COMMENT

NEITHER SEEN NOR HEARD: IMPEACHMENT BY PRIOR CONVICTION AND THE CONTINUED FAILURE OF THE WISCONSIN RULE TO PROTECT THE CRIMINAL DEFENDANT-WITNESS

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The evidentiary rule "impeachment by prior conviction" is grounded in the common law assumption that a person convicted of a crime is less credible than a person not convicted of a crime. It followed that convicted individuals testifying at trial may be impeached merely by their conviction record. In the wake of decades of research challenging the validity of the rule's underlying assumption, as well as its utility, the federal government and at least a majority of states revised their evidentiary rules to protect the criminal defendant-witness from its prejudicial effect. Compared to the rest of the country, Wisconsin stood as a bulwark against any statutory revision or case law interpretation that would mitigate the prejudicial effect to the criminal defendant-witness.

But after four decades of stasis, the Wisconsin Supreme Court and the Wisconsin Judicial Council ushered in the most substantial revision to the Wisconsin Rule on impeachment by prior conviction (Wis. Stat. § 906.09) in October 2017. Despite the revision, this Comment argues that the revised Wisconsin Rule continues to be less favorable to the criminal defendant-witness than its federal counterpart, which is unjustified by modern-day practices and constitutional contexts. Put simply, and despite presumably the best intentions of the revisers, the Wisconsin Rule still fails the criminal defendant. First, this Comment describes the history of the Wisconsin Rule and its underlying assumptions. This Comment then discusses the revised Wisconsin Rule's shortcomings compared to the federal rule and explains how it operates to the detriment of the criminal defendant-witness, by detailing its "balancing test" presumption, exclusive reliance on judicial discretion without providing an adequate guide, and one-of-a-kind "counting rule." Accordingly, this Comment advocates for an overlooked, but simple, solution: reformative incrementalism by which the policymakers take meaningful steps to bridge the divide between the Wisconsin Rule and its federal counterpart.

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INTRODUCTION

Nearly half of all Americans—a pool of potential jurors—believe that "[o]nly guilty people don't testify [at trial]."[1] Suppose the state of Wisconsin brings a criminal complaint against a person ("the defendant") who has several prior criminal convictions. The State may present the defendant with a choice: accept a plea bargain or go to trial. The defendant's decision will likely turn on the expected outcome—the verdict and the sentence—at trial.[2]

One consideration in the decision to go to trial is whether the jury will believe the defendant or the defendant's story told by her attorney. Despite several prior convictions, the defendant may wish to take the stand and tell the jury her story to mitigate her guilt or assert her innocence. However, the defendant's attorney advises her of the very

1. John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEG. STUD. 477, 478 (2008) (citing a Fox News survey dated February 12–13, 2002); *see also* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH 104–09 (2003).

2. *See, e.g.*, Shawn D. Bushway et al., *An Explicit Test of Plea Bargaining in the "Shadow of the Trial,"* 52 CRIMINOLOGY 723, 723 (2014).

real possibility that the State may impeach her, if she testifies, by the mere evidence of her prior convictions under Wis. Stat. § 906.09 (the "Wisconsin Rule").[3] Problematic for the defendant is that robust empirical research shows that jurors persistently use evidence of prior convictions for improper purposes.[4] The defendant's attorney also informs her that whether the prior convictions occurred ten years ago, as a minor, or constituted only misdemeanor offenses does not mandate their exclusion.[5] Instead, the defendant is at the mercy of the circuit court's discretion to exclude her convictions.[6]

The deck is stacked against the defendant in the face of such uncertainties, and her decision may tilt in favor of declining to testify or accepting the plea bargain to avoid trial.[7] The result: the defendant is "neither seen nor heard." In other words, the defendant either accepts a plea and is not "seen" or the defendant proceeds to trial, does not testify, and is not "heard." This undermines her constitutional right to testify in her own defense,[8] risks that an innocent person may go to prison *because of* a prior conviction,[9] and remains in tension with ideal notions of justice.

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3. WIS. STAT. § 906.09 (Updated 2015–16) (amended Oct. 11, 2017; effective Jan. 1, 2018).

4. *See infra* Section I.B.

5. *See* § 906.09.

6. *See id.*; *State v. Smith*, 553 N.W.2d 824, 828 (Wis. Ct. App. 1996) (reversing trial court for misapplying presumption against relevance of prior convictions).

7. *See, e.g.*, Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 400 (2018) ("The parallel penalties awaiting defendants with a criminal record at trial increase the pressure to forego trial and plead guilty."); Alan D. Hornstein, *Between* Rock *and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 VILL. L. REV. 1, 1–6 (1997) ("The decision whether to testify at the cost of having the jury learn of the defendant's prior convictions or not to testify and have the jury draw an impermissible inference of guilt from the defendant's silence, presents among the most difficult choices in the criminal justice system."). Indeed, less than three percent of criminal cases involving a felony charge go to trial in Wisconsin. *See Felony Disposition Summary: Statewide*, WICOURTS.GOV (Jan. 12, 2018, 7:31 PM), https://www.wicourts.gov/publications/statistics/circuit/docs/felonystate17.pdf [https://perma.cc/BKG5-FVAD].

8. *See, e.g.*, Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2314 (1994); Hornstein, *supra* note 7, at 1–2, 7.

9. *See, e.g.*, Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 2004 (2016).

The Wisconsin Rule, impeachment by prior conviction, and its federal counterpart, Federal Rule of Evidence 609 ("FRE 609") prescribe the limit and use of prior convictions as evidence to impeach a criminal defendant that testifies at trial.[10] Prior to the 2017 statutory

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10. Below is a side-by-side text of the Wisconsin Rule and FRE 609. The Wisconsin Rule reads:

> (1) GENERAL RULE. For the purpose of attacking character for truthfulness, a witness may be asked whether the witness has ever been convicted of a crime or adjudicated delinquent and the number of such convictions or adjudications. If the witness's answers are consistent with the previous determination of the court under sub. (3), then no further inquiry may be made unless . . . [to] . . . rehabilitat[e] the witness[] . . . .
>
> (2) EXCLUSION. Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Factors for a court to consider in evaluating whether to admit evidence of prior convictions . . . include:
>
> (a) The lapse of time since the conviction.
>
> (b) The rehabilitation or pardon of the person convicted.
>
> (c) The gravity of the crime.
>
> (d) The involvement of dishonesty or false statement in the crime.
>
> (e) The frequency of the convictions.
>
> (f) Any other relevant factors.
>
> (3) ADMISSIBILITY OF CONVICTION OR ADJUDICATION. No question inquiring with respect to a conviction of a crime or an adjudication of delinquency, nor introduction of evidence with respect thereto, shall be permitted until the court determines pursuant to s. 901.04 whether the evidence should be excluded.
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> . . .

WIS. STAT. § 906.09 (Updated 2015–16).

Federal Rule 609 is as follows:

> (a) IN GENERAL. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
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> (1) for a crime that . . . was punishable by death or by imprisonment for more than one year, the evidence:
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> . . .
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> (B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and
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> (2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.
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> (b) LIMIT ON USING THE EVIDENCE AFTER 10 YEARS. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence . . . is admissible only if:

revision to the Wisconsin Rule, several scholars and policymakers had described the Wisconsin Rule as more "liberal," or permissive, than FRE 609 in admitting prior convictions as evidence against a criminal-defendant witness, providing "less protection to the accused."[11] Even more troubling, the Wisconsin Rule has been considered one of the most liberal rules when compared to the other fifty states.[12] In contrast to FRE 609, for example, the Wisconsin Rule fails to distinguish between felony and misdemeanor convictions, stale and fresh convictions, and adult and juvenile convictions.[13] Each of these differences likely affects the criminal defendant's decision to plead or testify, holding all else constant, by influencing whether she may be

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(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it . . . .

(c) EFFECT OF A PARDON, ANNULMENT, OR CERTIFICATE OF REHABILITATION. Evidence of a conviction is not admissible if:

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or

(2) the conviction has been the subject of a pardon, annulment . . . .

(d) JUVENILE ADJUDICATIONS. Evidence of a juvenile adjudication is admissible under this rule only if:

(1) it is offered in a criminal case;

(2) the adjudication was of a witness other than the defendant;

(3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and

(4) admitting the evidence is necessary to fairly determine guilt or innocence.

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FED. R. EVID. 609.

11. 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, 241, 286–87 (2005–06) (analyzing impeachment by prior conviction evidentiary rules across all fifty states and noting that the standard Wisconsin and Rhode Island use "potentially authorizes the admission to impeach the accused and all other witnesses with a much greater percentage of convictions"); *see also* Roberts, *supra* note 9, at 1989 (citing the pre-revision Wisconsin Rule as a more permissive than FRE 609 in regard to impeachment by prior conviction); *infra* text accompanying note 85 (discussing critiques from WJC members).

12. *See* Holley, *supra* note 11, at 286–87.

13. *See infra* Part II.

impeached and by what convictions.[14] Furthermore, the scope of the Wisconsin Rule is far-reaching, potentially affecting the 70 to 100 million Americans with criminal records.[15] Revising the Wisconsin Rule and reinterpreting case law could mitigate such differences and extend more friendly protections to the criminal defendant. Unfortunately, the 2017 revision to the Wisconsin Rule and its controlling case law fail to do any such thing.[16]

This Comment joins and builds on the debate over the Wisconsin Rule and offers the most comprehensive critique, since the rule's conception over four decades ago, of what Wisconsin courts—and now the Wisconsin Judicial Council ("WJC"), in its 2017 revision[17]—have done with this rule of evidence. This Comment argues that the revised Wisconsin Rule continues to be less favorable to the criminal defendant-witness than FRE 609, which is unjustified by modern-day practices and constitutional contexts. Accordingly, this Comment advocates for meaningful incremental reform where the WJC bridges the divide between the Wisconsin Rule and FRE 609.

This Comment contains three parts. Part I discusses the Wisconsin Rule's history, examining how the rule evolved overtime and its underlying assumptions. Part II demonstrates how the revised Wisconsin Rule continues to be less favorable to the criminal defendant-witness than FRE 609 and explains why this is unjustified. Part III charts a path forward.

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14. *See, e.g.*, Dannye R. Holley, *Judicial Anarchy: The Admission of Convictions to Impeach: State Supreme Courts' Interpretative Standards, 1990-2004*, 2007 MICH. ST. L. REV. 307, 384–85; Blume, *supra* note 1, at 486; FISHER, *supra* note 1, at 104–10 (summarizing the dilemma that the criminal defendant-witness faces in deciding to plead or go to trial: "The upshot was that [the defendant-testimony] law[s] that purported to grant defendants a new right to testify at trial instead deprived those defendants who had criminal records of the right to any meaningful trial, and left them with little alternative but to seek the best plea bargain they could get."). This assertion does not argue that the Wisconsin Rule is the only or the most prevalent factor in determining whether a criminal defendant will testify at trial or accept a plea bargain.

15. *See, e.g.*, Dan Clark, *How Many U.S. Adults Have a Criminal Records? Depends on How You Define It*, POLITIFACT (Aug. 18, 2017), http://www.politifact.com/new-york/statements/2017/aug/18/andrew-cuomo/yes-one-three-us-adults-have-criminal-record/ [https://perma.cc/QZ4J-VFCU]. This is equivalent to the proportion of Americans that has a college degree. Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, BRENNAN CTR. FOR JUST. (Nov. 17, 2015), https://www.brennancenter.org/blog/just-facts-many-americans-have-criminal-records-college-diplomas [https://perma.cc/Z9TC-MJ32]. The scope is understated because the Wisconsin Rule does not exclude juvenile adjudications. *See infra* text accompanying note 122.

16. *See infra* Part II.

17. Parts I and II discuss and analyze the 2017 revision in detail.

I. THE WISCONSIN RULE'S JOURNEY TO ITS CURRENT FORM

The evolution of the Wisconsin Rule as well as the underlying assumptions of the impeachment of a criminal defendant-witness by prior conviction are pertinent to analyzing the Wisconsin Rule and its controlling case law. This Part first discusses the development of the Wisconsin Rule since its conception. It then summarizes the underlying assumptions of this rule of evidence and the range of inferences available to the jury when assessing a criminal defendant-witness's conviction record.

A. Historical Background and Statutory Evolution

A preliminary review of the history behind "impeachment by conviction record" shows how the rule has evolved from, but remains rooted in, common law assumptions.[18] Impeachment by conviction record originated in the common law.[19] The common law imposed a categorical ban: convicted persons were incompetent to testify.[20] The common law justified a categorical ban for two reasons. First, convicted persons were considered not credible or "unworthy of belief."[21] Second, holding convicted persons as incompetent to testify constituted part of the punishment for committing a crime.[22] With respect to the criminal defendant-witness, the common law also rationalized a categorical ban partly on the basis that she had a "strong incentive to lie" on the stand because of the severity of the sentence.[23] In 1849, Wisconsin codified a similar categorical ban, which barred persons "having committed any crime" *if* "convicted" from testifying at trial.[24]

Wisconsin's categorical ban evolved significantly throughout the late 1880s and early 1900s. Yet, Wisconsin law remained anchored in the common law assumption that convicted persons were less credible

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18. *Cf.* 1 EDWARD J. IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE § 708, at 248–56 (3d ed. 1998).

19. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 511 (1989).

20. Edward Roslak, Comment, *Game Over: A Proposal to Reform Federal Rule of Evidence 609*, 39 SETON HALL L. REV. 695, 698 (2009) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *9).

21. Mark A. Humphrey, Note, *Impeachment for Prior Criminal Conviction—Federal Rule of Evidence 609*, 27 DRAKE L. REV. 326, 327 (1977).

22. *Id.*

23. Roslak, *supra* note 20, at 698. Death was often the sentence for a felony conviction during the common law era. *Id.* (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *9).

24. WIS. STAT. ch. 98 § 51 (1849).

than non-convicted persons.[25] In 1878, Wisconsin repealed the categorical ban and enacted a new law that allowed convicted persons to testify.[26] However, the new law permitted a party upon cross-examination to use the witness's conviction record to "affect his credibility" and to inquire into the facts regarding the prior conviction.[27] Wisconsin aligned its new law with the state of New York's law on the grounds of fairness and justice,[28] and determined that "[t]he rendering of felons [as] incompetent witnesses . . . upon the idea that their testimony is wholly unreliable and unsafe, and . . . [as] proper punishment for their crimes" could not be justified.[29] In *Fosdahl v. State*,[30] the Wisconsin Supreme Court ("the Court")[31] also explained that under the 1878 law, prior convictions would only be admissible to affect the credibility of the witness and the jury should be instructed accordingly.[32]

Wisconsin law on impeachment by prior conviction remained relatively unchanged until 1974. The Court then adopted the WJC's proposed amendments to the law that explicitly allowed the exclusion of a witness's conviction record subject to a judge's discretion "if its probative value [was] substantially outweighed by the danger of unfair prejudice."[33] This amendment occurred alongside substantial amendments to FRE 609,[34] which included, for instance, a bar on impeachment by misdemeanor convictions that did not involve proving an element of dishonesty and a limit on the use of prior convictions ten years or older.[35] The WJC, however, explicitly acknowledged that the Wisconsin Rule deviated from FRE 609.[36] This is particularly significant because the WJC adopted wholesale nearly all the federal evidentiary rules *except* the rule for impeachment by prior conviction and a few others.[37] For the next forty-two years, the Wisconsin Rule remained static—except for a 1996 amendment expanding the scope of

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25. *See infra* notes 26–31 and accompanying text.

26. WIS. STAT. ch. 176 § 4073 (1878).

27. *Id.*

28. WIS. STAT. ch. 176 § 4073, note (1898).

29. *Id.* Note of New York revisers.

30. 62 N.W. 185 (Wis. 1895).

31. This Comment focuses on Wisconsin law, and thus, "the Court" refers to the Wisconsin Supreme Court.

32. *Fosdahl*, 62 N.W. at 185.

33. 59 Wis. 2d R176 (1974); WIS. STAT. § 906.09 (1973).

34. *See, e.g.*, FED. R. EVID. 609 Notes of Advisory Committee on Proposed Rules.

35. *See* Evidence Comm. of the Wis. Judicial Council, *Proposed Wisconsin Rules of Evidence*, 56 MARQ. L. REV. 155, 293–95 (1973) [hereinafter Judicial Council].

36. *See id.* at 293; *see also* Holley, *supra* note 11, at 287 & n.144.

37. *See* Judicial Council, *supra* note 35 (introductory letter).

the rule to allow the use of juvenile adjudications for impeachment purposes as a result of "soaring rates of juvenile crime."[38]

Then as part of an effort to re-examine the Wisconsin Rules of Evidence, the WJC took renewed interest in the Wisconsin Rule in 2016.[39] The WJC considered four options: (1) "adopt the federal rule," (2) make "no change[s] to the current rule," (3) implement "judicial education," or (4) "codify factors found in case law."[40] Among concerns that a revision adopting the federal rule would disturb settled case law and result in inefficiencies, the WJC largely embraced the fourth reform.[41] Notably, the Wisconsin Department of Justice disfavored any changes to the current rule.[42] In October 2017, the Court, satisfied with the WJC's consideration of its suggested revisions to the Wisconsin Rule,[43] submitted an order amending the rule.[44] The revised Wisconsin Rule took effect on January 1, 2018.[45] Part II discusses and analyzes these revisions in greater detail.[46]

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38. DANIEL D. BLINKA, 7 WISCONSIN PRACTICE SERIES, WISCONSIN EVIDENCE § 609.1 (4th ed. 2017). *Compare* WIS. STAT. § 906.09 (1973), *with* WIS. STAT. § 906.09 (Updated 2015–16).

39. WIS. JUDICIAL COUNCIL, MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL MADISON, WISCONSIN JANUARY 15, 2016 at 3 (2016), https://www.wicourts.gov/courts/committees/judicialcouncil/docs/minutes0116.pdf [https://perma.cc/KYF4-N8YG].

40. APRIL SOUTHWICK, WIS. JUDICIAL COUNCIL, MEMORANDUM IN SUPPORT OF PETITION OF WISCONSIN JUDICIAL COUNCIL FOR AN ORDER AMENDING WIS. STATS. §§ 901.07, 906.08, 906.09; AND CREATING WIS. STAT. § 906.16, at 10 (2016), https://www.wicourts.gov/supreme/docs/1602petitionsupport.pdf [https://perma.cc/8AZQ-9YLS] [hereinafter SOUTHWICK].

41. *Id.* at 10–12.

42. *Id.* at 11.

43. The WJC incorporated one of the Wisconsin Supreme Court's suggested revisions. This revision aligned the statutory language of Wis. Stat. § 906.08 and § 906.09. *See* Wis. Sup. Ct. Order No. 16-02 (filed Jan. 20., 2017), http://docs.legis.wisconsin.gov/misc/sco/289.pdf [https://perma.cc/ES9K-AK2J]. Specifically, this revision modified the proposed language, "[f]or the purpose of attacking the credibility of a witness . . . ," to the codified language, "[f]or the purpose of attacking the character for truthfulness . . . ." Wis. Sup. Ct. Order No. 16-02A, 2017 WI 92 (filed Oct. 11, 2017, eff. Jan. 1, 2018) http://docs.legis.wisconsin.gov/misc/sco/301.pdf [https://perma.cc/7MQY-5SJX]. However, the Court proposed this revision for textual consistency. *See id.* Wisconsin courts already held "credibility" as substantively synonymous with "character for truthfulness." *See infra* text accompanying notes 91–92. Therefore, this revision had no substantive effect.

44. No. 16-02A, *supra* note 43.

45. *Id.* at 11.

46. *See infra* Part II.

B. Underlying Assumptions and Available Inferences to the Jury

The assumptions underlying the rule on impeachment by prior conviction are imperative to understanding the rationale for the rule's existence as well as the concern that a juror may misuse the conviction record for purposes other than assessing the defendant's credibility. Most of the available research on these assumptions is specific to FRE 609.[47] However, this research remains equally relevant to the Wisconsin Rule.[48]

To start, evidentiary rules in all U.S. jurisdictions prohibit, with limited exceptions, the use of character evidence to prove the accused acted in accordance with such character.[49] This is often referred to as the "anti-propensity rule," and its rationale is simple: "The admission of such evidence is thought to create a danger that the jury will punish the defendant for offenses other than those for which . . . she is [currently] on trial . . . ."[50] The defendant is on trial for her alleged criminal conduct, not for being a "bad person."[51] In contrast, impeachment by prior conviction is often criticized as an "'end run' around the anti-propensity rule" because of the fear that "character evidence [will be] admitted under the guise of impeachment evidence . . . ."[52]

The underlying assumption of the Wisconsin Rule, and that of FRE 609, is that a convicted witness is less credible or trustworthy than a non-convicted witness.[53] Put another way, "convicted criminals are less credible as witnesses because they lack respect for the law."[54] Wisconsin courts note that the Wisconsin Rule strongly endorses this assumption: "[A] person who commits a crime is considered to be less credible than the ordinary witness. A person who has been convicted

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47. *See, e.g.*, sources cited *infra* note 71.

48. *See supra* Section I.A (noting the common origins between the Wisconsin Rule and FRE 609).

49. *See* Holley, *supra* note 11. For instance, Wisconsin's rule states: "[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." WIS. STAT. § 904.04(2)(a) (Updated 2015–16).

50. Blume, *supra* note 1, at 481.

51. *Id.*

52. *Id.* at 482 (quoting Note, *Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime*, 79 HARV. L REV. 426, 440 (1965)); *see also* Tarleton D. Williams, Jr., *Witness Impeachment by Evidence of Prior Felony Convictions: The Time Has Come for the Federal Rules of Evidence to Put on the New Man and Forgive the Felon*, 65 TEMP. L. REV. 893, 921 (1992).

53. *See, e.g.*, BLINKA, *supra* note 38; ROBERT J. GOODWIN & JIMMY GURULÉ, CRIMINAL AND SCIENTIFIC EVIDENCE 857 (2d ed. 2002).

54. BLINKA, *supra* note 38.

[eleven] times previously . . . is considerably less credible than a person who has only been convicted once."[55] However, the validity of this assumption is heavily critiqued because a relationship between a prior conviction and an increased propensity to lie on the stand while under oath remains highly suspect and unfounded.[56]

Even taking the underlying assumption as valid, the concern remains that a juror will use a conviction record for improper purposes. On one hand, the Wisconsin Rule and its federal counterpart permit a juror to infer that a criminal defendant-witness who has a prior conviction has a greater tendency to lie.[57] On the other hand, a juror *may not* infer that a conviction record indicates that the criminal defendant-witness is a bad person or has a greater propensity to engage in criminal conduct.[58] For instance, Wisconsin's Jury Instructions include a limiting instruction that "[conviction record evidence] [is] received solely because it bears upon the credibility of the defendant as a witness," and "[i]t must not be used for any other purpose."[59] However, in reality nothing prohibits the juror from making an improper inference—deliberately or otherwise—in her own mind that a prior conviction means the defendant is more likely to have committed the crime for which she is on trial.[60] No "magic box" monitors a juror's processing of information during a trial or later in jury deliberations.[61] The judge has no guarantee to ensure that the juror follows the law or limiting instruction, or robustly participates in the deliberations.[62] For this reason, a conviction record may inadvertently lighten the prosecution's burden of proof.[63] Motivated by such

55. *Liphford v. State*, 168 N.W.2d 549, 551 (Wis. 1969); *State v. Kruzychi*, 531 N.W.2d 429, 435 (Wis. Ct. App. 1995).

56. *See, e.g.*, Todd A. Berger, *Politics, Psychology, and the Law: Why Modern Psychology Dictates an Overhaul of Federal Rule of Evidence 609*, 13 U. PA. J.L. SOC. CHANGE 203, 207–14 (2009); Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 L. & HUM. BEHAV. 67 (1995); Roberts, *supra* note 9, at 1992–97.

57. *See* GRAHAM C. LILLY ET AL., PRINCIPLES OF EVIDENCE 309–13 (7th ed. 2006).

58. *See* WIS. STAT. § 904.04(2)(a) (Updated 2015–16); Roslak, *supra* note 20, at 696.

59. Wis. JI-Criminal 327 (2018).

60. *See* Alison Markovitz, *Jury Secrecy During Deliberations*, 110 YALE L.J. 1493, 1493, 1504–30 (2001) (noting that "[j]urors are expected to follow the law and participate in deliberations, yet under current law there is no way for a judge to ensure that this occurs").

61. *See id.* at 1493–95.

62. *See id.* at 1525–30

63. Blume, *supra* note 1, at 486–87; 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, 44 (1999).

concerns, states have revised their applicable rules regarding impeachment by prior conviction.[64]

These concerns are not without merit. They are supported by ample empirical research that suggests jurors do indeed use conviction records for the wrong purpose. For instance, Jeffrey Bellin concluded, after a comprehensive review of the available research, that "juries consider trial silence to be incriminating, and draw legally improper criminal character inferences from prior convictions admitted as 'impeachment.'"[65] Similarly, Robert Dodson discussed the body of empirical research with respect to jurors' misuse of evidence: "[T]he conclusion these scientists have reached simply confirms what lawyers, judges, and courts have known all along. Juries will use evidence of prior convictions for impermissible purposes and a judge's limiting instruction will have little or no effect on jurors."[66] Roselle Wissler and Michael Saks found that although the introduction of a defendant's criminal conviction into evidence for impeachment purposes does not affect the defendant's credibility, it does increase the likelihood of the defendant's conviction.[67] In addition, they found that limiting instructions on the use of conviction records have little effect on the jury.[68] David Sklansky similarly suggests that such limiting instructions are not effective when they are poorly implemented.[69] This lack of intended effect is partially because a juror, without a broader explanation from the court, typically finds it illogical that a conviction record does not suggest criminal propensity.[70] An abundance of other authorities confirm similar findings of jurors' misuse of conviction evidence.[71] Considering this research, there is a grim outlook for the

64. *See generally* Holley, *supra* note 11 (reporting results of study of fifty states' standards regarding admission of convictions to impeach).

65. Bellin, *supra* note 7, at 433.

66. Dodson, *supra* note 63, at 42–43.

67. Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 L. & HUM. BEHAV. 37, 43–47 (1985).

68. *Id.*

69. David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 439, 450–52 (2013).

70. *Id.*

71. *See, e.g.*, Dodson, *supra* note 63, at 31–50 ("[J]urors draw impermissible inferences from prior conviction evidence. When jurors hear the defendant committed some crime in the past . . . , they conclude the defendant must have committed the crime with which he is currently charged . . . . Even jurors who attempt to faithfully adhere to a judge's limiting instruction are likely to view the defendant with contempt because of prior conviction evidence."); 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, 1353, 1358, 1388 (2009) (performing a robust empirical analysis on jurors' use of prior conviction records and trial outcomes, and concluding that "as our results and

criminal defendant-witness with a prior conviction who testifies at trial and is impeached.

II. AN INEXCUSABLE VERDICT: THE REVISED WISCONSIN RULE CONTINUES TO BE LESS FAVORABLE TO THE CRIMINAL DEFENDANT-WITNESS THAN FRE 609

Put simply, the revised Wisconsin Rule fails to advance the law on impeachment by prior conviction as it relates to the criminal defendant-witness. First, this Part explains how the revised Wisconsin Rule continues to be less favorable to the criminal defendant-witness than FRE 609. Second, this Part shows that this stasis in Wisconsin and the unfortunately circumscribed protections to the criminal defendant-witness that accompany it have unjustified explanations.

A. The Meager Protections of the Revised Wisconsin Rule

Meager protections characterize the revised Wisconsin Rule. Make no mistake, FRE 609 is not perfect and suffers from some of the same problems as the Wisconsin Rule, albeit in a more limited manner.[72] However, this section shows *how*, considering the 2017 revision, the Wisconsin Rule continues to be less favorable to the criminal defendant-witness than FRE 609. This is a result of the lack of a meaningful revision to the Wisconsin Rule, key differences preserved (and now codified) between the texts of the Wisconsin Rule and FRE 609, and different approaches of their respective case law.[73]

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experimental results suggest, prior [conviction] record[s] affect case outcomes but not credibility, the historical justification for allowing the use of criminal records is unfounded"); Gold, *supra* note 8, at 2295, 2313–16 ("the jury might also use the evidence of past crimes to infer that the accused committed the crime charged in this case, . . . [and] jury instructions to refrain from drawing such improper inferences may be futile. . . . [T]he threat that such evidence might be admitted to impeach could discourage the accused from taking the stand."); Note, *To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant with a Criminal Record*, 4 COLUM. J.L. & SOC. PROBS. 215, 218 (1968) (discussing a survey that found 98 percent of lawyers and 43 percent of judges believed that jurors were unable to follow limiting instructions concerning the proper use of conviction record evidence for impeachment purposes); Roberts, *supra* note 9, at 1997–2001 ("[No empirical support exists] for the idea that jurors are more able to partition their brains in the case of convictions than in the case of confessions. Even if [jurors] understood . . . [limiting] instruction[s] . . . , they might not wish to [follow it]. Rather . . . jurors tend to use the evidence to conclude that the defendant is a bad person . . . .").

72. *See infra* Sections II.A.2–3.

73. *See infra* Sections II.A.1–3.

1. THE WISCONSIN "BALANCING TEST" WEIGHS AGAINST THE CRIMINAL DEFENDANT-WITNESS

The Wisconsin Rule and FRE 609 espouse two different "balancing tests" that govern the introduction of prior conviction evidence to impeach a criminal defendant-witness.[74] The Wisconsin Rule's balancing test starts with the presumption that prior convictions are *admissible*.[75] In other words, it presumes that prior convictions are more probative than unfairly prejudicial to the criminal defendant-witness.[76]

On its face, the Wisconsin balancing test says "[e]vidence of a conviction [for impeachment purposes] . . . may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."[77] The permissiveness of the text "*may* be excluded"—as opposed to "*shall* be excluded"—commands the conclusion that the danger of unfair prejudice to outweigh the conviction's probative value is not wholly dispositive.[78] Furthermore, the balancing test requires unfair prejudice to "*substantially* outweigh[]" the probative value as opposed to merely "outweigh."[79] Notably, the rules treat conviction record evidence the same as relevant evidence under Wis. Stat. § 904.03; the law presumes both types of evidence admissible.[80]

The 2017 statutory revision leaves the balancing test and the presumption of admissibility intact.[81] The Wisconsin Rule's appended WJC note,[82] a non-binding authority, affirms that there is no change to the status quo, citing approval of *State v. Gary M.B.*[83] *Gary M.B.* specifically states that "[the rule] presumes that evidence of prior

74. *See infra* notes 77 and 100 and accompanying text.

75. *See* WIS. STAT. § 906.09(2) (Updated 2015–16).

76. *See id.*

77. *Id.*

78. *See id.* (emphasis added).

79. *See id.* (emphasis added).

80. *Compare id.*, *with* § 904.03.

81. *See* § 906.09(2).

82. Judicial Council Notes are a form of legislative history that courts use to understand a statute. *State ex rel. Kalal v. Circuit Court of Dane Cty.*, 681 N.W.2d 110, 131–33 (2004) (Abrahamson, J., concurring). The Notes appear with the text of the rules, but the Court does not usually adopt the Notes as a part of the rule. *Id.* at 133. Thus, the Notes are persuasive, not binding, authority.

83. § 906.09 Judicial Council Note, 2017. The revised official statutes omit a previous WJC note that quoted the Federal Advisory Committee, found in the annotated code. *Compare id.*, *with* WIS. STAT. ANN. § 906.09(1) Judicial Council Committee Note—1974 (2000) ("The most troublesome aspect of impeachment by evidence of conviction is presented when the witness is himself the accused in a criminal case," acknowledging "a growing uneasiness that impeachment in this form not only casts doubt upon his credibility. . . ."). This note expressly communicated the danger of impeachment by prior conviction to the criminal defendant-witness.

convictions is admissible to attack a witness' credibility."[84] During the revision process to the Wisconsin Rule, several WJC members "questioned the fairness of Wisconsin's current rule" to the criminal defendant-witness and asked "whether there should be a different impeachment rule for defendants in criminal cases where liberty is often at stake."[85] However, no "different impeachment rule" was promulgated.[86] The presumption still favors admission.

Loyal to the statutory text, Wisconsin courts consistently adhere to the presumption that prior convictions are probative of a witness's character for truthfulness.[87] Wisconsin courts repeatedly acknowledge that such a presumption is a long-standing view in Wisconsin,[88] and is unlikely to change in the immediate future.[89] What is more, Wisconsin courts have explicitly approved of and asserted a broad view of the presumption that *all* prior convictions are probative to a witness's character for truthfulness.[90] For instance, *Smith* asserts that "a prior conviction of *any* crime is relevant to the credibility of a witness's testimony."[91] *Gary M.B.* states that "*all* prior convictions are relevant to a witness's character for truthfulness."[92] *State v. Turner*,[93] the first case decided after the 2017 revision that discusses the Wisconsin Rule, affirms the status quo: "Wisconsin law presumes that criminals as a

84. 676 N.W.2d 475, 484 (Wis. 2004).

85. SOUTHWICK, *supra* note 40, at 10.

86. *Id.* at 10–12.

87. *See, e.g.*, *Nicholas v. State*, 183 N.W.2d 11, 14 (Wis. 1971); *State v. Kuntz*, 467 N.W.2d 531, 542–43 (Wis. 1991); *State v. Smith*, 553 N.W.2d 824, 827–28 (Wis. Ct. App. 1996); *State v. Turner*, No. 2017AP1348-CR (Wis. Ct. App. Apr. 25, 2018), https://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=211854 [https://perma.cc/7QUT-YQRV], *cert. denied*, 2018 WI 92.

88. *See* cases cited *supra* note 87.

89. *See Turner*, No. 2017AP1348-CR, https://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=211854 [https://perma.cc/7QUT-YQRV].

90. *See, e.g.*, *State v. Gary M.B.*, 676 N.W.2d 475, 483–84 (Wis. 2004); *State v. Jacob L.G.*, No. 2008AP1136-CR (Wis. Ct. App. Jan. 6, 2010), https://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=45233 [https://perma.cc/8Y7Q-F6CB]; *State v. Henningfield*, No. 2015AP1824-CR (Wis. Ct. App. Mar. 15, 2017), https://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=186160 [https://perma.cc/3W2S-4FS3].

91. *Smith*, 553 N.W.2d at 827 (emphasis added).

92. *Gary M.B.*, 676 N.W.2d at 484 (emphasis added); *see also State v. McMahon*, No. 2015AP2632-CR (Wis. Ct. App. Jan. 18, 2017), https://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=182610 [https://perma.cc/NZ66-PVJR].

93. No. 2017AP1348-CR (Wis. Ct. App. Apr. 25, 2018), https://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=211854 [https://perma.cc/7QUT-YQRV].

class are less truthful than persons who have not been convicted of a crime. . . . [Evidence of a prior conviction] is admissible for the purpose of attacking the witness's character for truthfulness."[94] Thus, if a criminal defendant looks for assistance today, she will find little help from the court in explicitly construing the Wisconsin Rule's balancing test in her favor.

That said, the WJC stated in its memorandum proposing the revised rule that "the *trend* has been moving toward greater analysis by the judge" and that as a result "more convictions are now excluded."[95] In response, "greater analysis by the judge" is only acknowledged as a "trend," not a legal requirement or the prevailing norm.[96] Second, the WJC does not further contextualize the statement "more convictions are now excluded."[97] Are more convictions now excluded compared to convictions now admitted or compared to convictions excluded in prior years? Even in the best light, if the trend is toward exclusion, this suggests judges are weighing convictions differently, testing the validity of the presumption that convictions are admissible.[98] The rule on the books should match the rule in action: the balancing test should be inverted. Third, greater analysis by the judge is a good thing, but this comment fails to acknowledge that the analysis required under the rule is premised on faulty assumptions.[99]

In contrast, FRE 609's balancing test for a criminal defendant-witness starts with the presumption that prior convictions are excluded.[100] Put another way, the balancing test on its face presumes that the criminal defendant-witness's prior convictions are more prejudicial than probative—whereas the Wisconsin Rule strikes the balance conversely.[101] Under FRE 609's balancing test, a court only admits evidence of a felony conviction record for impeachment purposes "if the probative value of the evidence outweighs its prejudicial effect."[102]

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94. *Id.* ¶ 14.

95. SOUTHWICK, *supra* note 40, at 11 (emphasis added).

96. *See id.*

97. *Id.*

98. *See id.*

99. *See supra* note 56 and accompanying text.

100. FED. R. EVID. 609(a)(1)(B); *see also* BLINKA, *supra* note 38, § 609.2.

101. *Compare* FED. R. EVID. 609(a)(1)(B), *with* WIS. STAT. § 906.09(2) (Updated 2015–16).

102. FED. R. EVID. 609(a)(1)(B); *see also United States v. Causey*, 9 F.3d 1341, 1344–45 (7th Cir. 1993). Of course, prior convictions involving proof of an element of dishonesty is automatically admitted under FRE 609. This is discussed below. *See infra* Parts II & III.

In Wisconsin, criminal defendant-witnesses remain at a disadvantaged starting point compared to their federal counterparts.[103] As a result, the Wisconsin Rule's balancing test continues to make it less certain in most instances that the court will exclude a prior conviction compared to FRE 609, thereby increasing the risk of impeachment.[104] Although the difference between the two rules may only exist in the statutory text, there are no statistical studies to confirm the contrary.[105] The significance: the 2017 revision affirms a balancing test that weighs against the criminal defendant-witness.[106]

2. Reliance on Judicial Discretion to Exclude (or Admit) Prior Convictions

a. The Revised Wisconsin Rule Exclusively Relies on Judicial Discretion Without Providing an Adequate Guide

The Wisconsin Rule, in its revised form, preserves and reinforces characteristics of unguided judicial discretion, thereby continuing to be less favorable to the criminal defendant-witness than FRE 609.[107] The Wisconsin Rule exclusively relies on judicial discretion to exclude prior convictions.[108] As previously discussed, evidence of a prior conviction "*may* be excluded *if* its probative value is substantially outweighed by the danger of unfair prejudice."[109] This language itself implies judicial discretion, calling on the judge to determine the effect of the evidence.[110]

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103. *See supra* Section II.A.

104. *See, e.g.*, Holley, *supra* note 11, at 286–87; Fisher, *supra* note 1, at 104–10.

105. A statistical study would be a meaningful contribution to the literature and debate on this issue.

106. The Wisconsin Rule's balancing test asks the court to determine whether to "exclude" conviction record evidence. § 906.09(2). Interestingly, Wisconsin courts, on occasion, inaccurately use the word "admit" in place of "exclude." In *State v. Gary M.B.*, for example, the Court pronounced "it is within the discretion of the circuit court to determine whether to *admit* evidence of prior convictions." 676 N.W.2d 475, 483 (Wis. 2004) (emphasis added). However, several lines later, the Court flips, stating that "[i]n considering whether a conviction should be *excluded* under the balancing test" *Id.* (emphasis added). Unfortunately, such misstatements appear to be inadvertent mistakes. An examination of the case law shows that Wisconsin courts adhere to the presumption that all prior convictions are admissible. *See supra* Section II.A.1.

107. *See infra* Section II.A.2.a.

108. *See supra* Section II.A.1.

109. § 906.09(2) (emphasis added).

110. The text of the Wisconsin Rule tasks the court with determining whether a question is permitted that inquires into the criminal defendant-witness's conviction record. § 906.09(3).

At this point in the discussion, it is important to note that this Comment is not arguing wholesale against the merits of judicial discretion. Judicial discretion is inherent and indeed necessary in a judicial system; it is associated with countless private and social benefits that have allowed the law to accommodate different facts.[111] Rather, this Comment emphasizes that the 2017 revision to the Wisconsin Rule failed to erect sufficient guardrails on a court's discretion to administer an evidentiary rule that is premised on faulty assumptions.[112]

Most notably, the 2017 revision to the Wisconsin Rule codified six factors to allegedly guide the court's discretion and indicate to the court that the "balancing test" is a "particularized application" in determining whether to exclude a conviction record.[113] These six factors include: "(a) The lapse of time since the conviction[;] (b) The rehabilitation or pardon of the person convicted[;] (c) The gravity of the crime[;] (d) The involvement of dishonesty or false statement in the crime[;] (e) The frequency of the convictions[; and] (f) Any other relevant factors.[114]

Although these six factors now enjoy the imprimatur of an official statutory revision, they are merely a restatement of controlling case law.[115] Dating to at least 1991 in *State v. Kuntz*,[116] Wisconsin courts have emphasized that the presiding judge should consider such factors—and in nearly verbatim language to the 2017 revision.[117] Wisconsin courts have paid homage to the factors over this time period.[118] Further undermining the practical effect of this codification, the WJC note to the 2017 revision says that these factors were already written into

111. *See* JOHN HENRY MERRYMAN & ROGELIO PEREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA (3d ed. 2007); Jon R. Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 NW. U. L. REV. 1097 (1984).

112. *See supra* Section I.B; *see also* BLINKA, *supra* note 38 ("[Judicial] [d]iscretion here is so hard to exercise because the rule rests upon a shaky social and cultural assumption that is empirically untested: Convicted criminals are less credible class of witnesses.").

113. *See* WIS. STAT. § 906.09 Judicial Council Note, 2017.

114. § 906.09(2)(a)–(e).

115. *See, e.g.*, SOUTHWICK, *supra* note 40; *State v. Kuntz*, 467 N.W.2d 531, 552–53 (Wis. 1991).

116. 467 N.W.2d 531 (Wis. 1991).

117. *See id.* at 543.

118. *See, e.g.*, *State v. Gary, M.B.*, 676 N.W.2d 475, 492 & n.5 (Wis. 2004) (noting that these factors have "long been relied on"); *State v. Smith*, 533 N.W.2d 824, 827 (Wis. Ct. App. 1996); *State v. Lesueur*, No. 2011AP1550-CR (Wis. Ct. App. June 26, 2012), https://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=84016 [https://perma.cc/4VLM-QHC9].

controlling case law prior to the revision.[119] Most of these factors were also discussed in the WJC's 1974 Note, accessible in the annotated statutory text for the past several decades.[120]

Moreover, none of the six factors substantively preclude or restrict the use of any particular type of conviction; they are only factors for the court to consider in evaluating whether to exclude the prior conviction.[121] For example, nothing in the statutory text restricts the use of stale convictions (e.g., convictions more than ten years old), misdemeanor convictions, or even juvenile adjudications.[122] The statutory text also fails to signal to the courts whether one factor is more important than another factor.[123] Nowhere in the statutory text does the Wisconsin Rule clarify whether a factor works in favor or against exclusion.[124] Additionally, Wisconsin case law does not preclude the admission of any particular type of prior conviction.[125]

That said, the WJC note to the 2017 revision asserts that the inclusion of these factors "codifies the holding in *State v. Gary M.B.* that circuit courts are *required* . . . to examine a number of factors."[126] But the rule's text, case law precedent, and subsequent provisions of the WJC note undermine this claim.[127] The rule's text leaves the precise number of factors a judge has to consider undetermined.[128] The *Gary M.B.* Court determined that a circuit court had properly exercised judicial discretion (and considered the factors) by simply providing a limiting instruction to the jury.[129] Dannye Holley, former Dean at

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119. *See* WIS. STAT. § 906.09 Judicial Council Note, 2017 (Updated 2015–16).

120. Wisconsin Rules of Evidence and Commentaries, 59 Wis. 2d R176, R183 (1974) (Judicial Council Committee's Note).

121. WIS. STAT. § 906.09.

122. *See id.*

123. *See id.*

124. *See id.*

125. Wisconsin courts have held that civil ordinance violations, *State v. Chu*, 643 N.W.2d 878, 886 (Wis. Ct. App. 2002), and expungements, *State v. Anderson*, 466 N.W.2d 681, 681–82 (Wis. Ct. App. 1991), are not admissible as prior convictions. While precluding expungements from impeachment evidence certainly offers protection to the criminal defendant-witness, these cases merely confirm that expungements and civil ordinance violations fall outside the Wisconsin Rule because they are not criminal convictions.

126. § 906.09 Judicial Council Note, 2017 (emphasis added).

127. *See supra* notes 128–131 and accompanying text.

128. § 906.09.

129. *State v. Gary M.B.*, 676 N.W.2d 475, 486 (Wis. 2004); *see also In re Isaiah H.,* No. 2014AP399 (Wis. Ct. App. July 10, 2014), https://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=116722 [https://perma.cc/7XQA-BMDK]; *State v. Cardoza*, No. 2008AP1048-CR (Wis. Ct. App. May 13, 2009), https://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=364

Thurgood Marshall School of Law, noted that the *Gary M.B.* Court "deliberately ignore[d] that the trial judge made no genuine attempt to perform the rule required balancing evaluation, including failing to even mention the court's own array of balancing factors."[130] The WJC note shows that *Gary M.B.* remains valid law, and thereby implicitly sanctions its determination that a limiting instruction alone still constitutes proper judicial discretion under the revised Wisconsin Rule.[131]

The revised Wisconsin Rule espouses additional ambiguities that underscore the reliance on unguided judicial discretion, showing that it does little to ensure courts thoroughly assess each conviction. The Wisconsin Rule's text permissively states that the six factors are only "for a court to consider in evaluating."[132] At the same time, the WJC note waters down the rule, stating: "the court need only consider factors applicable to the case."[133] However, the WJC note asserts that four court cases "require" a circuit court to evaluate the factors.[134] But all four court cases only determined that circuit courts "should" consider the factors, which further undermines any hard requirement that a circuit court must consider all, or any, of the factors.[135] The only opinion that expressly determined that a circuit court *must* consider the factors is a dissenting opinion.[136] Notably, the revised Wisconsin Rule does not reflect the Wisconsin Supreme Court's recommendation that the rule include the language that a court consider "*all* of the following [six] factors."[137] The revised Wisconsin Rule also does not require an on the record determination of the court's application of the rule. The WJC note only mentions that it would be "prudent" for the court to do so.[138] Therefore, the revised Wisconsin Rule continues to fail the criminal defendant-witness by failing to adequately guide judicial discretion.

The significance of a Wisconsin circuit court's discretion should not be understated. The court's decision is to whether prior conviction

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60 [https://perma.cc/D4TW-VAHQ] (affirming the circuit court's use of discretion despite recognizing that the "trial court did not specifically mention any of the factors listed above").

130. Holley, *supra* note 14, at 368.

131. *See* Southwick, *supra* note 40, at 13.

132. § 906.09(2).

133. *Id.*

134. *Id.* Judicial Council Note, 2017.

135. *State v. Gary M.B.*, 676 N.W.2d 475, 483 (Wis. 2004) ("to consider"); *State v. Kruzychi*, 531 N.W.2d 429, 435 (1995) ("should consider"); *State v. Kuntz*, 533 N.W.2d 531, 543 (1991) ("should consider"); *State v. Smith*, 533 N.W.2d 824, 827 (1996) ("should consider").

136. *Gary M.B.*, 676 N.W.2d at 492 (Abrahamson, C.J., dissenting).

137. 16-02A, *supra* note 44, at 7–9.

138. § 906.09 Judicial Council Note, 2017.

evidence should be excluded is often final.[139] The standard of appellate review in Wisconsin is "abuse of discretion."[140] If the appellate court finds that the circuit court did not abuse its discretion, then it will uphold its decision, regardless of whether the appellate court would have made the same ruling or not.[141] This standard of review means that the circuit court's decision is rarely susceptible to appellate reversal.[142]

In this regard, *State v. Gary M.B.* illustrates the finality of the circuit court's decision. The Court did not find an abuse of discretion despite the circuit court's on-the-record statement: "But to the extent that there is I guess a presumption in the statute and the statute allows for prior convictions to be brought in because it does say something about the person's credibility, I will allow it."[143] If this statement is sufficient to satisfy the standard of review, it is difficult to posit what would constitute an abuse of discretion. The 2017 revision to the Wisconsin Rule does not do enough to check judicial discretion and protect against this situation.

b. FRE 609 More Measuredly Guides and Relies on Judicial Discretion

In contrast to Wisconsin law, FRE 609 uses a mix of restricted balancing tests and case law factors to more adequately guide judicial discretion that is more favorable to the criminal defendant-witness in limiting conviction record evidence for impeachment purposes.[144] FRE 609 also prohibits the use of particular types of conviction records to impeach the criminal defendant-witness as an added layer of protection on top of its balancing test that already favors the "exclusion" of conviction records.[145] Specifically, the criminal defendant-witness need not concern herself with most misdemeanor convictions, stale convictions, or juvenile adjudications.[146]

For instance, FRE 609 imposes a restrictive balancing test on convictions that are more than ten years old: "Evidence . . . is admissible *only if* . . . its probative value, *supported by specific facts and circumstances*, substantially outweighs its prejudicial effect . . .

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139. *See, e.g.*, *State v. Turner*, No. 2017AP1348-CR (Wis. Ct. App. Apr. 25, 2018), https://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=211854 [https://perma.cc/7QUT-YQRV], *cert. denied*, 2018 WI 92.

140. *Smith*, 553 N.W.2d at 827.

141. *E.g.*, *State v. Sullivan*, 576 N.W.2d 30, 36 (Wis. 1998).

142. *See, e.g.*, *id.*

143. *State v. Gary M.B.*, 676 N.W.2d 475, 491–92 (Wis. 2004) (Abrahamson, C.J., dissenting).

144. *See infra* Section II.A.2.b.

145. *See* FED. R. EVID. 609.

146. *See id.* 609(a)–(d).

."[147] The Seventh Circuit has adhered to the text of the rule: "impeachment by a conviction falling outside the rule's ten-year time limit should be permitted only in rare and exceptional circumstances."[148] This language renders such convictions outside the rule's grasp more than the Wisconsin Rule.[149] The Wisconsin Rule only states that "the lapse of time since the conviction" is an (optional) factor for the court to consider.[150] Furthermore, FRE 609 prohibits the use of misdemeanor prior convictions for crimes that did not include proving an element of dishonesty.[151] It also prohibits the use of prior convictions where the criminal defendant was pardoned or rehabilitated[152] and the use of prior juvenile adjudications to impeach a criminal-defendant witness.[153] These restrictions attenuate some of the concerns of the jurors' potential misuse of prior convictions by more tightly demarcating what the jurors hear.[154] Conversely, the absence of such restrictions in Wisconsin means that it is potentially more likely for the jury to hear and misuse this information. The revised Wisconsin Rule, therefore, remains less favorable to the criminal defendant-witness.

Even when a federal court decides to admit a prior conviction, it also examines case law factors. However, these factors are noticeably different factors from Wisconsin's factors. Federal courts sitting in the Seventh Circuit examine five factors in weighing the prejudicial effect against the probative value: "(1) The impeachment value of the prior crime; (2) The point in time of the conviction and the witness' subsequent history; (3) The similarity between the past and present crime; (4) The importance of the defendant's testimony; and (5) The centrality of the credibility issue [in the trial]."[155]

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147. *Id.* 609(b)(1) (emphasis added).

148. *United States v. Rogers*, 542 F.3d 197, 201 (7th Cir. 2008).

149. *See* WIS. STAT. § 906.09(2)(a) (Updated 2015–16).

150. *Id.*

151. FED. R. EVID. 609 (c); *see supra* notes 34–35 and accompanying text.

152. *Id.* 609(d)(2).

153. *Id.* 609 (a)–(d). In contrast, the Wisconsin Rule only makes the fact that the criminal defendant-witness pardoned or rehabilitated a *factor* in considering whether to exclude the prior conviction. *See* § 906.09(2)(b).

154. *See supra* Section I.B.

155. *E.g.*, *United States v. Gant*, 396 F.3d 906, 909 (7th Cir. 2005); *United States v. Hernandez*, 106 F.3d 737, 739–40 (7th Cir. 1997); *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976). *Mahone* has "permeate[d] the federal case law" well beyond the Seventh Circuit. Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 313–17, 317 n.109 (2008) (cataloguing federal courts that have substantially adopted the *Mahone* test). *Mahone* has also influenced states with a rule similar to FRE 609. *See id.* at 317 n.110.

This five-factor list is inclusive, but non-exhaustive, meaning that courts should examine the five factors, but the court is not limited to these factors.[156] Some district courts have concluded that it is a requirement to examine at least all five factors.[157] The Seventh Circuit has concluded more firmly than Wisconsin courts that the court should explicitly evaluate, on the record, the factors of their respective tests, concluding:

> In the future, to avoid the unnecessary raising of the issue of whether the judge has meaningfully invoked his discretion under Rule 609, we urge trial judges to make such determinations after a hearing on the record . . . and to explicitly find that the prejudicial effect of the evidence to the defendant will be outweighed by its probative value.[158]

This has been binding law since 1976, suggesting it has been the federal practice ever since.[159] Simply put, Wisconsin courts do not have to "show their work" in the same meaningful way that federal courts do—to the ultimate detriment of the criminal defendant-witness.

Moreover, the Seventh Circuit factors' substantive content signals that the court should be more concerned with the danger of unfair prejudice to the criminal defendant-witness than the probative value to assessing her credibility.[160] Factors such as "[t]he similarity between

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156. *See Mahone*, 537 F.2d at 929 (describing the five-factor test: "[s]ome of the factors which the judge should take into account in making his determination"); *United States v. Castor*, 937 F.2d 293, 298–99 & n.8 (7th Cir. 1991) (finding "[the trial court's] painstaking examination to be an adequate basis for . . . [its] decision to admit the prior convictions," and noting that "the *Mahone* list was intended to be inclusive, not exclusive"); *United States v. Rein*, 848 F.2d 777, 782 (7th Cir. 1988) ("The district court here carefully considered each of these factors twice, once before trial and again after the defendant's direct testimony . . . .").

157. *See, e.g.*, *United States v. Smith*, 181 F. Supp. 2d 904, 910 (N.D. Ill. 2002) ("[T]he factors that we are *required* to analyze . . . .") (emphasis added); *United States v. Sayles*, No. 11-CR-30162-WDS, 2012 U.S. Dist. LEXIS 52428, at *3 (S.D. Ill. Apr. 13, 2012) ("[T]he court is directed to consider . . . ."); *United States v. Darr*, No. 07-30026, 2007 U.S. Dist. LEXIS 49233, at *2 (C.D. Ill. July 9, 2007) ("[T]he Court *must* consider the following factors . . . .") (emphasis added). Although the Seventh Circuit appeals court has been less consistent in clearly making use of the five factors mandatory, it held in *United States v. Causey* that "a district court must consider five factors . . . ." 9 F.3d 1341, 1344 (7th Cir. 1993).

158. *Mahone*, 537 F.2d at 929; *see, e.g.*, *Rodriguez v. United States*, 286 F.3d 972, 983–84 (7th Cir. 2002). However, *United States v. Alvarez* explained that "[u]nder *Mahone*, the absence of an explicit finding is not necessarily reversible error," 833 F.2d 724, 727 (7th Cir. 1987). Still *Alvarez* reiterated: "[T]rial judges should strive to make explicit their findings on Rule 609 so that the court on appeal can more readily determine whether the judge followed the requirements of Rule 609." *Id.*

159. *See Mahone,* 537 F.2d at 922.

160. *See* FED. R. EVID. 609(a)(1)(B).

the past crime and charged crime" and the "impeachment value of the prior crime" guard against the forbidden inference of criminal propensity.[161] For instance, a greater "similarity between the past crime and charged crime"[162] communicates a "caution" to the court that the jury may assume the criminal defendant-witness committed the crime today because she committed the same crime in the past.[163] Likewise, the factor "[t]he importance of the defendant's testimony" conveys that the court should consider whether admitting the prior convictions may undermine or dissuade the criminal defendant's right to testify.[164]

In contrast, the Wisconsin Rule's factors do not explicitly overlap with any of the Seventh Circuit's factors.[165] This partially makes sense considering that the Wisconsin Rule presumes prior convictions are admissible.[166] The Wisconsin factors—now codified—focus more on the type of prior conviction than the importance of the testimony or the risk of unfair prejudice[167] and partly endorse unfounded correlations between a prior conviction and a greater propensity to lie.[168] For instance, the factor "gravity of the crime," communicates to the court that the worse the crime, the greater propensity to lie and the more probative to credibility.[169] However, the worse the crime, then the more

161. *See Mahone,* 537 F.2d at 929.

162. *Id.*

163. *See, e.g.*, *United States v. Hernandez*, 106 F. 3d 737, 740 (7th Cir. 1997) (determining that a similarity between two prior convictions "requires caution on the part of the district court to avoid the possibility of the jury's inferring guilt on a ground not permissible"); *United States v. Wooten*, No. 10-20088-DRH, 2010 WL 3614922, at *2 (S.D. Ill. Sept. 9, 2010) ("[T]he similarity of crimes . . . weighs against admissibility.").

164. *See, e.g.*, *Mahone,* 537 F.2d at 929; *Smith*, 181 F. Supp. 2d at 910 ("Knowledge that one's prior convictions will be admitted tends to deter a defendant from testifying; there is an understandable fear that jurors will disregard any limiting instructions that the Court gives and will assume that because the defendant has committed crimes . . . , he likely committed th[is] . . . crime," and then concluding that "all but one of the factors . . . weigh in favor of admitting Smith's prior convictions . . . . The Court believes that the factors favoring admission . . . outweigh the possibility that admitting the convictions might deter Smith from testifying."); *United States v. Washington*, No. 13-CR-50070, 2015 WL 1403887, at *3 (N.D. Ill. Mar. 26, 2015) (not admitting a prior conviction because "while the jury needs to be able to evaluate [the defendant's] testimony, defendant should not be unnecessarily deterred from taking the stand," and determining that a limiting instruction to the jury would not suffice). *But see* Bellin, *supra* note 155, at 322–30 (arguing that the fourth and fifth factors of *Mahone* can work against the criminal defendant-witness).

165. *See* WIS. STAT. § 906.09 (Updated 2015–16).

166. *See supra* notes 75, 81 and accompanying text.

167. *See* § 906.09.

168. *See infra* notes 169–170 and accompanying text.

169. *See* § 906.09(2). This is consistent with the Wisconsin Rule's presumption. *See supra* notes 87–94 and accompanying text.

a juror may be tempted to misuse it as evidence of criminal propensity.[170]

In summary, and in light of the foregoing discussion, the revised Wisconsin Rule codifies an exclusive reliance on judicial discretion without providing an adequate guide.[171] This, coupled with subjecting all prior convictions to the rule's grasp, works to the detriment of the criminal defendant-witness more than FRE 609, by potentially increasing the risk of impeachment by prior conviction and the risk that a juror will misuse the prior conviction for improper purposes.[172] The effect of these increased risks translates into a grave concern that the criminal defendant-witness will plead out rather than proceed to, and testify at, trial, or worse allow the state to convict the defendant on evidence otherwise insufficient by itself.[173] The lack of any revision to the Wisconsin Rule to meaningfully reduce such risks to the criminal defendant-witness is fundamentally unfair. Therefore, the revised Wisconsin Rule continues to be less favorable to the criminal defendant-witness than FRE 609.

3. BLINDFOLDING THE JURY: THE WISCONSIN "COUNTING RULE"

The "counting rule" is another unique twist of the Wisconsin Rule[174] compared to FRE 609 that results in a less favorable rule to the criminal defendant-witness. In essence, the "counting rule" is how courts administer the Wisconsin Rule.[175] The "counting rule" precludes the jury from hearing anything other than "the fact that the [criminal defendant-]witness has been convicted of a crime and the number of prior convictions."[176] The jury does not learn the name or nature of the underlying conviction.[177]

The 2017 revision codified the "counting rule," but it has been a long-held practice in Wisconsin courts.[178] The conception of the

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170. The Wisconsin "counting rule" may mitigate the effect. *But see infra* Section II.A.3.

171. *See supra* Section II.A.2.

172. *See supra* notes 7, 9, 14, 63, and 71 and accompanying text.

173. *See supra* notes 57–71 and accompanying text.

174. Daniel D. Blinka, *Evidence of Character, Habit, and "Similar Acts" in Wisconsin Civil Litigation*, 73 MARQ. L. REV. 283, 291 (1989) (noting that "Wigmore dubbed [the Wisconsin Rule] a 'queer rule'").

175. BLINKA, *supra* note 38. In practice, a party files a motion in limine and then the court rules outside the presence of the jury on whether the prior conviction may be excluded for purposes of impeachment. *See id.* at 582.

176. *Id.* at 580.

177. *Id.*

178. *See* WIS. STAT. § 906.09 Judicial Council Note, 2017 (Updated 2015–16) ("The amendment to sub. (1) is intended to conform the rule more closely to current practice.").

practice dates back to at least 1968.[179] The "counting rule" states that the criminal defendant-witness may be asked two questions: "Ha[ve] [you] been convicted of a crime[?]" and "[H]ow many times?"[180] The responses to these two questions are pre-determined by the court.[181] If the defendant-witness's responses to both questions are "truthful and accurate" then no further inquiry may be made on cross-examination.[182]

Federal courts pursue a different practice that is arguably more favorable to the criminal defendant-witness. First, a "counting rule" is wholly absent from FRE 609 and its controlling case law.[183] The Seventh Circuit, in *Campbell v. Greer*,[184] rejected the argument that the underlying name of the conviction should not have been disclosed.[185] The Seventh Circuit reasoned "[m]ost jurors have only an indistinct sense of the range of offenses connoted by the term 'felony'; . . . . The jury cannot [evaluate the witness's credibility] if all it is told is that the witness was convicted of a 'felony.' The crime must be named."[186] Recall that in Wisconsin courts, the jury does not learn the name of the crime. The jury only learns whether the criminal defendant-witness has committed a "crime."[187]

That said, the practice in federal courts is not a free-for-all.[188] FRE 609 and its case law only allow a measured, limited inquiry into the underlying convictions so the jury can more accurately assess the criminal defendant-witness's credibility.[189] Specifically, the inquiry into the nature of the conviction "must be limited to whether the defendant had previously been convicted of a felony, to what that felony was and to when the conviction was obtained."[190] Further, "the circumstances and details of prior criminal conduct should not be explored by the [cross-examiner]."[191] Even if the criminal defendant-witness opens the door to her conviction record, the prosecution may not "harp on the witness's crime, parade it lovingly before the jury in all its gruesome details, and thereby shift the focus of attention from the events at issue

179. *See State v. Midell*, 159 N.W.2d 614, 617 (Wis. 1968).

180. *E.g.*, *Nicholas v. State*, 183 N.W.2d 11, 14 (Wis. 1971).

181. § 906.09(3).

182. § 906.09(1); *Nicholas*, 183 N.W.2d at 14–15.

183. *See* FED. R. EVID. 609; *Campbell v. Greer*, 831 F.2d 700, 707 (7th Cir. 1987).

184. 831 F.2d 700 (7th Cir. 1987).

185. *Id.* at 707.

186. *Id.*

187. *See supra* note 176 and accompanying text.

188. *See infra* notes 190–192 and accompanying text.

189. *See infra* notes 190–192 and accompanying text.

190. *United States v. Robinson*, 8 F.3d 398, 409–10 (7th Cir. 1993).

191. *Id.*; *see also United States v. Castro*, 788 F.2d 1240, 1246 (7th Cir. 1986).

in the present case to the witness's conviction in a previous case."[192] These limitations place constraints on using conviction evidence for impeachment purposes, in addition to the restrictions on particular types of convictions discussed in Section II.A.2.b.

At first glance, the Wisconsin "counting rule" may appear more favorable to the criminal defendant-witness because the jury does not learn the nature of the underlying conviction. This argument is similar to the viewpoint of Wisconsin courts for restricting the scope of the inquiry: "[W]hen the state is allowed to expatiate on the nature and details of the past crimes," then it is more likely that "[t]he jury may conclude that if he has committed all those other crimes, then he probably committed the one he is on trial for also."[193] This viewpoint, however, fails to recognize the equally plausible outcome that the jury might infer from the fact of a prior conviction and the number of convictions, the precise forbidden inference of criminal propensity that the "counting rule" was to prohibit.[194] However, Wisconsin case law opposes this counter-viewpoint, *Liphford* rejected the defendant's argument that the number of convictions is evidence of criminal propensity.[195] Likewise, *Smith* held that a circuit court abused its discretion in excluding convictions because the circuit judge opined on his "serious doubts about the probative value . . . when the jury doesn't learn about what the conviction is for."[196] These viewpoints contrast sharply with that of the Seventh Circuit.[197]

Daniel Blinka noted that the "counting rule" can be "an especially effective compromise" for the criminal defendant-witness when the prior conviction is highly similar to the case at hand.[198] This is premised on the idea that the jury will be left guessing as to what crime the criminal defendant-witness committed.[199] But considering the research on jurors' misuse of evidence and how their individual expectations can subvert the effectiveness of the law's blindfold effect, jurors may still infer the *worst* that the underlying nature of the crime

192. *See Campbell v. Greer*, 831 F.2d 700, 707 (7th Cir. 1987); *see also Robinson*, 8 F.3d at 409–10.

193. *Nicholas v. State*, 183 N.W.2d 11, 14 (Wis. 1971).

194. *See supra* Section I.B.

195. *Liphford v. State*, 168 N.W.2d 549, 551 (Wis. 1969) (rejecting the defendant's argument that "the only purpose of asking 'how many convictions' was to show that the defendant had a propensity for committing crimes").

196. *State v. Smith*, 553 N.W.2d 824, 827–28 (Wis. Ct. App. 1996) (noting that "[t]he trial court's discretionary ruling was primarily guided by a consideration that is contrary to the presumptions of Wisconsin law").

197. *See supra* notes 183–190 and accompanying text.

198. *See* Blinka, *supra* note 174, at 295. This is a relatively insignificant difference from FRE 609 as the similarity between crimes is a *Mahone* factor that works heavily against admission. *See supra* notes 159 and accompanying text.

199. *See* Blinka, *supra* note 174, at 295.

in the conviction record is at least substantially similar to, if not the same as, the alleged crime at trial.[200] Indeed, this is analogous to the inference that many jurors make when the criminal defendant fails to testify: they assume the worst and presume she's guilty.[201] Thus, it is idealistic at best to say the criminal defendant-witness benefits from withholding information about the underlying nature of the conviction from the jurors.

Several other aspects of the "counting rule" and its operation also work to the detriment of the criminal defendant-witness with each aspect exacerbating the uncertainty she faces in deciding whether to proceed to, and testify at, trial. First, the counting rule can be anomalous and confusing to criminal defendant-witnesses.[202] For example, if the defendant-witness has five prior convictions, but the court determines that only three of them may be used for impeachment, the defendant will be instructed to testify that she has three prior convictions.[203] Because the defendant must swear to tell truth before testifying, the court effectively instructs the defendant to commit perjury.[204] Worse yet, if the criminal defendant fumbles her response or forgets or fails to answer with the court's determined number of convictions, then the inquiry on cross-examination is not limited to the fact and number of convictions of the criminal defendant-witness.[205] Here, a risk lingers that a skilled cross-examiner may introduce some of the underlying prejudicial details of the prior convictions. As a result, the rule itself paints the criminal defendant-witness as a liar right in front of the jury for telling the truth.

Second, a jury that hears only the fact and number of prior convictions may actually be more harmful to the criminal defendant-witness than a jury that also hears the underlying nature of such convictions. In *State v. Henningfield*,[206] for instance, the court allowed

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200. *See supra* Section I.B.; *cf.* Shari Seidman Diamond et al., *Blindfolding the Jury*, 52 L. CONTEMP. PROBS. 247, 261 (1989); SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 103–14 (2012).

201. *See supra* notes 1, 7 and accompanying text.

202. See *State v. Turner*, No. 2017AP1348-CR (Wis. Ct. App. Apr. 25, 2018), https://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=211854 [https://perma.cc/7QUT-YQRV], *cert. denied*, 2018 WI 92, as an example where the criminal defendant claims he was confused.

203. *See* BLINKA, *supra* note 38, at 587.

204. *See* WIS. STAT. § 906.03 (Updated 2015–16).

205. *See* § 906.09(1); *see also Nicholas v. State*, 183 N.W.2d 11, 14–15 (Wis. 1971).

206. No. 2015AP1824-CR, ¶ 4 (Wis. Ct. App. Mar. 15, 2017), https://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=186160 [https://perma.cc/3W2S-4FS3].

the prosecution to use nineteen prior convictions to impeach the defendant charged with operating a vehicle while intoxicated (OWI).[207] It seems unlikely that having the jury hear the nature of the convictions in *Henningfield* would be any more prejudicial than hearing "19."[208] There can be just as much harm in hearing the number of convictions.[209] The "counting rule" also assigns the same weight to every conviction, and thus, does not allow the jury to distinguish between those crimes bearing more or less on the witness's credibility.[210] The jury may differ drastically from the court as to the relative probative value of each conviction. Thus, the jury's choice is limited: either presume, as the Wisconsin Rule does, or not presume, that the fact and the number of convictions are the only facts that bear on the witness's credibility.[211]

Although a Wisconsin court may base its decision to exclude a conviction from being "counted" on the nature of the underlying offense, the "counting rule" deprives the jury of the very same information.[212] *Kuntz* implicitly and rather paradoxically demonstrates the point that some prior convictions bear more than others on the defendant-witness's credibility: "Whether a prior conviction involves dishonesty is, of course, a relevant consideration to admissibility . . . convictions involving dishonesty are more probative than those that do not, Wisconsin law presumes that all criminal convictions have some probative value regarding truthfulness."[213]

Without learning such information, it is questionable how the jury can appropriately weigh the prior conviction evidence. The court is able to determine whether the conviction should be counted because it involves dishonesty, but the "counting rule" denies the jury the same opportunity to know if the conviction involved dishonesty and blindfolds them in assessing the witness's credibility.[214] In this regard, Wisconsin courts, through the "counting rule," intrude upon the role of the jury; the court weighs the conviction record as to whether the witness is truthful or not and the jury merely takes such evidence as probative to a witness's credibility.[215] But the fact-finder is supposed to weigh and assess the evidence.[216]

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207. *Id.*
208. *See id.*
209. *See supra* notes 206–207 and accompanying text.
210. *See* BLINKA, *supra* note 38, at 580–81.
211. *See supra* Section II.A.
212. *See supra* Section II.A.2.
213. *State v. Kuntz*, 467 N.W.2d 531, 543 (Wis. 1991).
214. *See supra* notes 175–182 and accompanying text.
215. *See State v. Romero*, 432 N.W.2d 899, 905 (Wis. 1988).
216. *See id.*

A rebuttal to the foregoing is that judicial discretion is the remedy.[217] However, the Wisconsin Rule does not restrict the use of specific types of convictions; and therefore, circuit courts may differ on which types of convictions are worthy of exclusion.[218] Similarly, Blinka artfully explained that the "counting rule" often seems "arbitrary" and "occasional mistaken tallies [exist] which leave the courts struggling to divine the enormity of a mistake in subtraction."[219] It is also possible that the counting rule results in a Wisconsin judge discounting the prejudicial effect of a prior conviction because the judge expects that the counting rule will operate and the jury will never know the nature of the conviction, thereby increasing the number of convictions admitted compared to federal court. Although the criminal defendant's counsel may elicit the nature of the conviction on direct examination to blunt its impact,[220] this requires the witness to receive effective assistance of counsel.[221]

In summary, the revised Wisconsin Rule has merely codified a rule cloaked in ambiguity. The counting rule exclusively relies on the court's discretion without an adequate guide, presents an anomalous dilemma to the criminal defendant, and impedes the jury's ability to assess her credibility.[222] FRE 609 avoids these absurdities by not asking the criminal defendant to lie on the stand and narrowly telling the jury the defendant's prior convictions.[223] Thus, the revised Wisconsin Rule continues to be less favorable to the criminal defendant-witness than FRE 609.

B. An Unjustifiable Failure

In light of the 2017 revision, the Wisconsin Rule continues to be less favorable rule to the criminal defendant-witness than FRE 609. Finding any possible justification for the Wisconsin Rule's shortcomings indefensible, the next Section is a call to action to change the Wisconsin Rule because the 2017 revision did not go far enough to adequately protect the criminal defendant-witness. The Wisconsin Rule

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217. *See* SOUTHWICK, *supra* note 40, at 13–14.

218. *See supra* Section II.A.2.a.

219. BLINKA, *supra* note 38, at 587.

220. *See Nicholas v. State*, 183 N.W.2d 11, 14 (Wis. 1971); BLINKA, *supra* note 38, at 587.

221. *State v. Turner* is an example of the low likelihood that a criminal defendant-witnesses succeed on appeal in ineffective assistance of counsel cases. No. 2017AP1348-CR ¶¶ 25–54 (Wis. Ct. App. Apr. 25, 2018), https://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=211854 [https://perma.cc/7QUT-YQRV], *cert. denied*, 2018 WI 92.

222. *See supra* Section II.A.3.

223. *See supra* Section II.A.3.

is an outlier among states and stands in tension with the criminal defendant's constitutional rights.

1. THE WISCONSIN APPROACH: AN ANACHRONISM AMONG MODERN-DAY PRACTICES

In light of modern-day practices, it is a failure that the 2017 revision to the Wisconsin Rule did not provide greater protections to the criminal defendant-witness or bridge the divide to FRE 609. This stasis is attributed to the fact that Wisconsin's rule remains anchored to the assumptions of a common law era.[224] Ironically, this rule of evidence is refuted by the evidence.[225] A voluminous body of research shows that jurors improperly use conviction record evidence as well as refutes the probative value of a prior conviction to prove credibility.[226] Consider the "six factors" now codified in the Wisconsin Rule.[227] Aside from the factor pertaining to a crime that involves an element of dishonesty, little empirical research exists that supports a correlation between any of the other factors and a criminal defendant-witness's lack of credibility or a greater propensity to lie.[228]

Even assuming for the sake of argument that the voluminous research against impeachment by prior conviction is "junk science," excessive or unprincipled reliance on the common law rationale is still inconsistent with the twenty-first century justice system. There are many more crimes on the books today.[229] Not only are there more crimes on the books, the era of "tough on crime" and mass incarceration has increased the number of people with criminal records.[230] Wisconsin's prison population is "on track to hold a record

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224. For a discussion on why impeachment by prior conviction persists, see Roberts, *supra* note 9, at 2014–18.

225. *See supra* Section I.B.

226. *See supra* Section I.B.

227. See *supra* Section II.A.2.a, for a discussion of the factors.

228. *See supra* note 56 and accompanying text.

229. *See, e.g.*, Roberts, *supra* note 9, at 1995; George F. Will, *When Everything Becomes a Crime*, WASH. POST (Apr. 8, 2015), https://www.washingtonpost.com/opinions/when-everything-is-a-crime/2015/04/08/1929ab88-dd43-11e4-be40-566e2653afe5_story.html?noredirect=on&utm_term=.83420a5900a0 [https://perma.cc/QK46-TAYS] (discussing over-criminalization in the United States and noting that there are over 4,500 federal crimes).

230. *See* Lennox Yearwood, *The Tough on Crime Era Needs to End*, HILL (Sept. 23, 2016), http://thehill.com/blogs/pundits-blog/crime/297446-the-tough-on-crime-era-needs-to-end [https://perma.cc/72ZD-YW4Y]; Clark, *supra* note 15; Friedman, *supra* note 15.

number of people by 2019."[231] In essence, the Wisconsin Rule, potentially holding in its grasp up to thirty percent of the adult population,[232] is highly over-inclusive compared to the common law. Thus, the potential impact of the rule continues to grow in scope to concerning proportions.[233]

By any calculation, the Wisconsin Rule stands as an outlier among modern-day practices. This was the case before the revision,[234] and remains the case today.[235] Even the WJC recognized that the Wisconsin Rule is different.[236] All of Wisconsin's neighbors—Illinois, Michigan, Minnesota, Iowa—have modeled their rules on FRE 609 or exceed its protections.[237] Many states adopted or surpassed FRE 609 in terms of limitations on prior-conviction evidence.[238] Some states, including Hawaii and Montana, bar all use of prior convictions to impeach a defendant-witness because in the estimation of their legislatures and courts, such evidence is unfairly prejudicial to the criminal defendant or has no bearing on her credibility.[239] The Wisconsin Rule also contrasts with the Uniform Rules of Evidence.[240] The practice of adopting the federal rule suggests that states have concluded that the potential harm from impeaching the criminal defendant by prior conviction often outweighs its benefit.[241] Adopting a restricted impeachment by prior conviction rule acknowledges the concern that the trial becomes more about prior convictions than the alleged conduct at hand.[242]

Finally, the Wisconsin Rule, following the 2017 revision, continues to perpetuate a moral deficit in the law. In a world of second chances, impeachment by prior conviction rules brand all witnesses—not merely criminal defendant-witnesses—as convicted felons despite

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231. Patrick Marley, *Wisconsin Prison Population to Hit Record Soon*, MILWAUKEE J. SENTINEL (Apr. 29, 2017), https://www.jsonline.com/story/news/local/wisconsin/2017/04/29/wisconsin-prison-population-hit-record-soon/100944740/ [https://perma.cc/7ZA9-MK2G].

232. *See supra* note 15 and accompanying text.

233. *See* Bellin, *supra* note 7, at 432–33.

234. *See supra* notes 11–12 and accompanying text.

235. *See infra* notes 236–240 and accompanying text.

236. *See* SOUTHWICK, *supra* note 40, at 10.

237. *Compare* FED. R. EVID. 609, *with* IOWA R. EVID. 5.609, MINN. R. EVID. 609, MICH. R. EVID. 609, *and* ILL. R. EVID. 609.

238. *See* Holley, *supra* note 11, at 257.

239. *See, e.g.*, Dodson, *supra* note 63, at 14–22 (discussing the approach in Hawaii, Pennsylvania, Kansas, Georgia, and Montana that have largely disallowed impeachment with prior conviction evidence, with certain exceptions).

240. UNIFORM RULES OF EVIDENCE ACT § 609 (NAT'L CONFERENCE OF COMM'RS. ON UNIF. STATE LAW 1999).

241. *See, e.g.*, Dodson, *supra* note 63, at 14–22.

242. *See supra* Section I.B.

time served or rehabilitation efforts.[243] The Honorable Timothy Rice, United States Magistrate Judge for the Eastern District of Pennsylvania, articulately promotes a restorative approach to justice and argues why impeachment by prior conviction rules should be reconsidered:

> Impeachment using a felony conviction is more than simply posing a question to a returning citizen. Rather, it rekindles a psychological barrier to a returning citizen's full integration into the community by labeling the witness as possessing bad character. Each time a person who has successfully reentered our community is impeached with a prior felony unrelated to truthfulness, society renews its condemnation of that person's character and undermines restorative efforts aimed at rehabilitation and healing. Any marginal relevance of such impeachment fails to justify the ongoing punishment of returning citizens called to testify in our courts.[244]

Despite decades of criticism directed at FRE 609, Wisconsin remains decades behind, associating with a handful of states too stubborn to meaningfully improve their rules to the modern-day practice.[245]

2. NO MEANINGFUL TRIAL: UNDERMINING THE CRIMINAL DEFENDANT'S CONSTITUTIONAL RIGHTS

The shortcomings of the revised Wisconsin Rule are unjustified in light of the criminal defendant's constitutional rights. This argument is largely analogous to those directed at FRE 609.[246] First, the criminal defendant has a right to be heard.[247] The Wisconsin Constitution expressly confers this right: "In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel."[248] Likewise, the United States and Wisconsin Supreme Courts have held that

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243. Timothy Rice, *Restoring Justice: Purging Evil from Federal Rule of Evidence 609*, 89 TEMP. L. REV. 683, 699 (2017).

244. *Id.*

245. *See, e.g.*, Dodson, *supra* note 63, at 12–14 (contrasting North Carolina's very broad approach with the restrictive approaches of Hawaii, Pennsylvania, Kansas, Georgia, and Montana).

246. *See, e.g.*, Roslak, *supra* note 20, at 698–99.

247. WIS. CONST. art. I, § 7.

248. *Id.*

"criminal defendants possess a fundamental constitutional right to testify in their own defense."[249]

Second, the criminal defendant has a right to present a *full* defense.[250] The United States and the Wisconsin Supreme Courts have held that "the right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."[251] These courts have emphasized that "the rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process."[252] This includes calling yourself.

The Wisconsin Rule, in practice, stands in tension with these rights. Despite a de jure right to testify in one's own defense, the Wisconsin Rule acts as a de facto bar on the criminal defendant-witness's right to testify on her own behalf and her right to present a full defense.[253] However, these rights need not be perpetually undermined. For example, the *Chambers* Court struck down the state evidentiary rule of evidence of that one may not impeach his or her own witness.[254] The *Chambers* Court stated that such a rule has been "condemned as archaic, irrational, and potentially destructive of the truth-gathering process."[255] The *Chambers* reasoning fits closely with the volume of research that has, for the past several decades, condemned FRE 609.[256] However, the Wisconsin Rule continues to be far more "archaic, irrational, and potentially destructive of the truth-gathering process" than FRE 609.[257] Despite the 2017 revision, the rule continues to impinge on the defendant's constitutional rights, and such harm should serve as an impetus for change. Unfortunately, the WJC

249. *State v. Lagrone*, 878 N.W.2d 636, 638 (Wis. 2016); *see also Rock v. Arkansas*, 483 U.S. 44, 49 (1987) (stating that "a defendant's right to testify is fundamental").

250. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *see also State v. Lynch*, 885 N.W.2d 89 (Wis. 2016).

251. *Chambers*, 410 U.S. at 294; *see also Lynch*, 885 N.W.2d at 109.

252. *Chambers*, 410 U.S. at 294; *see also Lynch*, 885 N.W.2d at 114 (stating that "all defendants have the right to physically confront and cross-examine witnesses").

253. This assertion is similar to that of legal scholars who claim that the defendant's right to testify is "illusory," in part, because of FRE 609 and the adverse pressures it places on the defendant in determining whether to plead or proceed to trial, and if they proceed to trial, whether to testify at trial. *See, e.g.*, Hornstein, *supra* note 7, at 1–6.

254. *Chambers*, 410 U.S. at 296 n. 8.

255. *Id. Lynch* cited the *Chambers* Court's reasoning for striking down the state evidentiary rule. *Lynch,* 885 N.W.2d at 110–11 (citing *Chambers*, 410 U.S. at 295).

256. *See supra* Section I.B.

257. *Chambers*, 410 U.S. at 296 n.8; *see also supra* Section II.A.

did not justify its 2017 revisions on protecting core constitutional rights,[258] and the lack of any meaningful revision to the Wisconsin Rule reflects that accordingly.

III. A MISSED OPPORTUNITY AND A POTENTIAL FIX: THE REFORMATIVE EFFECT OF INCREMENTALISM

By merely codifying case law,[259] the 2017 revision to the Wisconsin Rule missed an opportunity to fundamentally transform the Wisconsin Rules. This was an opportunity that typically only comes once every few decades.[260] The codification of well-known case law—which was already the prevailing practice and largely available in the annotated statutory text prior to the 2017 revision—effectively does nothing to change the law or make it more favorable than FRE 609. Moreover, codifying this case law reinforced and extended the shortcomings of the Wisconsin Rule to the detriment of the criminal defendant-witness.[261] Therefore, a renewed reform effort focusing on the rights of the criminal defendant-witness and incremental change is necessary.

First, a renewed reform effort needs to focus on the criminal defendant-witness. The WJC largely justified its latest revision on the need for greater efficiency for court practitioners, but a meaningful incorporation of the criminal defendant-witness's interest was missing.[262] The WJC's memorandum proposing the rule notes that the 2017 revision respects "the concerns raised by prosecutors," but fails to explicitly state its effect on the criminal defendant.[263] Moreover, focus on judicial economy is contrary to the purpose of the rules of evidence, which is "[to promote the] growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined,"[264] and the voluminous body of research questioning the relevancy of criminal convictions to the witness's credibility.[265] The importance of placing the criminal defendant-witness at the forefront

258. *See infra* notes 262–263 and accompanying text.

259. *See supra* Part II.

260. *See supra* Section I.A (explaining that over the past forty-five years the Wisconsin Rule has been revised three times: 2018, 1996, and 1974).

261. *See supra* Section II.A.

262. *See* SOUTHWICK *supra* note 40, at 11. The lack of consideration to the rights of the criminal defendant was also apparent during the 1974 revision process. Not a single memo in the WJC record discussed the criminal defendant's rights as it relates to the Wisconsin Rule. *See Judicial Council Index*, WIS. ST. L. LIBRARY, http://wilawlibrary.gov/search/jc.html (last updated Mar. 22, 2018).

263. *See* Southwick *supra* note 40, at 12.

264. WIS. STAT. § 901.02 (Updated 2015–16).

265. *See supra* Section I.B.

acknowledges that the rule undermines the criminal defendant's constitutional rights and that innocent people could go to jail or prison.

Second, a renewed reform effort should embrace incremental reform rather than only consider the extreme ends of the spectrum. During the 2017 revision process, the WJC only discussed four reforms at the polar ends of the spectrum: (1) adopt the federal rule; (2) leave the existing rule as is; (3) implement judicial education; or (4) codify case law.[266] The discussion failed to consider minor, yet significant, incremental reforms, such as restricting the use of misdemeanor crimes that do not involve an element of dishonesty, prohibiting the use of juvenile adjudications,[267] or even altering the "balancing test" to align with FRE 609.[268]

Make no mistake, FRE 609 carries with it many decades of fierce criticism.[269] FRE 609, for instance, still allows the use of judicial discretion to administer a rule whose underlying premise is based on faulty social and cultural assumptions.[270] Therefore, some of the same problems with the Wisconsin Rule plague FRE 609 as well, albeit in a more limited manner.[271] FRE 609 also automatically admits all prior convictions that involved an element of dishonesty.[272] Some criminal justice advocates take particular issue with this automatic admission, but Todd Berger, a public defender at the Defender Association of Philadelphia, suggests that while the rest of FRE 609 should be substantially revised this is the only part that actually might be premised on valid assumptions.[273]

Given Wisconsin's history of intransigence on substantively revising its rule, it is probably unrealistic to expect Wisconsin to adopt the Hawaii or Montana approach to impeachment by prior conviction. However, more modest steps are a reachable and admirable goal that begin with adopting the more criminal defendant-friendly provisions of FRE 609. A non-exhaustive list of incremental reforms to the text of the Wisconsin Rule include:

- Invert the balancing test to include a presumption that admits a conviction record only if "the danger of unfair prejudice is substantively outweighed by its probative value";

266. *See* SOUTHWICK *supra* note 40, at 11.
267. *See, e.g.*, Berger, *supra* note 56, at 214–17.
268. *See* FED. R. EVID. 609.
269. *See supra* Section I.B.
270. *See supra* Section II.A.2.b.
271. *See supra* Part II.
272. FED. R. EVID. 609(a)(2).
273. Berger, *supra* note 56, at 217.

- Expressly require circuit courts to evaluate all the factors in a particularized application (rather than the current ambiguous language "to consider" the factors);[274]
- Expressly require circuit courts to make an on-the-record evaluation of whether to exclude a prior conviction record;
- Incorporate two of the Seventh Circuit factors that the circuit court must consider "the similarity between the past and present crime" and "the importance of the defendant's testimony";[275]
- Prohibit the use of juvenile adjudications;[276]
- Restrict the use of stale convictions;
- Restrict the use of misdemeanor convictions; and
- Curtail the "counting rule" to only the fact of conviction, not the number of convictions.[277]

Even under much more restrictive reforms, the prosecution may still impeach the criminal defendant-witness in the form of an opinion or reputation under Wis. Stat. § 906.08.[278] But these proposals are only incremental reforms. They are not wholesale adoptions of FRE 609.[279] Some even originate in Wisconsin sources.[280] However, they should not be considered the end, or the ideal, solution. They are a true compromise that acknowledges the unfair prejudice and harm to criminal defendant-witnesses rather than focusing merely on efficiency. These proposals emphasize that the rules of evidence should reflect the current empirical evidence that undermines the assumptions that this rule is built on. Therefore, any of these proposed reforms would constitute a meaningfully build on the status quo to the benefit of the criminal defendant-witness and bridge the divide between the Wisconsin Rule and FRE 609.

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274. *Cf.* Wis. Sup. Ct. Order No. 16-02A, 2017 WI 92 (filed Oct. 11, 2017, eff. Jan. 1, 2018) http://docs.legis.wisconsin.gov/misc/sco/301.pdf [https://perma.cc/7MQY-5SJX].

275. *See supra* note 155 and accompanying text.

276. This was subsection (4) of the Wisconsin Rule before its 1996 repeal. WIS. STAT. § 906.09(4) (repealed 1995–96).

277. Daniel Blinka suggests this proposal. BLINKA, *supra* note 38.

278. WIS. STAT. § 906.08 (Updated 2015–16).

279. *Compare* FED. R. EVID. 609, *with* notes 274–277 and accompanying text.

280. *See supra* Part II.

CONCLUSION

Despite the fact that FRE 609 is more "favorable" to the criminal defendant-witness compared to the Wisconsin Rule, it has taken the brunt of the criticism on "impeachment by prior conviction."[281] This criticism is valid. But it is ironic that the Wisconsin Rule has gone unscathed without a substantial, comprehensive rebuke in the literature—even though the Wisconsin Rule is less favorable to the criminal defendant-witness.

It is a hopeful expectation that a statutory revision will cure the ailments of old legislation. Unfortunately, the 2017 revision brought no such cure: it offers only a step sideways, not a step forward. The revised Wisconsin Rule continues to be less favorable to the criminal defendant-witness as compared to FRE 609. First, the revised Wisconsin Rule preserves a balancing test that favors the admission of prior convictions. Second, the revised Wisconsin Rule, despite codifying case law factors, continues to rely exclusively on judicial discretion without an adequate guide to administer a rule premised on faulty assumptions. Third, the Wisconsin "counting rule" brings its own absurdities to the Wisconsin Rule. In total, the 2017 revision is effectively a protraction of the status quo. It provides limited protection to the criminal defendant-witness and fails to bridge the Wisconsin Rule to FRE 609.

The Wisconsin Rule's current stasis is unjustified by modern-day practices and the criminal defendant's constitutional rights. Inevitability, these shortcomings undermine the integrity of the trial and the criminal justice system. These shortcomings increase the risk that the criminal defendant will plead, not testify at trial, or be convicted on the basis of otherwise insufficient evidence. With 70 to 100 million adults having a criminal record, the Wisconsin Rule's broad scope makes each one of them a possible victim.[282]

Life is full of second chances, and a true second chance for criminal defendant-witnesses includes not carrying the stigma of past convictions. A true second chance allows criminal defendants to testify without fear of impeachment by prior conviction. To effectuate a true second chance, the WJC must take a second look at advancing incremental, meaningful reforms to the Wisconsin Rule.

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281. *See, e.g.*, *supra* note 71.

282. *See supra* note 16.