

Prior Conviction Impeachment: the Need for Reform

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**Strengthening
the **sixth**
JUSTICE FOR ALL**



Resources

1. NACDL Report
2. Champion Article
3. Reforming-PCI.org

PRIOR CONVICTION IMPEACHMENT: THE NEED FOR REFORM
Anna Roberts & Julia Simon-Kerr*

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Roadmap

- I. History of prior conviction impeachment
- II. The current landscape
- III. The need for reform
- IV. What can be done

History

Prior conviction impeachment has roots in “competency rules”



Testimony prohibited from:

Interested parties

Those with “infamous”
criminal convictions

Those who refuse to swear an
oath

Some states: African-
Americans, Native Americans,
certain immigrants

Transition from Incompetency to Prior Conviction Impeachment

- “[N]o person shall be excluded as a witness because of the conviction of crime, but that such conviction may be shown for the purpose of affecting the weight of his testimony.”
 - State v. Evans, 145 Wash. 4, 14, 258 P. 845, 849 (1927) (citing Rem. Comp. Stat. § 2290)

Witness
disqualification
through dishonor

No honor = no
credibility



Current Landscape

Prior conviction impeachment in the Federal Rules of Evidence (“FRE”)

2 categories of admissible conviction under FRE 609(a):

1. **Felony conviction**, if court finds balancing test satisfied;
2. **Any conviction** that required proof or admission of a “dishonest act or false statement” – no judicial discretion to exclude.

Many states borrow components of this rule, though there is a lot of state variation.

States of interest

- **Hawai'i & Kansas:**
 - No prior conviction impeachment of those testifying in their own defense in criminal trials (unless the witness is found to have “opened the door”);
- **Montana:**
 - No prior conviction impeachment of any witness (unless the witness is found to have “opened the door”).

At the other end of the spectrum, some states mandate admission of felonies.

Need For Reform

Probabilistic Rationale for Prior Conviction Impeachment

- Convictions tell us something about a witness's “propensity for truthfulness.”
 - *See, e.g.,* United States v. Lipscomb, 702 F.2d 1049, 1062 (D.C. Cir. 1983)

Flaws with Probabilistic Rationale

1. Prior convictions are not necessarily the outcome of a well-functioning criminal legal system.
 - Systemic inequalities burden D's ability to go to trial
 - Pleas may not relate to conduct on the ground
 - Discrimination in the system means one defendant may have no prior convictions to be impeached with while another may, even with identical behavior.
2. No scientific backing for the idea that we can learn something about a witness's propensity for lying from the existence of a previous criminal conviction

What do fact-finders do with prior convictions?

- Lower the burden of proof in close cases
- “Evidence against a defendant with a prior conviction appears stronger to the jury”
 - Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1357 (2009)

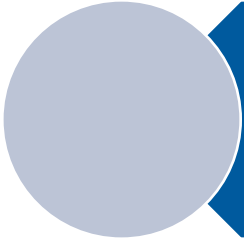
The risk of unfair prejudice

- Deterrence of testimony:
 - Can lead to pleas or silence
 - Jurors take silence as guilt
- Forbidden propensity risk
 - Prior conviction impeachment is highly prejudicial
 - The risk will outweigh the probative value even under a 403 balancing test, and certainly under the more restrictive test for defendants in crim. cases
 - Instructions can't fix this.
- Risk jurors will convict someone they view as "bad."
 - This is what research shows jurors actually do when they learn of prior convictions in close cases

Rule 609 Does Not Account for Drastic Increase In Felony Convictions Since Rule 609 Was Created



Size of U.S. criminal legal system has increased exponentially.

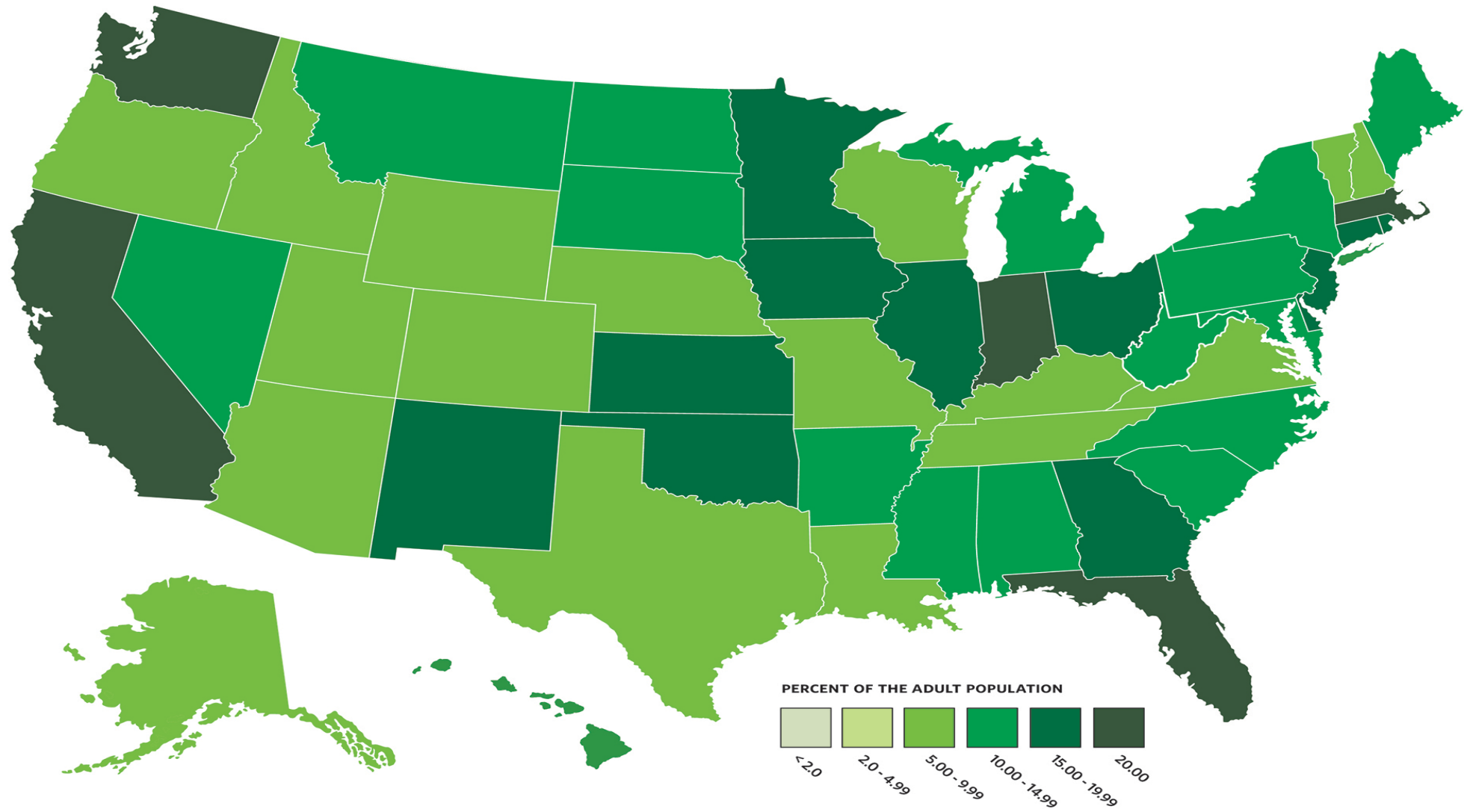


Number of adults with felony convictions increased from fewer than two million people in 1948 to nearly 20 million in 2010

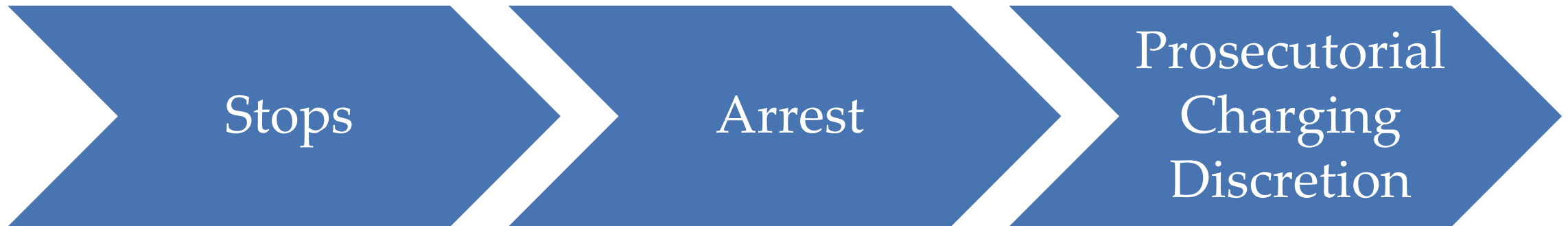


33 % of the African-American adult male population has a felony conviction

PERCENT OF AFRICAN AMERICAN ADULT POPULATION WITH FELONY RECORDS BY STATE, 2010



Rule 609 Does Not Account For Systemic Racism and Implicit Bias



Stops

- Officers stop black drivers at higher rates than white drivers
- In nearly every jurisdiction, study found that black and Hispanic drivers are searched more often than white drivers.

Arrest

- Higher rates of arrest explain between 70% and 80% of Black overrepresentation in prisons.

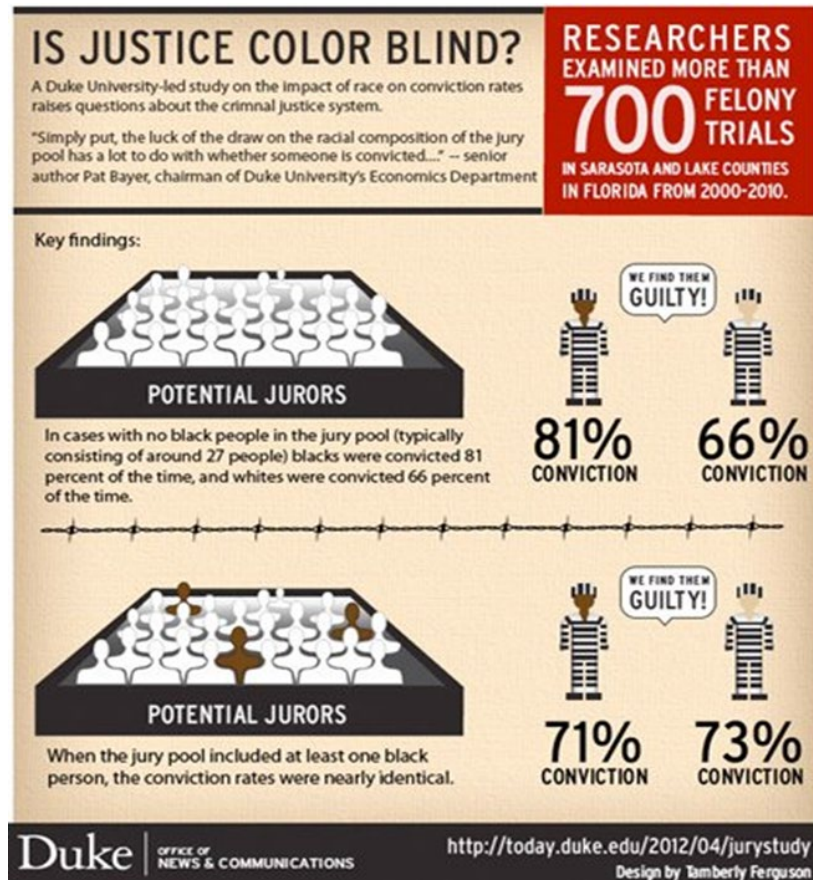
Racial Disparities in Prosecutorial Decision-making

- Throughout the pretrial process, the balance of power is heavily skewed toward prosecutors.
 - Whether to file charges
 - Charge the same act as a misdemeanor or a felony

Racial Disparities In The Courtroom

- Race has evidentiary value in America's courtrooms in that it "tends to prove or disprove something in the American justice system just as it does in society at large."
- Prior Convictions presents the risk Black pathological criminality.

Racial Disparities In How Jurors Treat Black Defendants



2018, 2019, and 2020, Black people were 2.7x more likely to be convicted than White people

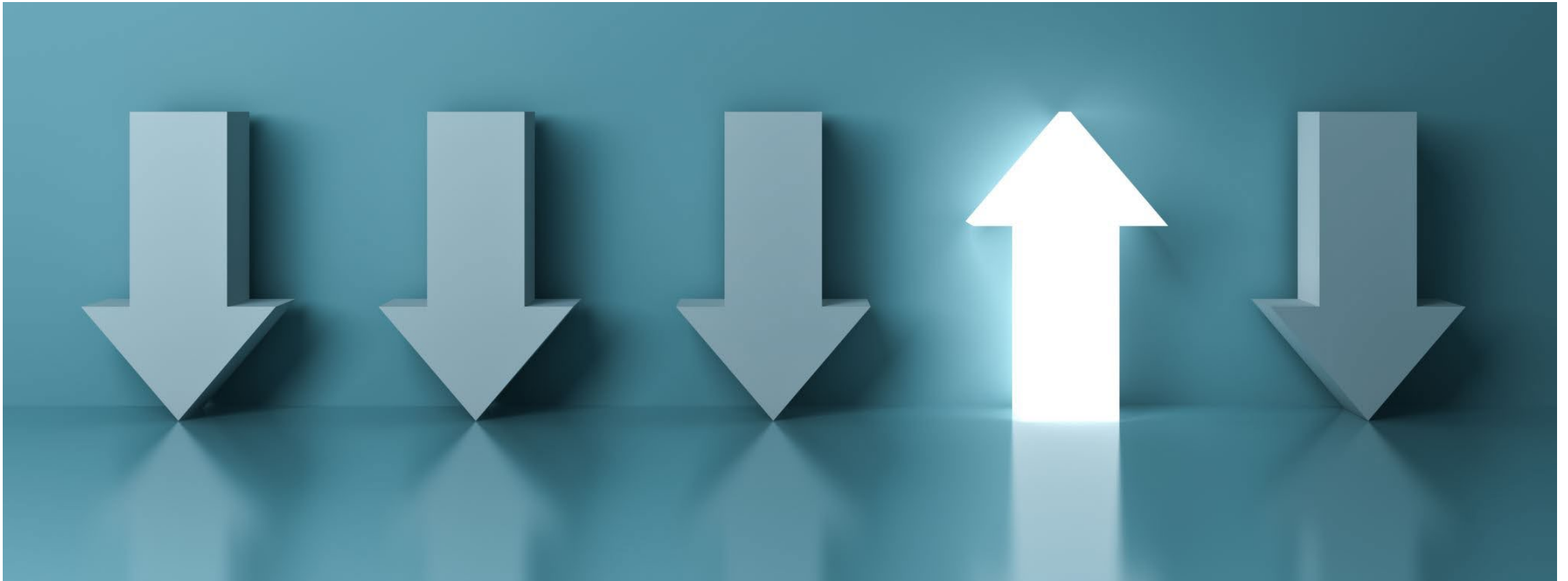
Juries formed from all-white jury pools convict black defendants (16 percentage points) more often than white defendants

Gap in conviction rates is eliminated when the jury pool includes at least one black member.



What Can Be Done

Raise and Preserve the Issue for Appeal



Luce v. United States, 469 U.S. 38 (1984)

- The Supreme Court held that to preserve an objection to a trial court's *in limine* ruling allowing the use of a prior conviction to impeach a defendant's credibility, the defendant must **actually testify** at trial.
 - Court must know the nature of the defendant's testimony to rule on evidentiary questions
 - Any harm is speculative
 - Without testimony, almost any error results in automatic reversal

Raising the Issue



MAKE TIMELY OBJECTIONS



CLEARLY FRAME THE ISSUE
FOR APPEAL



MORE DEFENSE-FRIENDLY
STANDARD OF REVIEW (DE
NOVO VS. PLAIN ERROR)



EASIER TO OVERCOME
HARMLESS ERROR
ARGUMENTS

Waiver vs. Forfeiture

Waiver

- Intentionally relinquish a known right
- Invited error (seek a particular result, cannot challenge same on appeal).
- Expressing satisfaction (no objection).
- **Result: Extinguishes the error and courts don't need to review.**

Forfeiture

- Failing to timely raise an issue for appeal
- Failing to object
- Failing to seek a final ruling
- **Result: Will be reviewed for plain error**

Making the Record



Object! Object! Object!
(Timely)



Get a final ruling



Memorialize off-record
discussions-side bars,
in-chambers.



Watch for inadvertent
waiver



State legal grounds for
the objection(s)



Arguing the balancing test

Argue the balancing tests (where possible)

- Risk of Unfair Prejudice
 - Silencing defendants
 - Lowering the burden of proof
- Probative value
 - Remember the question is probative value on the witness's *untruthfulness*
 - No research to suggest that there is much, if any, probative value
 - Even if we assume some probative value as do the rules, the risk of unfair prejudice substantially outweighs it
 - There are many other ways to impeach
 - Courts should err on the side of exclusion

Contest any “mandatory” provision!

Options include:

- Argue for its scope to be as narrow as possible;
 - *See, e.g.,* WA brief on website.
- Argue that it is not mandatory!
 - *See, e.g.,* apparently mandatory rules being interpreted as requiring judicial balancing.
- Bring in the constitution:
 - *See* OR brief on website arguing due process *requires* judicial balancing.

Invoke the constitution more broadly

- Note that it was a constitutional ruling by Hawai'i's Supreme Court that led to the banning of prior conviction impeachment of those facing criminal charges.
- For examples of constitutional arguments, see WA and OR briefs on our website.
- Case law offers support for arguments based on the right to testify, the right to a fair trial, Due Process, etc.

Changing The Rule

Change to FRE 609

- Eliminate FRE 609(a)(1)
 - Recently rejected by Advisory Committee with no chance for notice and comment
- Change the balancing test for defendants in criminal cases to allow for admission of a prior conviction for impeachment only if the probative value substantially outweighs the risk of unfair prejudice
 - Advisory Committee will consider at a date TBA

Protect Defendant's Constitutional Rights - Rule Proposal

DEFENDANT'S RIGHT TO IMPEACH. In a criminal case, impeachment by prior conviction is prohibited, except where the exclusion of such evidence would violate the defendant's constitutional rights.

Impeachment with Evidence of Lying under Oath – Rule Proposal

EVIDENCE OF LYING UNDER OATH. A witness, not the defendant, may be impeached with evidence that he or she was untruthful about a material matter when making a statement under oath within the past ten years. This provision does not apply to past testimony by a witness as a defendant.

Collaborate With Us!

We can offer:

- Amicus briefs/ litigation support – let us know of good cases;
- Presentations to attorneys or judges in your jurisdiction;
- Assistance with proposing rule changes.

We also welcome:

- Your stories of what you're seeing and your ideas of what to try!

- Our website (where you can find briefs, reports, articles, and more): <https://www.reforming-pci.org/>
- Our emails:
 - Monica Milton: mmilton@nacdl.org
 - Anna Roberts: anna.roberts@brooklaw.edu
 - Julia Simon-Kerr: julia.simon-kerr@uconn.edu