects did not find the accused significantly less credible than those subjects told he had been convicted of two other crimes). Even more significantly, the subjects with knowledge of a perjury conviction did not find the accused significantly less credible than did those subjects who received no information that the accused had been previously convicted of any crime). *Id.*

<sup>210</sup> Wissler & Saks, *supra* note 209, at 41. The subjects across all eight conditions, including those control conditions when the subjects were not informed of a prior conviction, rated the credibility of the accused as significantly lower than that of all of the other witnesses. *Id.* The strength of this across the board finding was more than enough to satisfy the basic evidence standard of relevance. *Id.* In fact, the strength of this finding, when translated into evidence law proof terminology, was that it had probative value well beyond the relevance threshold in establishing that it is reality that jurors are inherently skeptical of the likelihood an accused will tell the truth should he testify in his own defense. *Id.*

<sup>211</sup> Doob & Krishenbaum, *supra* note 194, at 93-94 (presenting seven convictions, including five convictions for the identical crime as the charge being currently tried, which were admitted to certain "cells" of the entire test group). Some "cells" were control groups who did not learn of the convictions. The strength of the findings of this study were far more than enough to satisfy the basic evidence standard of relevance—heightening the probability that in reality jurors learning of convictions of the accused, ostensibly only to impeach the accused, are much more likely to return guilty verdicts than jurors who do not learn of convictions to impeach. See Greene & Dodge, *supra* note 209, at 67, 75-76 (explaining that individual simulated jurors were significantly albeit unwittingly influenced to return a guilty verdict by exposure to a prior conviction, when they were told it was substantively admissible for a limited purpose). These jurors self-assessment was that they did not allow the prior conviction to influence their verdict. The strength of the study's key finding, however, was far more than enough to satisfy the basic evidence standard of relevance—heightening the

sufficiently rejected the hypothesis that the admission of conviction to impeach the accused would not influence individual or collective juror verdicts to satisfy the basic evidence standard of relevance—heightening the probability that, in reality, jurors are unfairly prejudiced by the admission of convictions, ostensibly only to impeach. The studies prove that simulated and actual jurors provided with prior conviction information will, at a rate of difference fairly characterized as probative on this issue, more frequently return guilty verdicts than jurors reviewing exactly the same case under exactly the same conditions who did not receive such information.<sup>212</sup> Several of these studies either obtained data from jurors and other sources of evidence after actual jury deliberation and verdicts, or included simulation of the jury deliberation phase of the trial.<sup>213</sup> These studies lessen concern about “external

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probability that in reality jurors learning of convictions of the accused for this limited purpose were more likely to return a guilty verdict than jurors who did not learn of the conviction, when all other circumstances were identical); Hans & Doob, *supra* note 209, at 242, 249 (explaining again that study group members overwhelmingly agreed the prior conviction had not influenced their evaluation of the evidence to prove guilt or innocence, or their individual or collective verdicts). The strength of the study’s key finding, however, was far more than enough to satisfy the basic evidence standard of relevance—heightening the probability that in reality jurors are unfairly prejudiced by the admission of even a single same crime conviction, ostensibly only to impeach. The study proved that such jurors will more frequently return guilty verdicts than jurors reviewing exactly the same case who did not receive information of convictions to impeach the accused. *Id.* at 242. See also Kalven & Zeisel, *supra* note 36 (reviewing study of the performance of actual juries and concluding that introduction of the prior record of the accused for any purpose increased the likelihood of conviction by 27%); Martha A. Myers, *Rule Departures and Making Law: Juries and Their Verdicts*, 13 L. & SOC. REV. 781, 792-93 (1978) (studying over two hundred actual jury verdicts in criminal felony cases and finding that defendants, who during their trial had multiple convictions admitted were more likely to be convicted); Wissler and Saks, *supra* note 209, at 41-42.

<sup>212</sup> Doob & Krishenbaum *supra* note 194, at 93-94 (1973); Greene & Dodge, *supra* note 209, at 67, 76; Hans & Doob, *supra* note 209, at 251; Wissler & Saks, *supra* note 209, at 42.

<sup>213</sup> Hans & Doob, *supra* note 209, at 242-43, 251. The study included a

validity,” and thereby enhance the probative value of the studies collectively as proof that convictions cause prejudice.<sup>214</sup> The simulation study found that the “fact that the defendant has a record permeate[d] the entire discussion of the case, and appeare[d] to affect the [jury’s] perception and interpretation of the evidence in the case.”<sup>215</sup>

In one study, convictions for the same crime as that for which the accused was on trial were found to even more significantly influence subjects to find the defendant

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total of thirty, four person juries, and forty individual simulated jurors. This meant that fifteen groups and twenty individuals received information about the prior conviction. The other half of the test subjects, were given the exact same “transcript,” except the prior conviction was omitted. All thirty of the four person jury deliberation discussions were tape recorded. While the prior record did not significantly affect the verdicts reached by individuals, none of the fifteen simulated juries who were not informed of the prior record of the accused returned guilty verdicts, while six of the fifteen juries who were given this information returned guilty verdicts. Kalven & Zeisel, *supra* note 36; Myers, *supra* note 211, at 792-93. For a mega-study purporting to identify and categorizing all jury deliberation studies between 1955-1999, see Devine et al., *supra* note 166 (identifying and describing over 200 empirical studies of various facets of jury deliberation during this forty-five year period).

<sup>214</sup> FAIGMAN ET AL., *supra* note 166, at 143-44 (identifying external validity based on the ability to generalize the findings of a study, and differences that could make generalization debatable). As shown in the studies cited in this sub-section, this study also identified replication of the same or similar findings by multiple studies, especially if the studies employed multiple, sound methodologies. See also Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63 (1993) (commenting that there is little agreement about whether and how the absence of a deliberation component, or other factors present in actual jury decision making processes, actually skew results of jury studies that do not include such components).

<sup>215</sup> Hans & Doob, *supra* note 209, at 244, 251 (showing that the analysis of the taped deliberations revealed that the “juries” who were informed of the prior conviction were significantly more likely to characterize the identical evidence as strong proof of guilt, while the “juries” who did not learn of the prior record were significantly more likely to make more frequent disparaging statements about the case against the accused). Hans and Doob note that “juries” who learned of the prior conviction also made more references to those items of evidence supporting a guilty verdict.



guilty.<sup>216</sup> Subjects of these studies were less likely to use information that the accused had a prior conviction of a comparatively minor crime to increase the likelihood of returning a guilty verdict for a much more serious crime, such as murder.<sup>217</sup> Convictions have the effect of creating partial jurors and biasing the jury deliberation process, even when the subjects of some of these studies knew it was not to be used to decide the outcome, and in those studies in which they were expressly told that such use was impermissible.<sup>218</sup>

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<sup>216</sup> Wissler & Saks, *supra* note 209, at 42 (noting that convictions for murder and for auto theft in current murder and auto theft trials significantly increased verdicts of guilty beyond the significant increase that resulted when subjects were told of convictions for a dissimilar crime or perjury).

<sup>217</sup> *Id.* at 44 (showing that subjects who were informed that a defendant on trial for murder had a prior conviction for auto theft returned guilty verdicts at a lesser rate than those subjects who evaluated the murder prosecution without access to any prior record information). On the other hand, Wissler and Saks acknowledge that when subjects evaluating the merits of an auto theft prosecution were informed that the accused had a prior conviction for murder, the percentage of guilty verdicts doubled from the percentage of guilty verdicts returned when the auto theft "jurors" received no prior record information.

<sup>218</sup> Doob & Krishenbaum, *supra* note 194, at 94-95 (concluding that despite being told in the very last instruction that the seven prior convictions were to be used only to evaluate the credibility of the accused who testified in the defense-case-in-chief, subjects were significantly more likely to convict than those subjects who did not know of the convictions, and just as likely to convict as those subjects who knew of the convictions but were not given the limiting instruction); Greene & Dodge, *supra* note 209, at 67, 76 (giving no significance to the limiting instruction when the matter disclosed to jurors was the conviction of the accused or the witness). Other studies using simulated jurors also found that subjects often ignore a ruling that evidence is inadmissible or a limiting instruction that certain evidence should not be used to decide the merits, and still use such evidence as part of their basis for reaching a verdict. *See, e.g.,* Hans & Doob, *supra* note 209, at 237, 240 (reflecting on a study in which one-half of the study's subjects who received information about a single same crime conviction were expressly instructed not to use the conviction of the accused to determine guilt or innocence, and were also told that the only permissible use of the conviction was to impeach the testimony of the accused who did take the stand). Other studies, focusing more broadly on the effect of inadmissible evidence have reached similar conclusions. *See, e.g.,* Wissler & Saks, *supra* note 209, at 44 (noting

The collective findings of these studies far exceed the slight increase in probabilities that satisfies the law's basic evidence relevance standard, which means that there is empirical evidence that in fact supports two crucial conclusions: first, lay persons eligible to serve as jurors join the chorus that criminal conviction records are irrelevant to prove propensity to lie; second, there is a significant risk that individual jurors and the jury will be partial if exposed to a prior conviction of the accused, and will be more likely to convict such a person on a basis other than the specific facts of the current prosecution. Hence, this fourth possible reason for twenty-eight state standards, almost all of which authorize in some form convictions to impeach, is not reality based.

Is the quantitative and qualitative empirical evidence, as discussed in this and previous subsections of this article, sufficient to serve as a significant component of the basis for finding that the admission of a prior conviction to prove propensity to lie violates the right to an impartial jury and due process? This article returns to and completes this evaluation in the next subsection.

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that all subjects who received information that the accused had a prior conviction were all instructed to use that information only to evaluate the credibility of the accused, but a majority of the subjects admitted that the conviction influenced their verdict); Sharon Wolf and David Montgomery, *Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgments of Mock Jurors*, 7 J. APPLIED SOC. PSYCHOL. 205 (1977). These and several other studies are noted and their most crucial findings discussed in the literature review section of Joel D. Lieberman & Jamie Arndt, *Understanding The Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard and Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL'Y & L. 677, 686-88 (2000). These authors summarize their review of prior studies on the effect of limiting instructions with regard to both substantive admissibility use restrictions, and use for impeachment purposes only instructions, by concluding "that with few exceptions, empirical research has repeatedly demonstrated that both types of limiting instructions are unsuccessful at controlling juror cognitive processes." *Id.* at 686.

**5. If There is No Valid Reason for Admitting Convictions to Impeach, Is the Contra Evidence, Especially the Contra Empirical Evidence, and the Law's Heightened Scrutiny of Admitting Evidence Based on Junk Science Enough to Support a Finding that the Admission of Records of Convictions to Impeach is Both Poor Policy and Unconstitutional?**

For the better part of the last one hundred years, the United States Supreme Court has intermittently relied upon empirical evidence as a significant component of its basis for recognizing, expanding, or even devolving several constitutional rights, or to evaluate whether there was a rational basis for legislation which arguably infringed upon a constitutional right.<sup>219</sup> The Court has also sanctioned the

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<sup>219</sup> *Washington v. Glucksberg*, 521 U.S. 702, 730 (1997) (finding complete ban on assisting suicides to be rational because of statistical evidence that suicides are a serious public health problem, and that a large proportion of suicides are suffering from a serious mental illness at the time they take their lives); *Maryland v. Wilson*, 519 U.S. 408, 412 (1997) (characterizing Fourth Amendment liberty interests of all people who are passengers in motor vehicles as de minimis and subordinate to the interests of the government in protecting police who legally stop such vehicles). The Court established significant state interests by relying on statistics of number about the number of injuries to police officers inflicted during such stops, despite the express acknowledgement by the majority that the empirical data on such injuries was fairly characterized as "sparse." *Id.* at 413, n.2. See *Lee v. Weisman*, 505 U.S. 577, 593-94 (1992) (interpreting the First Amendment Establishment Clause to protect junior and senior high school children from choosing between their religious beliefs and participation while attending graduation ceremonies in which the state authorized prayer and requested participation of all attendees). In *Lee*, the Court relied on three social science studies to support its evaluation that teens who did not want to participate in the state prayer would feel pressured to do so by their peers. See also *Taylor v. Louisiana*, 419 U.S. 522, 532 n.12 (1975); *Brown v. Board of Education*, 347 U.S.

use of empirical evidence to evaluate if a proffered rational basis for legislation is reality, and hence can survive a claim that the legislation is irrational, or even if rational, is not protective of so strong a state interest that it can justify the injury it inflicts or threatens to a national constitutional right.<sup>220</sup> The Court has also established and restated several times the principle that when legislation infringes upon a specific right recognized in the Constitution, or specific liberty interests identified by the Court in its substantive due process jurisprudence, the quantum of empirical evidence needed to satisfy heightened judicial scrutiny of such an enactment will vary up or down with the novelty and plausibility of the justifications offered in support of the legislation.<sup>221</sup> As documented earlier in this

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483, 494 n.11 (1954) (citing seven empirical, including ethnographic studies, as a partial basis to conclude that there was unjustified racial discrimination inherent in de jure segregation in the public schools). Included among the studies was a psychological study in which black children expressed an apparent preference for looking like white children. *Id.* A second study, an opinion survey in which the subjects were social science investigators, was also cited by the court because the consensus sentiment of those surveyed was that segregation was harmful. *Id.* For source of the name "Brandeis Brief," see *Muller v. Oregon*, 208 U.S. 412 (1908) (naming the appellate brief which contained the use of empirical evidence drafted by eventual Supreme Court Justice Louis Brandeis to defend Oregon legislation that limited the hours women could work). The brief that he filed contained a large volume of study and statistical data, compiled by others, which purported to show that in fact excessive work hours were detrimental to the health of women. See *Muller*, 208 U.S. at 419. The Supreme Court upheld the statute, and made reference to the data in the brief as a part of the basis for doing so. *Muller*, 208 U.S. at 419-23.

<sup>220</sup> *Saenz v. Roe*, 526 U.S. 489, 506 (1999); *Craig v. Boren*, 429 U.S. 190, 200-01 (1976) (rejecting statistics demonstrating that the arrest of males between eighteen and twenty for driving while under the influence substantially exceeded that of females of the same age as an adequate basis for upholding a statute which prohibited the sale of a mild form of beer to males but not females of that age). The Court found that study of additional statistics demonstrated that the gender differential in arrest rates for driving while under the influence persisted throughout adulthood. *Id.* Hence, even if the differential existed, it was not a rational basis for a differential treatment of only the youngest age group of males.

<sup>221</sup> *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 144 (2003)

article, the Court has employed empirical evidence for both these purposes, in its recognition and development of the components of the constitutional right to an impartial jury.<sup>222</sup>

On the other hand, for the better part of the last one hundred years, the United States Supreme Court has intermittently and erroneously relied on empirical research fairly characterized as junk science, rejected reliance on empirical evidence as a significant component of its basis for recognizing or expanding several constitutional rights, and has held legislative enactments rational or irrational by distorting the relevance, probative value, or reliability of existing studies, or by ignoring empirical evidence to the contrary.<sup>223</sup> State supreme courts have also used empirical

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(restating the “novelty and plausibility” evaluation standard); *Washington v. Glucksberg*, 521 U.S. 702, 719-21 (1997) (recognizing that regardless of procedural fairness use to implement certain enactments, due process prevents infringements on specific rights protected by the Bill of Rights as well as certain specific components of liberty, unless narrowly tailored to serve compelling state interests).

<sup>222</sup> See *supra* notes 181-82 and accompanying text.

<sup>223</sup> *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 435-36 (2001) (holding that the city could rely on a single study which attributed crime rate increases to adult book store concentrations, even though the study lacked any data on the specific issue before the Court, and the Court failed to make any reference to whether the study contained base rates, controls, and definitional integrity which would make it minimally plausible as a basis upon which to make such an attribution); *Kansas v. Hendricks*, 521 U.S. 346 (1997) (upholding the mandatory indefinite civil commitment of “sexual predators” despite express acknowledgement that mandatory constraint by the government of physical being of a person was at the core of liberty interests that the state could not violate without offering compelling justification, including the support of empirical evidence or data, which by definition means more than just a mere chance of being reality). All the Justices, without citation to a single empirical study to support their conclusion, and despite the fact that the Kansas legislature had premised the statute on a finding that such sexual predators did not suffer from a mental illness, nevertheless found that the appellee suffered from a “mental disease,” and authorized the possibility that Kansas and other states could deprive the appellee and those similarly situated of their liberty for the remainder of their lives. The case is an excellent example of how there can be multiple discipline decisions to ignore or failure to develop empirical evidence. This decision characterizing a sexual

evidence to evaluate alleged violations of state constitutional rights, and have critically examined the empirical evidence offered by a state government in defense of its legislation or legislative classification scheme.<sup>224</sup>

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predator as mentally ill was based mostly on the fact that the American Psychiatric Association had included pedophilia, and other sexual anti-social behavior, as a psychiatric disorder despite the absence of evidence to support finding that such persons suffered from any or similar physical symptoms, causes, or that there was an actual treatment protocol. In its amicus brief filed in *Hendricks*, the APA argued that lawyers should not necessarily use their categorization of anti-social behavior as a mental disorder to find that it was such a disorder or disease for purposes of the legal standard under scrutiny. Brief for the American Psychiatric Association as Amicus Curiae for Leroy Hendricks, *Kansas v. Hendricks*, 521 U.S. 346 (1997) (Nos. 95-1649, 95-9075), 1996 WL 469200. See also *Lockhart v. McCree*, 476 U.S. 162, 169-73 (1986) (citing death penalty cases re-qualifying death penalty jury). In this case, the defendant cited fifteen studies in support of his contention that the death penalty qualified process resulted in petite juries which were more likely to determine that the accused was guilty at the guilt-innocence phase of a trial when the state's system provided that the same jury would also determine punishment. The majority found that the plaintiff's claim was one which did not seek to have studies found relevant or even having probative value, but that the study results by themselves were the primary basis for satisfying some unspecified burden of persuasion to establish a per se constitutional rule. *Id.* at 171. The Court, without analysis and apparently in conflict with the apparent subject and nature of many of these studies as well as the finding of the trial judge, characterized eight of those studies as only marginally relevant. *Id.* at 169. This characterization and lack of evidence of careful evaluation occurred despite the fact that the Court strongly hinted that it had authority to carefully review and critically analyze these studies, notwithstanding the lower court finding. *Id.* at 170. The Court failed to note, comment upon, or integrate or synthesis the fact that two of the studies it broadly cast as at best only marginally relevant, were authored by the same core of authors as a study the court cast as potentially more probative, even though all three were published in the same volume of the same social science journal. *Id.*

<sup>224</sup> *Affronti v. Crosson*, 746 N.E.2d 1049, 1052-53 (N.Y. 2001) (holding that legislative facts can be submitted as evidence to the state's highest court for the first time on appeal). When offered by the government to justify the legislation, the court will evaluate the facts for their accuracy and if they provide a factual basis for finding that the legislative classification scheme is rational. On the other hand, those challenging the legislation have the burden to prove there are no facts to justify the legislation. See also *Am. Assoc. of Univ. Professors v. Central State Univ.*, 699 N.E. 2d 463, 469-70 (Ohio 1998) (determining

Given the random opportunities these courts have had to evaluate the validity and significance of empirical evidence, it is not surprising that their handling of it has been criticized. Nor is it surprising that they have not developed an express conceptual scheme (hereafter “a protocol”) for evaluating or a standard for determining when the quantity and quality of empirical evidence merits its use as a significant evaluation component of the rational basis for legislation, or as the basis for recognizing, expanding, or even devolving a constitutional right.<sup>225</sup> Such a protocol could be at least under construction if the state supreme courts kept better track of their prior evaluations of empirical evidence across doctrines and advocates. Furthermore, they must recognize the implications of decisions such as *Daubert* for their

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that evidence of multiple studies and a data compilation in defense of legislation that made university professors the only state employees not able to collectively bargain with regard to workload provided no facts to support the government’s conclusion that workload was causing the decline in the time university faculty devoted to teaching activities, and therefore there was no reality basis for the legislation). *See also supra* note 208 and accompanying text (discussing what should be the appropriate review standards employed by state supreme courts in deciding upon the merit of constitutional challenges to state legislation).

<sup>225</sup> For example, of the hundreds of cases the United States Supreme Court decided during the period of this study, 1990-2004, the court only made reference to the terms “rational basis” and “empirical evidence” or “data” in the same decision fourteen times. *See, e.g.,* David N. Bersoff & David J. Glass, *The Not So Weisman: The Supreme Courts Continuous Misuse of Social Science Research*, 2 U. CHI. L. SCH. ROUNDTABLE 279, 281, 295-96 (1995) (criticizing the failure of the Court to make reference to or explain why it rejected findings in social science studies which were in conflict with the Court’s sanctioning of state incursions on the liberty of adolescents seeking abortions). Despite the social science findings, the court agreed with the reality hypotheses that there was a factual need for such intervention because there was a difference that mattered in adolescent decision-making ability. *Id.* *See also* Blumenthal, *supra* note 204, at 6 (noting judicial reluctance to consistently accept the findings of social science studies, more specifically psychological studies, as the basis for law reform); Faigman, *supra* note 202, at 661, 678; Henry F. Fradella, *A Content Analysis of Federal Judicial Views of the Social Science “Researcher’s Black Arts,”* 35 RUTGERS L.J. 103, 105-06 (2003).

assessment of empirical evidence when offered by any party. Law trained statisticians, scientists, and scholars need to work together to assist these courts by developing and proposing a protocol that reflects mutually respectful, accurate, precise, discipline-appropriate components.<sup>226</sup>

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<sup>226</sup> See discussion *supra* notes 200-03, 214, 216-18, and accompanying text (suggesting the elements for a sound protocol). For an article which urges such mutual respect and makes a series of recommendations to improve the interplay of the expertise of social scientists and lawyers in evaluating and improving social policy, see Blumenthal, *supra* note 204, at 4-6, 24, 33-35 (providing multiple examples of failures of both law trained and social science experts to adequately appreciate the other's doctrines and methodologies). One of the Blumenthal's core recommendations was more production of meta-analytical studies of existing social science studies with the same or related null hypotheses by social scientists, and more reliance by lawyers and judges on quality meta-analysis. *Id.* at 39-42. In his article, Blumenthal also recommends more interdisciplinary training, and more joint studies by social scientists and lawyers to ensure accurate social science studies and proper use of social science studies by the legal profession. *Id.* at 37. However, Blumenthal did not make express reference to one of the most crucial element of a quality jointly created protocol that would follow from this line of analysis. A lawyer's and social scientist's most important collaborative work should occur at the time the former is fashioning her theory of the case, and the latter is formulating her null hypotheses. See, e.g., E. Gil Clary & David R. Schaffer, *Effects of Evidence Withholding and a Defendant's Prior Record on Juridic Decisions*, 112 J. SOC. PSYCHOL. 237 (1980). In researching their article, Clary and Schaffer should have collaborated with a lawyer familiar with criminal procedure and evidence because their null hypotheses omitted a crucial jury instruction, admitted an inadmissible juvenile crime record, and allowed an accused to invoke the privilege against self-incrimination during his trial when, under the circumstances, he had waived the privilege. Cf. Bersoff & Glass, *supra* note 225, at 289 (suggesting that law-trained persons recognize that almost all well-done social science studies have a literature review section carefully examining each study). Study and evaluation of these literature review sections should be undertaken to determine if there were prior studies, acknowledged by the current researchers that made findings contra to the relevant findings ultimately reported by the current researchers); Faigman, *supra* note 202, at 673-78 (recommending that research psychologists in particular, and social scientists and scientists more generally, remain faithful to the scientific method and disdain claims that a study or even a handful of studies can by the basis for a policy change); D.H. Kaye, *Is Proof of Statistical Significance Relevant?*, 61 WASH. L. REV. 1333, 1342-46 (1986) (recommending that researchers and experts testifying with regard to whether a null hypotheses was disproved, avoid focus



Absent such an existing protocol, and driven by the necessity for some guideline to evaluate whether the empirical evidence identified in this article is sufficient to prove that conviction records should be banned as evidence of propensity to lie, this subsection attempts to be faithful to the protocol construction principles just outlined. This article next compares the quantity and quality of that evidence to the quantity and quality of empirical evidence used expressly or implicitly by courts to decide whether legislation is rational, whether a specific constitutional right exists, its dimension if it exists, and whether legislation which threatens such a right is not only rational, but has adequate evidentiary support to justify the threat or injury to a specific constitutional right.

This article has established that no credible empirical evidence supports the contention that criminal conviction records are relevant to a prove propensity to lie. The quantity and quality of empirical evidence presented in this article to prove that conviction records are irrelevant or irrational to prove a propensity to lie greatly exceeds or is of the same magnitude of that relied upon in part by the United States Supreme Court to conclude that legislation was rational.<sup>227</sup> Moreover, the quantity and quality of empirical evidence presented in this article to prove that conviction records are irrelevant or irrational to prove a propensity to lie, and to establish that the specific constitutional right of an accused to an impartial jury is very seriously threatened by such admissions is of a greater

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solely on whether a finding(s) was statistically significant, and provide precise explanations of specific P-value findings). In addition, Kaye recommended reporting P-values as an incremental scale, conceptually similar to the evidence law evaluation sliding scale of relevant—probative value—prima facie case.

<sup>227</sup> See *supra* notes 196-98 and accompanying text. *Glucksberg*, 521 U.S. at 730 (relying in part on four to five statistical studies establishing the frequency of suicides, and concluding that a large percentage of suicide victims are suffering from a serious mental illness at the time they take their lives).

magnitude than the quantity and quality of statistical empirical evidence relied upon in part by the United States Supreme Court to conclude that a legislation classification was not rational because its premise was not reality, and therefore unjustifiably threatened to injure the right to an impartial jury trial.<sup>228</sup> The quantity and quality of empirical evidence presented in this article is more than the quantity and quality of empirical evidence uncritically relied upon by the United States Supreme Court as a component of the basis to find an injury to a specific constitutional right.<sup>229</sup> The quantity and quality of empirical evidence presented in this article to prove that conviction records are irrelevant as proof of a propensity to lie, and to establish that the specific constitutional right of an accused to an impartial jury is very seriously threatened by such admissions is of a greater magnitude than the quantity and quality of empirical evidence uncritically relied upon in part by the United States Supreme Court to conclude that a legislation classification was not rational because its premise was not reality, and therefore perpetuated a racial caste system.<sup>230</sup> Moreover, the quantity and quality of empirical evidence presented in this article to prove that conviction records are irrelevant as proof of a propensity to lie, and to establish that the specific constitutional right of an accused to an impartial jury is very seriously threatened by such admissions is of a greater magnitude than the quantity and quality of empirical evidence proffered by state governments, but rejected by

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<sup>228</sup> See *supra* notes 181-82, 196-98, 209-18 and accompanying text. *Taylor*, 419 U.S. at 532 n.12.

<sup>229</sup> See *supra* notes 181-82, 196-97, 209-18 and accompanying text (discussing empirical evidence). See also discussion *supra* note 219. The Court's uncritical reliance on these studies and failure to acknowledge empirical studies which had made findings, and based on those findings, reached ambiguous or conflicting conclusions to those cited and relied upon by the Court. See Bersoff & Glass, *supra* note 225, at 286-91.

<sup>230</sup> See *supra* notes 181-82, 196-97, 209-18 and accompanying text. *Brown*, 347 U.S. at 494 n.11.

the United States Supreme Court and a state supreme court as proving a factual, and therefore rational basis which justified state legislative classification schemes.<sup>231</sup> Finally, the quantity and quality of empirical evidence presented in this article to prove that conviction records are irrelevant to prove a propensity to lie, and to establish that the specific constitutional right of an accused to an impartial jury is very seriously threatened by such admissions, is far greater than the quantity and quality of empirical evidence uncritically relied upon by the United States Supreme Court to find that legislation which threatened to injure a specific constitutional right was rational and arguably trumped the threatened injury to that right.<sup>232</sup>

## V. Conclusions and Recommendations

This national study of an important evidence and criminal justice issue—the existing state rule standards for the admission of convictions to impeach—has proven that a wholly random and widely disparate pattern of federalism can emerge when states’ rules regulating the same issue were adopted and retained, reflecting history more than policy, even after a recent national opportunity for policy

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<sup>231</sup> *Craig v. Boren*, 429 U.S. 190, 200-01 (1976). See also discussion *supra* note 220; discussion *supra* note 224; *Am. Assoc. Univ. Professors*, 699 N.E. 2d at 469-70.

<sup>232</sup> See *supra* notes 181-82, 196-97, and 209-18 and accompanying text (discussing empirical evidence). *Alameda Books, Inc.*, 535 U.S. at 435-36 (relying on single twenty year old study to not only find that the legislation was rational but that it might be adequate evidence to justify subordinating first amendment right of a commercial entity). The Court reached this conclusion despite the fact that the data did not even address the specific multiple purpose adult books combined with video arcade same cite issue litigated in the case. The Court also reached this conclusion despite fact that it was willing to project, based on that research, a cause and effect relationship between multiple, geographically proximate adult book stores and an increase in crime, and decline in that area’s property values, and without making reference to whether that study included implementation of or the nature of “controls.”

reflection had occurred. Some federalism outcomes are not desirable—twenty-eight different standards in the fifty states with regard to admitting convictions to impeach is such an undesirable outcome—unless there is at least a plausible policy reason that can account for this much diversity. The article identified and evaluated the four plausible policy reasons for this pattern, and found that they were either not reality, and if reality, did not explain or justify this pattern of federalism with respect to admitting convictions to impeach.

Part I of this article examined the standards of the federal rule on this issue. In light of this examination and what has happened to state rules since its adoption, the federal rule can now be viewed as a national opportunity lost.<sup>233</sup> Only nine states' rules mimic the current federal standard.<sup>234</sup> This article found, however, that as a matter of policy analysis, the fact that so few states chose to adopt the federal standards was possibly an appropriate federalism policy outcome, because the federal rule and its evolution was as much based on history and mere mimicry of available enacted standards as it was even the attempt at sound policy identification, evaluation, and decision-making.<sup>235</sup>

Part II presented the primary research and analysis findings of this article, an identification and ranking of state evidence rules regulating the admission of convictions to impeach. The conceptual premises of the rankings of each state's admission of convictions to impeach standard(s) were explained.<sup>236</sup> The rules of the fifty states were each evaluated to determine the nature and number of standards they embodied, their appropriate ranking, and the rankings were organized into three categories based on whether a state's standard or standards were overall identical to, more

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<sup>233</sup> See *supra* notes 10-31 and accompanying text.

<sup>234</sup> See *supra* notes 39-40 and accompanying text.

<sup>235</sup> See *supra* note 10 and accompanying text.

<sup>236</sup> See *supra* notes 32-38 and accompanying text.

liberal than, or more restrictive than the three standards of the federal rule. The most significant overall finding of this part of the article is that at the end of 2004, nine of every ten of the fifty states' rules still authorize the possible admission of records of conviction to impeach most witnesses, including the accused, which, by element analysis, cannot satisfy the same states' fundamental admissions requirement—that the conviction record is relevant proof of a propensity to lie.<sup>237</sup> The second most significant overall finding of this part of the article is that even when state rules expressly or implicitly recognize that conviction records must be relevant to prove a propensity to lie to be admissible on that issue, almost all of them, like the federal rule, negate that recognition by failing to define such limiting concepts as “dishonesty” or “false statement.”<sup>238</sup> Failure to define such terms opens the door to the possibility of broad interpretations of the terms—eliminating any rational argument that conviction records for crimes qualified by these characterizations constitute logical proof of propensity to lie.<sup>239</sup> Blame for this fundamental failure must be shared by the drafters of the federal rule, who in the legislative history discussed much more express and policy based meanings of these concepts, yet failed to so define the concepts in the federal rule.<sup>240</sup>

Part III of this article began by identifying two major consequences of twenty-eight different state legislative standards regulating the issue of admitting conviction records to impeach. Both of these consequences most heavily impact members of the legal profession. First, even evidence experts do not necessary know the

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<sup>237</sup> See *supra* notes 39, 51, 65, 70, 79, 81, 88, 95, 100, 110, 114-115, 123, 127, 130, 133, 138 140, 142, 148-150, 152, 154, 156, 159 and accompanying text.

<sup>238</sup> See *supra* notes 45, 50, 53, 56, 61, 66, 73, 78, 92, 109, 114, 116, 125, 139, 147, 153, 160 and accompanying text.

<sup>239</sup> See *supra* note 166 and accompanying text.

<sup>240</sup> See *supra* notes 29-30 and accompanying text.

current national state of the law on this important issue, and more importantly, the practicing bar is faced with the possibility of further variance in these standards by state supreme courts' interpretations, and the possibility of hundreds of variants at the trial level.<sup>241</sup> Part III found that ultimately these consequences fall most heavily on the rights, including constitutional rights, of litigants, particularly the accused in criminal cases, and secondly, all civil party litigants, particularly individual persons as civil parties.<sup>242</sup>

Part III reached this ultimate conclusion by next identifying four possible reasons for twenty-eight state legislative standards regulating the issue of the admission of convictions to impeach.<sup>243</sup> Once history was dismissed as an adequate substitute for justice or policy analysis, four reasons remained that would arguably justify the federal system's current pattern of twenty-eight state legislative standards regulating the admission of convictions to impeach.<sup>244</sup>

Part III next evaluated each of these four reasons. The most significant overall finding of this section is that none of these reasons were found to be reality, and therefore, cannot serve as reality-based policy justifications for this pattern of federalism.<sup>245</sup> An element of this finding was disproof of the hypothesis that no constitutional rights are implicated by any or only a few of the current twenty-eight state standards, authorizing the admission of convictions to impeach.<sup>246</sup> Injury to the accused's specific constitutional right to an impartial jury, and the right of the accused and parties who testify in civil cases to minimal

<sup>241</sup> See *supra* notes 164-167 and accompanying text.

<sup>242</sup> See *supra* notes 175-91, 199, 219-32 and accompanying text.

<sup>243</sup> See *supra* notes 168-174 and accompanying text.

<sup>244</sup> As Justice Kennedy commented in *Lawrence v. Texas*, 539 U.S. at 572, history and tradition are the starting point but not necessarily ending point of substantive due process evaluations.

<sup>245</sup> See *supra* notes 175-218 and accompanying text.

<sup>246</sup> See *supra* note 170-71 and accompanying text.

substantive due process protection, are both threatened by most of the states' standards.<sup>247</sup>

An element of this overall finding was disproof of the hypothesis that there is empirical or any form of reality based evidence that a record of criminal conviction is relevant—i.e., makes it logically more likely—to prove a propensity to lie.<sup>248</sup> No credible evidence supports this hypothesis, the existing empirical evidence supports the conclusion that the hypothesized reason is false, and there is widespread agreement by lawyers and other experts that a record of conviction is not relevant to prove a propensity to lie.<sup>249</sup> Admitting irrelevant evidence violates the most basic evidence admission rule and the most basic substantive constitutional protection.<sup>250</sup>

An element of this overall finding was disproof of the hypothesis that most or all of these twenty-eight current state standards authorizing the admission of convictions to impeach are consistent with current major evidence trends, such as the *Daubert* doctrine.<sup>251</sup> The analysis in Part III concluded that most of these standards are inconsistent with the call of *Daubert* and its progeny for critical evaluation and even re-examination of the basis for admission of expert testimony. The article argued that *Daubert's* premise that reliance on hunch and heuristics by experts in other fields, in fairness, should be seen as a general call for a reality check on the basis of admission of all admission standards, even those favored by the hunch and heuristics of the legal community.<sup>252</sup> As such, *Daubert's* basic concerns are a subset and supportive of the basic evidence admissibility requirement of relevance.<sup>253</sup> There is more

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<sup>247</sup> See *supra* notes 175-91,199 and accompanying text.

<sup>248</sup> See *supra* notes 172 and accompanying text.

<sup>249</sup> See *supra* notes 193-98 and accompanying text.

<sup>250</sup> See *supra* notes 191, 199 and accompanying text.

<sup>251</sup> See *supra* note 173 and accompanying text.

<sup>252</sup> See *supra* notes 200-01 and accompanying text.

<sup>253</sup> See *supra* notes 202-03 and accompanying text.

than just the appearance of intellectual hubris on the part of lawyers and judges participating in drafting and interpreting evidence rules in continuing to rely on an unproven historical heuristic, when at the same time ignoring empirical research supporting conclusions that conviction records, while irrelevant to prove a propensity to lie, lead to biased jurors and juries.<sup>254</sup>

An element of this overall finding was disproof of the hypothesis that most or all of these twenty-eight current state standards which do authorize or mandate the admission of convictions to impeach are consistent with the reality that there is either no or inadequate empirical evidence that admitting conviction records ostensibly only to impeach testimony will result in, or create, a substantial risk of partial juror(s) and juries.<sup>255</sup> Also, in Part III of this article, multiple empirical studies were identified and their consistent and consensus findings reported. Those findings were that jurors and juries are prejudiced in deciding the merits of cases by misusing conviction evidence for that purpose, while disdaining use of such conviction records ostensibly for its only authorized use as impeachment evidence.<sup>256</sup>

Finally, the article identified a crucial consequence of this finding disproving all hypothesized reasons for the twenty-eight state standards; nine out of every ten state standards violate or threaten to violate national and state constitutional rights to substantive due process and the right of an accused to an impartial jury.<sup>257</sup> Now is the time for reform.

In 2005, all fifty states and the federal rule should abolish the admission of conviction records to impeach, especially where the unfair prejudice that results is likely to be greatest—when the accused or civil parties take the

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<sup>254</sup> See *supra* notes 204-08 and accompanying text.

<sup>255</sup> See *supra* note 174 and accompanying text.

<sup>256</sup> See *supra* notes 209-18 and accompanying text.

<sup>257</sup> See *supra* notes 219-32 and accompanying text.



stand as witnesses. Hence, all references to conviction records as a basis for impeachment should be eliminated. Montana has adopted this ban for all witnesses, and that ban demonstrates that such a ban can be implemented now.<sup>258</sup> In fairness, enhancing the likelihood of convicting persons with records, and taking their property in civil cases, are not adequate counterweights to the admission of irrelevant evidence that injures these person's constitutional rights. Nothing in substance will be injured by the ban when the focus is upon the primary goal of trials—the search for truth—because jurors will always be skeptical of the veracity of the accused, civil parties, and any witness who stands to gain or lose as a result of the outcome of the trial.<sup>259</sup> Furthermore, when it is appropriate and necessary, i.e., when a witness refuses to admit that he has previously lied under oath, and there is a judicial determination that he has so lied, the trial judge can instruct the jury of the fact that the person has previously lied under oath. There is never a justification for reference to a record of criminal conviction, and such a conviction record need not be the only basis for a judicial determination that the witness has previously lied under oath.<sup>260</sup> Federalism is one of the

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<sup>258</sup> See *supra* notes 42-43 and accompanying text. See also *supra* notes 44, 52, 102 (discussing the fact that Hawaii, Kansas, and Georgia all ban the offensive introduction of any conviction to impeach the accused). All states should immediately abandon qualifying which convictions can be admitted to impeach on the ground that the crime charged was punishable by more than one year in jail. States should also immediately abandon which qualifying convictions can be admitted to impeach by reference to common law concepts such as “moral turpitude” or any generic and undefined concepts such as crimes of “dishonesty” or “false statement.” These common law and generic concepts open the door to potential distortion to accomplish an admission goal.

<sup>259</sup> See *supra* note 211 and accompanying text.

<sup>260</sup> Pre-trial notice and a pre-trial hearing provide a procedural avenue for proving a previously unadjudicated lie under oath. Eliminating any reference to a record of criminal conviction means that the new national standard becomes simply a very limited procedural exception to FED. R. EVID. 608 and comparable state rules, which allow questioning but not extrinsic evidence to prove specific incidents of behavior relevant

greatest strengths of our system; it is not, however, an excuse for ignoring our most basic constitutional and evidentiary policies.

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to prove propensity to lie.

