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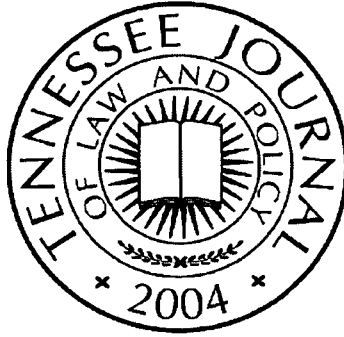
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RECLAIMING THE PUBLIC FORUM: COURTS MUST STAND
FIRM AGAINST GOVERNMENT EFFORTS TO DISPLACE
DISSIDENCE

Chris Ford

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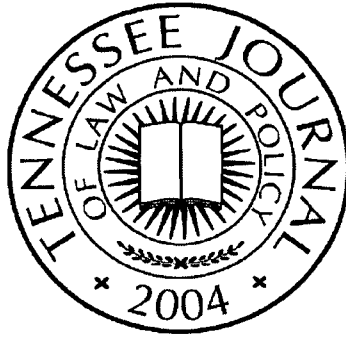
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RECLAIMING THE PUBLIC FORUM: COURTS MUST STAND
FIRM AGAINST GOVERNMENT EFFORTS TO DISPLACE
DISSIDENCE

*Chris Ford**

*Dissent is what rescues democracy from a quiet death
behind closed doors.¹*

I. Introduction

As the twenty-first century gets underway, governmental authorities appear to be undertaking increasingly unfriendly measures against citizens who take to the streets to influence policymaking. In some jurisdictions, for example, courts have given authorities the green light to stifle speech by limiting access to public spaces.² In one recent case involving the 2004 Republican National Convention in New York, a district court judge seemed more worried about the condition of the grass in Central Park than the right of the citizenry to gather in a public space and conduct a rally.³ Particularly in this age

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¹ Lewis Lapham, *Foreword* to HEIDI BOGHOSIAN, *THE ASSAULT ON FREE SPEECH, PUBLIC ASSEMBLY AND DISSENT: A NATIONAL LAWYERS GUILD REPORT ON GOVERNMENT VIOLATIONS OF FIRST AMENDMENT RIGHTS IN THE UNITED STATES 2* (The North River Press 2004).

² See, e.g., *United for Peace & Justice v. Bloomberg*, 783 N.Y.S.2d 255 (N.Y. Gen. Term); *Nat'l Council of Arab Ams. v. City of New York*, 331 F. Supp. 2d 258 (S.D.N.Y. 2004).

³ *Nat'l Council of Arab Ams.*, 331 F. Supp. 2d at 264.

of globalized media outlets and big-money political campaigns, which in concert tend to considerably constrain the range of debate,⁴ an important component of the health of American democracy is the general public's ability to make their grievances known by taking to the streets without undue governmental hindrance. The general public represents that vast majority who lack the means to convey their message via the media or directly to lawmakers.⁵

This escalating government clampdown on free expression, along with current trends toward privatization of public functions,⁶ governmental secrecy,⁷ and gagging

⁴ Media consolidation recently has drawn criticism. A bid during 2003 by the Federal Communications Commission (FCC) to allow large media companies to own television and radio stations and newspapers in the same cities provoked protests in more than a dozen U.S. cities, with marchers in Los Angeles displaying signs that read "No Choice, No Voice: Reclaim our Airwaves." Furthermore, 750,000 Americans phoned, wrote, or e-mailed messages, arguing that the proposed rule changes would stifle diversity and were fundamentally anti-democratic. The FCC ignored these messages. Steve Barnett, *On Broadcast: Hurrah for Jowell as She Puts Brakes on Big Media*, THE OBSERVER, June 29, 2003, at 6 (internal quotation marks omitted). See also Madison Smart Bell, *Have You Heard the New Neil Young Novel?*, N.Y. TIMES, Nov. 9, 2003, at 33 (noting that musician Neil Young is "not the first or last to notice that if our world is significantly less free now than in the time of his youth, it's less because of government than the inert momentum of the increasingly monolithic media.").

⁵ See *infra* notes 18, 60-73 and accompanying text.

⁶ See *infra* Part V.C.

⁷ This nation now holds some trials in secret. One newspaper columnist points out that "a tiny group of fringe right-wing lawyers" created secret and unaccountable military tribunals controlled by the White House that have proven "totally useless" in the war on terror, but have "indelibly stain[ed] America's reputation as a leader in democratic principles and endanger[ed] the lives of American prisoners of war in current and future conflicts." Robert Scheer, *The Man Behind the Oval Office Curtain*, L.A. TIMES, Oct. 26, 2004, at B11. Furthermore, the federal government has been operating under ever-greater secrecy in recent years, especially since the September 11, 2001 terrorist attacks in New York and Washington, D.C. For example, the number of classified government documents has jumped forty percent between 2001 and 2003. Moreover, in 2003 only one fifth as many documents were declassified as in 1997. Edward Epstein, *White House Takes Secrecy to New Levels, Coalition Reports*, S.F. CHRON., Aug. 27, 2004, at A7.

of citizens,⁸ should give anyone who favors governance by open democracy serious pause. Though perhaps not fashionable to emphasize in this era of magnified terrorism fears, evidence is abundant that the polity's rights are steadily eroding. "The war on terrorism threatens to destroy the very values of a democratic society governed by the rule of law."⁹ In light of recent mass arrests and secret detentions by the federal government, Judge Tashima, who was imprisoned in an internment camp in Arizona along with other Americans of Japanese ancestry during World War II, said, "It's happening all over again."¹⁰ Professor Don Mitchell argues that the

[President George W.] Bush has . . . presided over one of the most closed administrations in modern history, increasing the classification of documents and defending against any challenges to its secrecy. Early in his tenure, [former Attorney General John] Ashcroft issued a memorandum to other agencies of government promising to stand by any plausible refusal of a Freedom of Information Act request.

Editorial, *Administration Unbound*, ST. PETERSBURG TIMES, Oct. 2, 2004, at 16A. In addition, hearings for immigrants caught up in the sweeps following the September 11, 2001 attacks were closed to not only the news media and the public, but even the detainees' relatives. Adam Clymer, *Government Openness At Issue as Bush Holds On to Records*, N.Y. TIMES, Jan. 3, 2003, at A1. The details of their arrests and even the number detained have been kept secret. *Id.* Bush also has kept under wraps presidential papers pertaining to his father, George H.W. Bush, and Ronald Reagan, robbing scholars and the public of valuable information. *Id.* In general, the Bush Administration's "penchant for secrecy . . . has been striking to historians, legal experts and lawmakers of both parties." *Id.*

⁸ See *infra* Part III.

⁹ Steve Hymon, *Rights a Victim of Terror War, U.S. Judge Says*, L.A. TIMES, Nov. 7, 2004, at B3 (quoting United States Court of Appeals Judge A. Wallace Tashima, speaking at a conference on the civil rights cases challenging the World War II-era internments) (internal quotation marks omitted).

¹⁰ *Id.* (internal quotation marks omitted). Judge Tashima also criticized the government for interrogating people based only on race and for conducting searches of Internet, library, and university records without probable cause. *Id.* Another former detainee at an internment camp told the newspaper, "A lot of people now are governed by fear. There are friends of mine who say racial prejudice can be justified. . . . They really believe it. It's scary the way things are going. But I think people

intersection of the new repressive state apparatus spawned by the September 11, 2001 attacks on American soil, along with jurisprudence that defines where free speech may take place, “portends a frightening new era in the history of speech and assembly in America.”¹¹

Protecting core rights such as free expression is vital because “[s]ometimes a right, once extinguished, may be gone for good.”¹² Recognizing that the right to free speech for dissidents is increasingly at risk in the United States, this article catalogs manifold methods the government has employed to constrain free speech. It urges that courts not only serve as a bulwark against further erosion of public expression of dissent but endeavor to restore access to the public forum that recently has been lost. Part II surveys the background of the right of free expression, examining the traditional limits on the public forum. Part III provides details and examples of the government’s increasing tendency to suppress dissident expression by deploying heavily-armed police in demonstrations, committing violent acts against peaceful protesters, engaging in mass arrests, exaggerating the criminal charges against detained demonstrators, and holding demonstrators in ignominious conditions for unreasonably long periods of time. Part IV examines how such government actions violate constitutional protections of speech by deterring participation in public debate. In recent years, the government has gone beyond such street tactics and has placed public fora off-limits by forcing dissenters into protest pens, determining, based on viewpoint, where they may engage in political expression and limiting the landscape of free speech via privatization schemes. Part V analyzes the First Amendment

are going to be outraged sooner or later.” *Id.* (internal quotation marks omitted).

¹¹ Don Mitchell, *The Liberalization of Free Speech: Or, How Protest in Public Space is Silenced*, 4 STAN. AGORA 1, *45 (2004).

¹² *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 477 (S.D.N.Y. 2004).

implications of such developments, and Part VI concludes that courts must defend the right to free expression by limiting or disallowing these governmental schemes that have the effect of restricting access to the public forum.

II. Background

The First Amendment to the United States Constitution¹³ represents “nothing less than a celebration of the value of intellectual and moral autonomy.”¹⁴ Our nation’s founders believed that democratic government would only be possible with the widest access to information.¹⁵ This belief reflects the self-governance theory underlying the First Amendment tradition, whereby free speech is viewed as an indispensable tool for governing a democracy. Because it facilitates the spread of political truth, free speech receives heightened protection.¹⁶

¹³ The First Amendment provides in relevant part: “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST., amend. I.

¹⁴ Sheila Suess Kennedy, *Introduction* to FREE EXPRESSION IN AMERICA: A DOCUMENTARY HISTORY xviii (Sheila Suess Kennedy ed., Greenwood Publishing Group 1999).

¹⁵ *Id.*

¹⁶ According to one author,

The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion, for . . . once force is thrown into the argument, it becomes a matter of chance whether it is thrown on the false side or the true, and truth loses all its natural advantage in the contest.

ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 31 (Harvard Univ. Press 1948); RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 12 (Random House 1992). Professor Smolla lists five ways in which free speech is related to self-governance: (1) through participation (debating issues, casting votes, joining decision-making processes); (2) the pursuit of political truth; (3) augmentation of

A variation on this theory posits that the right of free expression is needed for citizens to develop the intellectual tools necessary to assimilate and evaluate a wide range of viewpoints.¹⁷ Additionally, commentators have cited the marketplace theory as an underlying purpose of free speech by which truth competes in the marketplace with falsity and ultimately triumphs.¹⁸ Free speech also is often justified as an end unto itself, inextricably tied to human autonomy and dignity.¹⁹ Thus, under this self-fulfillment theory, even where one's words may lack truth, value, or argumentative merit, free expression offers the speaker fulfillment through inner satisfaction and the realization of self-identity.²⁰ Whatever its true *raison d'être*, free speech on issues of public concern has enjoyed protection for hundreds of years and has as its conceptual progenitor the right to petition

majority rule; (4) restraint on "tyranny, corruption and ineptitude"; and (5) societal stability. *Id.* at 12-13. *See also* *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (declaring that "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials").

¹⁷ "By allowing for ambiguity and conflict in the public sphere, the First Amendment promotes the emergence of character traits that are essential to a well-functioning democracy, including tolerance, skepticism, personal responsibility, curiosity, distrust of authority, and independence of mind." GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 7 (W.W. Norton & Co. 2004).

¹⁸ "Truth has a stubborn persistence. Persecution may eliminate all visible traces of a truth, like the scorched earth after a napalm bombing. Yet truth comes back. . . . Cut down again and again, truth will still not be stamped out; it gets rediscovered and rejuvenated, until finally it flourishes." SMOLLA, *supra* note 16, at 7. However, Professor Smolla argues that like economic markets, the marketplace of ideas suffers a bias in favor of the wealthy who have greater access than the poor or disenfranchised. *Id.* at 6. *See also* *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market").

¹⁹ SMOLLA, *supra* note 16, at 9.

²⁰ "It is a right defiantly, robustly, and irreverently to speak one's mind, just because it's one's mind." *Id.*

government for redress of grievances, as originally developed in Medieval England.

A. The Right of Free Expression: Ancient Roots

The right of free expression as a means toward effecting change in governmental policy predates the founding of the United States. Although the Magna Carta contains no language directly protecting free speech, some authors suggest that it contains the seeds that later flourished into support for free-speech rights.²¹ These seeds take the form of the right to petition the governing authority for redress, which finds some reference in the Magna Carta²² but more direct support in later texts.²³ Yet,

²¹ The most salient feature in its seeds-of-free-expression context is that the Magna Carta enunciates a limit on the power of the Crown. Kennedy, *supra* note 14, at 1. "However unarticulated, there is in the Charter the principle that we today would call the 'rule of law.'" A.E. DICK HOWARD, *MAGNA CARTA: TEXT AND COMMENTARY* 23 (Univ. of Va. Press 1964). According to Howard:

The very fact that the King was forced to agree to this declaration of rights and liberties set an example that could never be erased. In a later century when Stuart kings, to cloak their tyranny, invoked the doctrine of 'Divine Right,' men could look back to Magna Carta as a reminder that free men are not obliged to allow themselves to be ground into the dust.

Id.

²² According to one author, who cites an unpublished Ph.D. dissertation, the right to petition predates even the Magna Carta. While the King regularly provided redress, he only provided redress when beneficial to himself and only under a very limited set of circumstances—namely in private disputes between property owners. Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 *FORDHAM L. REV.* 2153, 2163 n.26 (1998). Thus, this early petition for redress was not a means to bolster political rights or affect policy. *Id.* at 2163-64. On the other hand, the Magna Carta does provide, in Chapter 61, a means of petitioning by which barons could seek that the King abide by the Charter. *See id.* at 2164 n.29. The King and his counselors had discretion over how to treat petitions, but even those rejected or not

around the time of the Magna Carta, the right to petition the government for redress of grievances became a formal mechanism by which the disenfranchised could participate with the enfranchised in English political life.²⁴ Not surprisingly, the right to petition began early in North America when it was codified in the Body of Liberties adopted by the Massachusetts Bay Colony in 1641.²⁵

acted on had to be read. *Id.* at 2168. The Magna Carta provides:

[I]f We, Our Justiciary, bailiffs, or any of Our ministers offend in any respect against any man, or shall transgress any of these articles of peace or security, and the offense be brought before four of the said twenty-five barons, those four barons shall come before Us, or Our Chief Justiciary if We are out of the kingdom, declaring the offense, and shall demand speedy amends for the same.

HOWARD, *supra* note 21, at 50 (quoting MAGNA CARTA ch. 61).

²³ *E.g.*, The Bill of Rights of 1689, *quoted in* Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 685). This bill gave subjects the right to petition the King, and declared that “all commitments and prosecutions for such petitioning are illegal.” *Id.* at 685 n.92 (internal quotation marks omitted).

²⁴ Mark, *supra* note 22, at 2169. Mark observes:

In the thirteenth and fourteenth centuries, for example, an extremely wide band of English society participated in politics by petitioning for redress of grievances, without question a wider spectrum of society than that with the franchise. . . . A petition from a group of prisoners, for example, suggests a participatory consciousness that extended well beyond even that which underlies some quite modern concepts of enfranchisement.

Id. at 2169-70.

²⁵ See Wishnie, *supra* note 23, at 688. The Body of Liberties provides:

Every man whether Inhabitant or fforreiner, free or not free shall have libertie to come to any publique Court, Councell, or Towne meeting, and either by speech or writing to move any lawfull, seasonable, and materiall question, or to present any necessary motion, complaint, petition, Bill or information, whereof that meeting hath proper cognizance, so it [can] be done in convenient time, due order, and respective manner.

Not unlike today's demonstrators who take to the streets to protest war, economic injustice, or environmental degradation, those who petitioned the government in Colonial America were among the disenfranchised.²⁶ Also, like street marching today, petitioning in colonial times made it possible for even the disenfranchised to participate in political life.²⁷ Furthermore, like some street demonstrations carried out by the disenfranchised and their sympathizers in the 1960s, as well as more recently,²⁸ petitioning during colonial times successfully effected changes in governmental policy.²⁹ The Declaration of Independence also refers to unsuccessful petitions for redress from the King of England made "in the most humble terms," but which "have been answered only by repeated injury."³⁰ Finally, the First Amendment itself provides for petitioning.³¹ Although originally seen as central to the relationship between government and the governed, the courts and academics historically have paid

A Coppie of the Liberties of the Massachusetts Collonie in New England (December 1641), *reprinted in* 1 DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS: THE ANGLO-AMERICAN TRADITION 122, 124 (Zechariah Chafee, Jr., ed., 1963). *See also* Mark, *supra* note 22, at 2177.

²⁶ Wishnie, *supra* note 23, at 686-87. "Disenfranchised white males, such as prisoners and those without property, as well as women, free blacks, Native Americans and even slaves, exercised their right to petition for redress of grievances." *Id.* at 688-89 (citations omitted).

²⁷ *Id.* at 687.

²⁸ *See, e.g.,* Leti Volpp, *The First Annual Peter Cicchino Awards for Outstanding Advocacy in the Public Interest Pannel Discussion: A Defender of Humanity: In Honor of Peter Cicchino*, 9 AM. U. J. GENDER SOC. POL'Y & L. 45, 47 (2001) (rallying against global economic inequality allows participants to feel a connection with "the subordinated and disenfranchised whose humanity is routinely denied").

²⁹ For example, more than half the statutes enacted in eighteenth-century Virginia began as petitions. Wishnie, *supra* note 23, at 687.

³⁰ THE DECLARATION OF INDEPENDENCE, para. 30 (U.S. 1776).

³¹ "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I (emphasis added).

this aspect scant attention.³² For practical purposes, the First Amendment's protection of petitioning has been subsumed into its defense of speech and the press.³³ "[W]here once political speech had petitioning at its very core, and what we understand as speech and press stood at the periphery, now the core and periphery are reversed."³⁴

Giving historic context to and underlining the importance of free speech in America, colonists in the early 1720s, writing under the pseudonym "Cato," explained:

Freedom of Speech is the great Bulwark of Liberty; they prosper and die together. And it is the Terror of Traytors and Oppressors,

³² Mark, *supra* note 22, at 2155.

³³ *Id.* at 2154-56. A narrow exception to this trend arose during the 1960s with the development of the *Noerr-Pennington* doctrine, named for two Supreme Court cases, *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 HASTINGS L.J. 905, 908-10, 913 (1990). Under this doctrine, the Supreme Court, citing the right to petition as "an essential component of our representative government" under the First Amendment, immunized from antitrust attack petitioning (i.e., lobbying) by business special-interest groups, even where the purpose of such petitioning was to restrain trade and even if the restraint caused an antitrust injury. *Id.* at 909-10, 913. Professor Minda questions the validity of the *Noerr-Pennington* doctrine, however, when he states:

The true threat to the values of free expression and representative government lies not with antitrust regulation of petitioning, but rather with antitrust immunity, which has allowed the political process to be overwhelmed by the excessive influence of corporate greed and private access.

By immunizing government-petitioning cases under the *Noerr-Pennington* antitrust doctrine, the courts have allowed business interests to use political expression as a predatory strategy for capturing the benefits of regulation, thus threatening the political legitimacy of government.

Id. at 1028.

³⁴ Mark, *supra* note 22, at 2154.

and a Barrier against them. . . . But when [free speech] was enslaved . . . [t]yranny had usurped the Place of Equality, which is the Soul of Liberty, and destroyed publick Courage. The Minds of Men, terrified by unjust Power, degenerated into all the Vileness and Methods of Servitude: Abject Sycophancy and blind Submission grew the only means of Preferment, and indeed of Safety; Men durst not open their Mouths, but to flatter.³⁵

Yet, intellectuals of the time frequently followed the teaching of eighteenth century English commentator, Blackstone, whose conception of free expression consisted of barring government from prior restraint of speech while allowing subsequent punishment.³⁶ Arguably, this type of thinking underlies the passage of the Alien and Sedition Acts of 1798,³⁷ which punished, *inter alia*, criticism of the government.³⁸ These Acts, passed amid a looming

³⁵ Letter from Cato number 15, *Of Freedom of Speech: That the Same Is Inseparable from Publick Liberty*, in KENNEDY, *supra* note 14, at 15.

³⁶ See CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* 182-83 (Rowman & Littlefield rev. ed. 1994).

The liberty of press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints on publications, and not in freedom for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.

Id. at 182 (quoting WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (1866)).

³⁷ Law of June 25, 1798, ch. 58, 1 Stat. 570; Law of July 14, 1798, ch. 74, 1 Stat. 596 [hereinafter Law of July 14, 1798].

³⁸ The Sedition Act punished any act wherein a person should "write, print, utter or publish . . . any false, scandalous or malicious writing or

prospect of war against France, provoked immediate public furor.³⁹ Thomas Jefferson assailed the constitutionality of the Acts—rightfully so according to author Chafee—so much so that when he became the nation’s third President in 1801, he pardoned all prisoners arrested under these Acts.⁴⁰ Popular indignation with prosecutions under the Acts destroyed the Federalist Party, and Congress repaid all of the imposed fines.⁴¹

Despite this history, the United States Supreme Court has never passed on the constitutionality of the Alien and Sedition Acts,⁴² and for nearly the first century and a half of its existence, the Court expended little effort on examining or upholding free speech or free press rights.⁴³ One reason the Court rarely reached First Amendment

writings against the government . . . with intent to defame . . . or to excite against them . . . the hatred of the good people . . . or to stir up sedition” with up to two years in prison and a \$2,000 fine. Law of July 14, 1798, §2. Truth was a defense. *Id.* at §3.

³⁹ WOLFE, *supra* note 36, at 183. The passage of the Acts represented the one instance from the founding of the nation until 1917 in which the government attempted to apply the doctrine of bad tendency, which punishes speech that tends to favor an enemy at war by creating disaffection in the country and discouraging men from enlisting in the armed forces. *See generally* CHAFEE, *supra* note 16, at 25-28.

⁴⁰ CHAFEE, *supra* note 16, at 27-28.

⁴¹ *Id.* at 27. *See also Sullivan*, 376 U.S. at 276.

⁴² *Sullivan*, 376 U.S. at 276. “Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional.” *Id.* (citations omitted).

⁴³ *E.g.*, WOLFE, *supra* note 36, at 183 (“The period between 1800 and 1919 was generally dormant for free-speech cases on the federal court level.”). However, it is not as though the Supreme Court never referred to free-expression rights in the 19th century. *See, e.g.*, *United States v. Cruikshank*, 92 U.S. 542, 552 (1876) (“The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States.”); *Slaughter-House Cases*, 83 U.S. 36, 80 (1873) (“The right to peaceably assemble and petition for redress of grievances . . . are rights of the citizen guaranteed by the Federal Constitution.”).

questions during the nineteenth century is that the prospect of mob violence or economic punishment discouraged parties from asserting their rights to free speech in any court. Thus, few cases or controversies regarding speech made their way to the Supreme Court.⁴⁴

Indeed, it was not until well into the twentieth century that Justice Holmes, in his famous dissent in *Abrams v. United States*,⁴⁵ presaged the Court's modern tendency to give teeth to First Amendment protection of expression. Justice Holmes wrote, "I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe."⁴⁶ This dissent appeared in one case among a series in which both agitators against the World War I draft and Socialists, who advocated the violent overthrow of the government, were hauled into court for violating the Espionage Act of 1917⁴⁷ and a similar state statute. Once there, their convictions were upheld.⁴⁸ Even in the 1925 case of *Gitlow v. New York*,⁴⁹ which serves as a free-speech milestone by holding

⁴⁴ See generally Michael T. Gibson, *The Supreme Court and Freedom of Expression from 1791 to 1917*, 55 *FORDHAM L. REV.* 263, 268-70 (1986) (noting that economic and social pressures kept plaintiffs from taking free speech cases to court in the 19th century). For example, in 1869 the *New York Times* sent riflemen and machine guns to protect the *Herald Tribune* from a mob, and employers purportedly threatened to eliminate employees' jobs if William Jennings Bryan was elected president in 1896. *Id.* at 268 n.21, 269 n.22. Nevertheless, evidence exists that newspapers did not exactly feel "shackled" by the Supreme Court's nineteenth century free speech jurisprudence. *Id.* at 270-71. Moreover, nineteenth century procedural and substantive rules prevented many cases from reaching the Supreme Court, and the Court did not "incorporate" the First Amendment into the Due Process Clause of the Fourteenth Amendment until 1925. *Id.* at 267-68.

⁴⁵ 250 U.S. 616.

⁴⁶ *Id.* at 630 (Holmes, J., dissenting).

⁴⁷ Act of June 15, 1917, ch. 30, tit. 1, § 3, 40 Stat. 219, amended by the Act of May 16, 1918, ch. 75 § 1, 40 Stat. 553.

⁴⁸ See, e.g., *Abrams*, 250 U.S. 616; *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

⁴⁹ 268 U.S. 652 (1925).

for the first time that the First Amendment was “incorporated” into the Fourteenth Amendment Due Process Clause⁵⁰ and was therefore applicable to the states, the majority held that legislatures could prohibit classes of speech that they consider to be dangerous.⁵¹ Justices Holmes and Brandeis dissented, pointing out that “[e]very idea is an incitement.”⁵² This paved the way for the latter’s seminal concurrence in *Whitney v. California*.⁵³ There, Justice Brandeis enunciated the clear and present danger

⁵⁰ *Gitlow*, 268 U.S. at 666.

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.

Id. While debating the Bill of Rights, the House of Representatives approved a provision stating that “[n]o State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.” Gibson, *supra* note 44, at 268 n.18 (quoting 1 ANNALS OF CONGRESS 755 (J. Gales ed. 1834)). However, the Senate rejected the provision. *Id.* (citing 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1146 (McGraw-Hill Professional Publishing 1971)).

⁵¹ According to the Court:

[W]hen the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition.

Gitlow, 268 U.S. at 670.

⁵² *Id.* at 673 (Holmes, J., dissenting) (“Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker’s enthusiasm for the result.”).

⁵³ 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

test as a limit on government prosecution of speech, such that “[o]nly an emergency can justify repression.”⁵⁴

Justice Brandeis further emphasized that those who won the nation’s independence believed that “without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine.”⁵⁵ This call to limit government sanction of speech would not really strengthen until the 1960s.⁵⁶ During the Great War Era, Learned Hand, sitting as a district court judge, most eloquently defended the right of free speech in an Espionage Act case in which he issued an injunction requiring the postmaster to distribute a magazine containing anti-war poetry, cartoons, and other writings.⁵⁷

⁵⁴ *Id.* at 377 (Brandeis, J., concurring).

⁵⁵ *Id.* at 375.

⁵⁶ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (overturning Ohio law punishing advocacy of violence as a means to achieve industrial or political reform); *Sullivan*, 376 U.S. at 276 (enunciating the actual malice standard in defamation of public figures); *Noto v. United States*, 367 U.S. 290 (1961) (reiterating that the teaching of the moral propriety or necessity for a resort to force are not sufficient for conviction). In *Brandenburg*, Justice Douglas criticized the courts for too readily punishing advocacy by characterizing it as a threat. *Brandenburg*, 395 U.S. at 454-55 (Douglas, J., concurring). According to Justice Douglas,

When one reads the opinions closely and sees when and how the ‘clear and present danger’ test has been applied, great misgivings are aroused. First, the threats were often loud but always puny and made serious only by judges so wedded to the *status quo* that critical analysis made them nervous. Second, the test was so twisted and perverted in [*Dennis v. United States*, 341 U.S. 494 (1951)] as to make the trial of those teachers of Marxism an all-out political trial which was part and parcel of the cold war that has eroded substantial parts of the First Amendment.

Id. at 454.

⁵⁷ *Masses Pub. Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917), *rev’d*, 246 F. 24 (2d. Cir. 1917). Chafee considers that during the World War I era, there was “no finer judicial statement” advocating the right of free speech than this from Judge Hand. CHAFEE, *supra* note 16, at 46.

Judge Hand wrote:

Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of law. Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them in execution, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom.⁵⁸

B. The Need for Free Expression: The Lack of Alternatives

Certainly such an eloquent defense of free speech during wartime applies with no less force today, particularly where the current administration portends a permanent war against terrorism. Engaging in political speech in the streets is worthy of the most heightened

⁵⁸ *Masses Pub. Co.*, 244 F. at 540. Judge Hand further argues:

If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation. If that be not the test, I can see no escape from the conclusion that under this section every political agitation which can be shown to be apt to create a seditious temper is illegal. I am confident that by such language Congress had no such revolutionary purpose in view [when it passed the Espionage Act].

Id.

protection, especially because the mass media may not accurately reflect the voices of the public, and because much of the public lacks access to the media.⁵⁹ Indeed, for much of the twentieth century, the main avenues of protest—such as leafleting, picketing, rallying on public property, and engaging in door-to-door advocacy—were geared toward low-cost message-making. Courts’ First Amendment rulings sought to protect such methods⁶⁰ because the rich enjoyed a built-in advantage of media access in getting their message across to a broad audience, and potentially were able to exclude those without such means from public debate.⁶¹ Underscoring the importance

⁵⁹ “[F]reedom of the press is guaranteed only to those who own one.” Seth F. Kreimer, *Social Movements and Law Reform: Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet*, 150 U. PA. L. REV. 119, 121-22 (2001) (quoting A.J. LIEBLING, *THE PRESS* 32 (2d rev. ed. 1975)). While media consolidation has put the lack of access in sharp focus, *see supra* note 4, it can hardly be said that this concern is new. Justice Douglas, dissenting in a 1966 trespass case, stated:

The right to petition for the redress of grievances has an ancient history and is not limited to writing a letter or sending a telegram to a congressman; it is not confined to appearing before the local city council, or writing letters to the President or Governor or Mayor. . . . Conventional methods of petitioning may be, and often have been, shut off to large groups of our citizens. Legislators may turn deaf ears; formal complaints may be routed endlessly through a bureaucratic maze; courts may let the wheels of justice grind very slowly.

Adderley v. Florida, 385 U.S. 39, 49-51 (1966) (citations omitted). In *Adderley*, Florida students were convicted of “trespass with a malicious and mischievous intent” for demonstrating against racism and other governmental policies on the grounds of a local jail. *Id.* at 40.

⁶⁰ *E.g.*, *Martin v. Struthers*, 319 U.S. 141, 146 (1943) (protecting familiar methods is “essential to the poorly financed causes of little people”).

⁶¹ Kreimer, *supra* note 59, at 122. One book reviewer refers to “a world bought and paid for by big business, which, not coincidentally, can count on the corporate media to push anti-people agendas.” Marlene Webber, *Kicking Against Them*, *THE TORONTO STAR*, Jan. 13, 2002, at D14 (book review). A letter writer contends that members of the public will take to the streets when they are “deliberately bypassed

of low-cost street protesting, Supreme Court Justice Douglas noted:

Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a more limited type of access to public officials. Their methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable.⁶²

While it is true that the Internet has the potential to provide a low-cost medium for those with dissenting political messages to reach a broad audience, it serves more as a highly efficient organizational, research, and interpersonal communication tool than a replacement for the town square.⁶³ Still, the Internet enables both large and small groups, which represent the entire political spectrum, to make their views available to readers all over the world.⁶⁴ And thus far, they have been able to elude governmental and media censorship in doing so.⁶⁵ For

by those in power.” Postbag, *Don't be a Stooge of Globalization*, BANGKOK POST, Oct. 3, 2000 (letter to the editor).

⁶² *Adderley*, 385 U.S. at 50-51.

⁶³ See generally Kreimer, *supra* note 59, at 142-43 (arguing that the existence of more than five billion websites creates a “digital attention deficient” as Internet users only have so many hours in a given day to view websites and a group’s message may get lost in the clamor). See also Frederick W. Mayer, *Labor, Environment and the State of U.S. Trade Politics*, 6 NAFTA L. & BUS. REV. AM. 335, 339 (2000) (explaining that the Internet merely allows groups to promote leaders’ efforts, solicit support, provide information to members, distribute key documents, or serve as an informational clearinghouse, rather than engage in the debate characteristic of visible public protests).

⁶⁴ Kreimer, *supra* note 59, at 125. A good example of such a website may be found at <http://www.indymedia.org>.

⁶⁵ “Not only does the Internet allow insurgents to bypass the ‘soft’ censorship of the mainstream media, but it allows evasion of the more direct efforts at suppression of information by local, state, or national authorities.” Kreimer, *supra* note 59, at 127. Professor Kreimer cites

protest groups, maintaining a website means giving readers a view of marches and police reactions that the broadcast media may ignore.⁶⁶ Moreover, the use of Internet chat rooms, e-mail, and websites enables dissident groups to provide volumes of information including, for example, complaints and court decisions that would have been inconceivable without the computer-based medium. Moreover, groups employ online resources to facilitate recruitment and mobilization.⁶⁷

Professor Seth Kreimer, however, contends that for all its ability to move information and reach globally, the Internet has not developed into a cyber-town square.⁶⁸ Primary among the reasons for this lack of development include what he calls the “digital attention deficit”; dissident group websites, no matter how comprehensive, exist in a worldwide cacophony of websites, each trying to compete for readers who only have twenty-four hours a day.⁶⁹ Moreover, protest site publishers may be able to post links on portals that attract heavy traffic or host more easily found “sucks” sites.⁷⁰ But these may not offer the impact of ground protests at prominent venues, such as the National Mall in Washington, which by their nature capture

the Mexican Zapatista rebels’ ability to convey their accounts to the world, Vietnamese dissenters’ efforts to post banned novels, and Serbian radio stations’ web-based broadcasts to bypass airwave jamming by the government. *Id.* at 127-28. Similarly, Matt Drudge’s efforts arguably dragged the mainstream media into full-scale coverage of the Monica Lewinsky sex scandal during the Clinton era, while “the seamy quality of the Starr Report became impossible to disguise when the text of the report became available online.” *Id.* at 130.

⁶⁶ *Id.* at 125-26.

⁶⁷ *Id.* at 131-37.

⁶⁸ *Id.* at 140.

⁶⁹ *Id.* at 142-43.

⁷⁰ Kreimer, *supra* note 59, at 152-53. See, e.g., <http://homedepotsucks.com> (criticizing Home Depot for trying “to stifle [sic] freedom of speech, [and] attempting to steal this domain”); <http://paypalsucks.com> (critiquing the service used to pay for product purchased on the eBay auction website). Note that businesses, aware of the effects of “sucks” websites, have tried to thwart them through legal means.

the public's attention.⁷¹ "On the Internet, there are neither malls nor sidewalks."⁷²

While the argument is strong that the Internet has yet to serve as a substitute for the town square, it is also unlikely that the Internet would replicate the emotive impact of street protest. Although his expertise lay in copyright, Professor Melville Nimmer wrote an appellate brief on and advocated at oral argument the value of emotive speech in an important First Amendment case, *Cohen v. California*.⁷³ In *Cohen*, Justice Harlan adopted Nimmer's own phrasing⁷⁴ when he wrote:

[W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. Indeed, as Mr. Justice Frankfurter has said, "one of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation."⁷⁵

⁷¹ Kreimer, *supra* note 59, at 147-48.

⁷² *Id.* at 148.

⁷³ 403 U.S. 15 (1971) (overturning defendant's conviction for disturbing the peace by wearing a jacket with the slogan "Fuck the Draft"); William Van Alstyne, *Remembering Melville Nimmer: Some Cautionary Notes on Commercial Speech*, 43 UCLA L. REV. 1635, 1649, 1655-57 (1996).

⁷⁴ Van Alstyne, *supra* note 73, at 1656-57.

⁷⁵ *Cohen*, 403 U.S. at 26 (quoting *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944)).

Because the Internet does not duplicate a true public meeting place and the majority of the citizenry lacks meaningful access to shape the content of the mass media, most political dissenters still lack viable alternatives to a public forum in which to voice their opinions.

C. The Public Forum and its Traditional Limits

Whether bypassed by those in power, lacking alternate vehicles for message-making, or simply outraged at ill-conceived government policy, citizens who take to the streets and other public spaces utilize a forum traditionally dedicated to political expression. Though frequently recited in First Amendment literature, the words of Justice Roberts, in *Hague v. Committee for Industrial Organization*,⁷⁶ are worth repeating here. In that opinion, he wrote:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.⁷⁷

While this proclamation of privilege should resonate like a favorite tune to the ear of any street demonstrator, one should note that Justice Roberts also stressed that “the privilege of a citizen . . . to use the streets and parks for

⁷⁶ 307 U.S. 496 (1939).

⁷⁷ *Id.* at 515.

[free expression] may be regulated in the interest of all; it is not absolute, but relative.”⁷⁸

Yet, while recognizing a governmental prerogative to regulate in the interest of peace and order, Justice Roberts nonetheless admonished that government must not use “the guise of regulation” to abridge or deny free speech.⁷⁹ After deciding *Committee for Industrial Organization*, the Court developed a regulation scheme that categorizes the use of public spaces for political expression based on their relative availability to the public. Thus, the Court referred to what is now known as the traditional public forum—the streets, sidewalks, and parks found to be “natural and proper” places for political expression.⁸⁰ These are places that “by long tradition or by government fiat have been devoted to assembly and debate.”⁸¹ The Court also has defined limited or designated public fora and nonpublic fora,⁸² but the focus of this article rests on political expression in the traditional public forum,

⁷⁸ *Id.* at 515-16. The privilege “must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order.” *Id.*

⁷⁹ *Id.* at 516.

⁸⁰ In such places, “expressive activity will rarely be incompatible with the intended use of the property, as is evident from the facts that they are ‘natural and proper places for dissemination of information and opinion.’” *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 817 (1985) (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)).

⁸¹ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

⁸² Limited or designated public fora include university meeting facilities and municipal theaters, places that the government has deliberately opened to expressive activity for limited time periods, for a limited class of speakers (e.g., student groups), or for a limited range of topics (e.g., school board business). The nonpublic forum category refers to government property not traditionally used or deliberately designated for speech activity. For example, courts have found post office sidewalks, airports, state fairgrounds, jails, military bases, and a municipally-owned pier to be nonpublic fora. For a thorough treatment of the public forum doctrine, including abundant case citations, see Kevin Francis O’Neill, *Disentangling the Law of Public Protest*, 45 LOY. L. REV. 411, 418-62 (1999).

especially to elucidate how recent government actions have sharply limited its availability.

The extent to which the government is permitted to regulate speech in a public forum depends on whether or not the content is a motivation for the constraint. Content-based restrictions in public fora are sharply circumscribed and strictly examined.⁸³ “It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.”⁸⁴ To be valid, a content-based regulation “must be shown to protect some vital state interest, or to prevent some clearly identifiable harm.”⁸⁵ An egregious form of content-related regulation is that based on viewpoint.⁸⁶ “When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.”⁸⁷

⁸³ *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995) (citing *Perry Educ. Ass’n*, 460 U.S. at 45) (holding that a state may regulate expressive content “only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest”).

⁸⁴ *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). Moreover, “[d]iscrimination against speech because of its message is presumed to be unconstitutional.” *Id.* at 828. Professor O’Neill lists five categories in which courts have found impermissible governmental acts that restrict speech based on content: (1) categorically suppressing or favoring a particular message; (2) blocking access to a forum because of a speaker’s intended message; (3) charging higher fees for certain speakers to use a forum because the speech is likely to generate controversy and require more police protection; (4) withholding a subsidy to which a speaker, but for her message, would be entitled; and (5) altering a speaker’s message as the price of access to the public forum, such as when private parade organizers were required to include gay and lesbian participants who would convey a message that the organizers cared not to communicate). O’Neill, *supra* note 82, 429-433. See also *Rosenberger*, 515 U.S. at 828 (observing that the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression).

⁸⁵ Mitchell, *supra* note 11, at *15 (emphasis omitted).

⁸⁶ *Rosenberger*, 515 U.S. at 829.

⁸⁷ *Id.* “The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Id.* (citing *Perry Educ.*

In contrast, where a regulation is justified without reference to the content of the expression, courts give government entities some leeway to constrain speech by imposing reasonable restrictions on the time, place, or manner.⁸⁸ The government's purpose is the controlling factor in determining such content neutrality.⁸⁹ When the purpose served is unrelated to the content of the expression, a restriction will be deemed content-neutral, even if it has an incidental effect on some speakers or messages, but not others.⁹⁰ The content-neutral regulation must be narrowly tailored to serve a significant governmental interest—in this context, meaning that the restriction need not represent the least-intrusive means, but only that the governmental interest “would be achieved less effectively absent the regulation”⁹¹—and leave open ample alternate avenues through which to convey the information.⁹² “An

Ass'n, 460 U.S. at 46).

⁸⁸ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Boiled down to its essence, the time, place, or manner doctrine permits government to restrict speech to serve a substantial government interest, but does not allow it to restrict more speech than necessary to accomplish that end. Kelly Conlan, Note, *The Orange Order Looks to the First Amendment: Would it Protect Their Parades?*, 17 J.L. & POL. 553, 565 (2001).

⁸⁹ *Ward*, 491 U.S. at 792.

⁹⁰ *Id.* at 791. (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986)) (upholding zoning ordinance as content-neutral, even though it affected adult theaters differently than others, because the governmental purpose of its enactment was to quell undesirable secondary effects attending adult theaters).

⁹¹ *Id.* at 797-99. “The validity of [time, place, or manner] regulations does not turn on a judge’s agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests’ or the degree to which those interests should be promoted.” *Id.* at 800 (citing *United States v. Albertini*, 472 U.S. 675, 689 (1985)). Additionally, the validity of a regulation “depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government’s interests in an individual case.” *Id.* at 801.

⁹² *Ward*, 491 U.S. at 801. See also *Bay Area Peace Navy v. United States*, 914 F.2d 1224 (9th Cir. 1990). “[A]n alternative mode of communication may be constitutionally inadequate if the speaker’s ability to communicate effectively is threatened. . . . Restrictions have

alternative is not ample if the speaker is not permitted to reach the ‘intended audience.’”⁹³ The requirement that an alternative be ample is important because the First Amendment “protects the right of every citizen to reach the minds of willing listeners, and to do so there must be opportunity to win their attention.”⁹⁴

III. Bullying with Billy Clubs: Government Discourages Participation

Recently, governmental agencies across the nation have undertaken extensive and expensive efforts that have the ostensible purpose of enhancing public safety. In reality, however, these efforts have had the effect of curtailing the ability of political dissidents to win the attention of their intended audience. Much like government officials in the late eighteenth and early twentieth centuries, who were facing war when they passed laws clamping down on speech,⁹⁵ federal and local leaders today refer to concerns about terrorism as reasons for seeking constraints on free expression. In addition to oft-times harsh treatment of street demonstrators,⁹⁶ the

been upheld, for example, when [the challenged ordinance] does not affect any individual’s freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property is prohibited, and the [challenged rule] has not been shown to deny access within the forum in question.” *Id.* at 1229 (citations, emphases, internal quotation marks omitted) (alteration in original); *Weinberg v. City of Chicago*, 310 F.3d 1029 (7th Cir. 2002) (noting ample alternatives ineffective where author of book criticizing professional sports team owner prevented from reaching his audience by ordinance barring him from selling the book within 1,000 feet of the entrance to the sports venue during home games). “The alternatives require Herculean efforts by Weinberg or his customers to complete the sale.” *Id.* at 1042.

⁹³ *Bay Area Peace Navy*, 914 F.2d at 1229 (internal quotation marks omitted).

⁹⁴ *Id.*

⁹⁵ See discussion of Alien and Sedition Acts and Espionage Act, *supra* Part II.A.

⁹⁶ See *infra* Part III.B.

government has, under the auspices of the war on terror, sought to permanently gag certain entities subject to FBI searches.⁹⁷ A New York district court judge recently found the law prohibiting disclosure in such cases facially unconstitutional, noting that “as our sunshine laws and judicial doctrine attest, democracy abhors undue secrecy, in recognition that public knowledge secures freedom.”⁹⁸

Beyond the federal government’s current obsession with secrecy is its concentrated and multi-faceted assault on protesters and their use of public spaces to engage in political speech. Government agencies at the federal and local level intimidate protesters from participating, unjustifiably denounce them as violent, impede their entry or exit from demonstrations, assault them with chemical agents such as pepper spray, shoot them with so-called “less-than-lethal” projectiles (ignoring manufacturers’ suggested limitations on their use), round them up in mass arrests, seek exaggerated charges, and abuse them while they are in custody.⁹⁹

A. Denouncing the Participants

Before demonstrators even show up for their rally, authorities frequently have already begun to denigrate or intimidate them.¹⁰⁰ This denunciation often takes the form

⁹⁷ See 18 U.S.C. § 2709 (2000 & Supp. 2003); *Doe*, 334 F. Supp. 2d at 479-80, 483-84. For example, 18 U.S.C. § 2709(c) prohibits Internet service providers from disclosing “to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under this section.” 18 U.S.C. § 2709(c).

⁹⁸ *Doe*, 334 F. Supp. 2d at 519.

⁹⁹ See *infra* Sections III. A & III. B.

¹⁰⁰ For example, prior to the Republican National Convention in 2004, New York City officials demonized and criminalized those who planned to engage in political protest and portrayed them “in the most negative light.” Class Action Complaint, *MacNamara v. New York* (S.D.N.Y. filed 2004), para. 62 [hereinafter “MacNamara Complaint”] (internal quotation marks omitted), available at <http://nlgnyc.org/pdf/mcclassactioncomplaint.pdf> (last visited Aug. 19, 2005). New York Police Commissioner Kelly made public statements

of taunts, thinly veiled threats, or apocalyptic predictions of demonstrator-derived violence. Sometimes officials seem to base these predictions on little more than isolated incidences of vandalism or infrequent cases of violence that marked previous marches in other cities.

1. Protesters' Propensity for Violence Exaggerated

The Los Angeles Police Department (LAPD) "painted a dire picture" of civil disobedience and mass protests prior to the Democratic National Convention in August 2000,¹⁰¹ based on disruptions caused by dressed-in-black anarchists, who constituted a small percentage of the tens of thousands of marchers protesting globalization at the World Trade Organization (WTO) in Seattle in December 1999.¹⁰² During a presentation to the Los

about the threats "hard-core" and "dangerous" protesters posed to New York City. *Id.* (internal quotation marks omitted).

¹⁰¹ Jeffrey L. Rabin & Tina Daunt, *LAPD Seeks Reversal of Protest Site Designation*, L.A. TIMES, June 29, 2000, at B1.

¹⁰² The Washington Post described the scene in Seattle as follows:

Delegates who stepped out of their hotels Tuesday morning, the first day of the [WTO] conference, with freshly issued ID badges around their necks [exited their hotels to find that] throngs of chanting demonstrators had taken control of the streets of downtown Seattle. With arms linked, they formed tight human chains to block all entrances to the convention center where the meeting would take place.

Downtown's usual din of traffic was banished, replaced by the beating of protesters' drums and a lone trombone's wail, by chants and '60s rock tunes at peak volumes. Riot police marched in tight phalanxes, slapping their nightsticks against the sides of their boots. The sound was like massed jackboots on pavement.

Robert G. Kaiser & John Burgess, *A Seattle Primer: How Not to Hold WTO Talks*, THE WASH. POST, Dec. 12, 1999, at 40. Most protesters left property alone, but a small group of youths dressed in black, whose faces were covered with ski masks or bandanas, committed acts of

Angeles City Council in June 2000, the LAPD stirred fear of pandemonium by showing a dramatic video of the demonstrations in Seattle;¹⁰³ the tenor of this video could be compared to that of the famous 1936 anti-marijuana propaganda film, "Reefer Madness."¹⁰⁴ One police official told the city council, "We fully expect to be fully involved with mass arrests and civil disobedience . . . on a level of what we saw in Seattle if not more intense."¹⁰⁵

Poking fun at the City Council's concerns over protesters, a newspaper columnist wrote that city leaders, looking over their shoulders at Seattle, were "shaking with fear" over the prospect of the public relations fiasco that street-level political expression could bring.¹⁰⁶ "With trembling hands, they're ripping up the Constitution and throwing it to the winds, a craven sacrifice to the gods of chaos."¹⁰⁷

vandalism, breaking storefront windows of businesses such as McDonalds and Starbucks and spray-painting slogans on buildings. *Id.* "Though more than 20,000 union members marched peacefully in Seattle that day, the world would see and remember the sporadic violence and the clouds of tear gas." *Id.* The mayor of Seattle responded to these impromptu protests (other, sanctioned events took place at the same time in other parts of the city) by calling out the National Guard, covering every street corner of downtown Seattle with baton-wielding police officers "in head-to-toe black" who marched shoulder-to-shoulder and shoved demonstrators out of a 25-block zone of the city in which free speech effectively had been banned. Mitchell, *supra* note 11, at *33, *35; Lynda Gorov, *A Crackdown Calms Seattle Action Taken to Prevent Confrontation*, BOSTON GLOBE, Dec. 2, 1999, at A1.

¹⁰³ *Id.*

¹⁰⁴ The author of this article, who was a newspaper reporter at the time, attended the City Council meeting at which the LAPD showed its fear-of-another-Seattle video, and saw the video. For further information on Reefer Madness, see <http://www.reefer-madness-movie.com> (last visited August 22, 2005).

¹⁰⁵ Chris Ford, *Police Outline Plan To Handle Protests*, L.A. DAILY J., June 29, 2000, at 2.

¹⁰⁶ Garry Abrams, *Spines in Short Supply, Wimp City Faces Dreadful Electoral Pestilence*, L.A. DAILY J., July 11, 2000, at 1.

¹⁰⁷ *Id.* The LAPD even went so far as to chop down trees for fear that protesters might set them afire and to remove newspaper racks from downtown Los Angeles in case they might be used as battering rams.

2. Protesters Depicted as “Terrorists”

Preparing to host the 2004 Republican National Convention, New York City officials, no doubt still haunted by images of the September 11, 2001 terrorist attacks on their city, were concerned about a repeat during the GOP political event. However, their concerns about terrorist threats morphed into a practice of lumping demonstrators and terrorists together.¹⁰⁸ The media gave a voice to this effort. A top police official, for example, cited “terrorist threats and the escalating plans of anarchist groups to disrupt the city of New York” as cause for concern.¹⁰⁹ A civil rights attorney told *Newsday*, “The context we’re now operating here in New York City is that protesters are terrorist threats, protesters are anarchists, protesters are the enemy.”¹¹⁰ Furthermore, New York Mayor Michael Bloomberg presumed demonstrators had criminal motives by making statements to the press that they “came here to get arrested.”¹¹¹ Likewise, John Street,

Todd S. Purdum, *The 2000 Campaign: The Scene; Police and Protesters Ready; Politicians Hope for the Best*, N.Y. TIMES, Aug. 13, 2000, at 22.

¹⁰⁸ E.g., Bryan Virasami, *GOP Convention Threats; Arrests led to fingerprints; Top police official says terror fears convinced cops to verify IDs of hundreds held that week*, NEWSDAY, Oct. 27, 2004, at A05.

¹⁰⁹ *Id.* (internal quotation marks omitted). *Newsday* also reported that police fingerprinted hundreds of protesters during the Republican National Convention “due to looming threats by terrorist and anarchist groups.” *Id.*

¹¹⁰ *Id.*

¹¹¹ “The mayor . . . urged demonstrators not to fight their cases in court, despite the fact that many say they haven’t done anything wrong – and out-of-towners who have pleaded guilty said they did so to avoid returning to New York.” Glenn Thrush, *Convention Arrests; Mayor to ex-detainees: Plead Guilty*, NEWSDAY, Sept. 20, 2004, at A15. “The mayor’s comment reflects a disdain for the principle that people are innocent until proven guilty.” *Id.* (quoting Donna Lieberman, Executive Director for the New York Civil Liberties Union). Mayor Bloomberg further made public statements that those engaging in free speech were “terrorists and guilty criminals.” MacNamara Complaint

the mayor of Philadelphia anticipated the arrival of demonstrators to the 2000 Republican National Convention by belittling them, calling them “idiots.”¹¹² He then issued a warning, stating “[s]ome will come here to disrupt, to make a spectacle of what’s going on. They are going to get a very ugly response.”¹¹³ While mayors of Philadelphia and New York made no effort to hide their hostility toward free expression, recently a spokesman for the anti-terrorism section of the California Department of Justice was even more blatant, designating anti-war protesting as a form of terrorism outright.¹¹⁴

Similarly, police training in preparation for anti-globalization demonstrations that coincided with a 2003 Miami meeting of Western leaders attempting to create a Free Trade Area of the Americas (FTAA) emphasized violent protests, yet gave little regard to protection of free speech.¹¹⁵ The media build-up of the Miami FTAA protests emphasized the “anarchists, anarchists, anarchists.”¹¹⁶ The emphasis on anarchists “contributed to a police mindset to err, when in doubt, on the side of

para. 62.

¹¹² “[W]e have got some idiots coming here. Some will come and say whatever obnoxious things they want to say and go home.” BOGHOSIAN, *supra* note 1, at 21.

¹¹³ *Id.*

¹¹⁴ Mike van Winkle, the spokesman for the California Anti-Terrorism Information Center told the Oakland Tribune, “You can make an easy kind of a link that, if you have a protest group protesting a war where the cause that’s being fought against is international terrorism, you might have terrorism at that protest. You can almost argue that a protest against that is a terrorist act.” James Bovard, *Quarantining Dissent: How the Secret Service protects Bush from free speech*, S.F. CHRON., Jan. 4, 2003, at D1.

¹¹⁵ “[Miami-Dade Police Department] spent 40,000 ‘work hours’ preparing for this event, yet the training materials in the After-Action Report document little pertaining to the protection of citizen rights of free expression.” Independent Review Panel of the Miami-Dade Police Department, *The Free Trade Area of the Americas (FTAA) Inquiry Report* 5, Sept. 20, 2004, available at <http://www.miamidade.gov/irp/> (last visited Dec. 5, 2004).

¹¹⁶ *Id.* at 6.

dramatic show of force.”¹¹⁷ Disconcertingly, this mindset inhibited police from performing such basic tasks as assisting members of the public.¹¹⁸ In Seattle after the 1999 WTO Conference, the city council ultimately concluded that the images of rampant violence and chaos, which the media repetitiously broadcast to the world, amounted to an inaccurate portrayal, “as peaceful political demonstrators ‘were drowned out by press coverage of disturbances.’”¹¹⁹

Politicians, police, and the media are not the only ones who are quick to characterize citizens who go to public places and engage in political speech as hoodlums prone to violence. Sadly, this mindset crept into a federal court considering a motion by protest groups to enjoin the city of Boston, host of the 2004 Democratic National Convention, from forcing demonstrators to protest in a zone so harsh that the court said created the “overall impression . . . of an internment camp.”¹²⁰ Despite finding the protest zone to be “a grim, mean, and oppressive place,” the court justified the city of Boston’s security measures in light of the surmised potential for protesters to engage police in “hand-to-hand combat.”¹²¹

¹¹⁷ The idea was “to preempt violence rather than being subject to criticism for avoidable injury and destruction based on a reserved presence of police force.” *Id.*

¹¹⁸ The report cites “failure by the police to respond appropriately to civilian inquiries for directions, street closings, and other assistance.” *Id.* Suspicion of protesters is not new in Florida; St. Petersburg police practices of photographing demonstrators and recording their license plate numbers while they marched were criticized in 1988 for their chilling effect on free speech and assembly. Such tactics are similar to those the FBI allegedly used starting in 1981 in surveillance of groups opposed to U.S. foreign policy in Central America. See Stephen Koff, *City Police Accused of Spying at Rallies*, ST. PETERSBURG TIMES, Feb. 14, 1988, at 1.

¹¹⁹ *Menotti v. City of Seattle*, 409 F.3d 1113, 1160 n.3 (9th Cir. 2005) (Paez, J., dissenting).

¹²⁰ *Coalition to Protest DNC v. City of Boston*, 327 F. Supp. 2d 61, 74 (D. Mass. 2004).

¹²¹ *Id.* at 67, 75.

B. Penalizing the Participants

The government further chills expression and limits access to the public forum through intimidating and violent treatment of protesters, denial of access to public spaces, limiting ingress to and egress from marches, mass arrests that sometimes include uninvolved bystanders, and abusive treatment during detention.¹²²

1. Show of Force Intimidation

Police agencies prepare for demonstrations almost as though they are headed to war with a violent enemy rather than ensuring safety in a public forum for First Amendment expression.¹²³ For example, Los Angeles police projected their rough-and-ready image prior to the 2000 Democratic National Convention by staging a training for television cameras to film a mock containment of protesters.¹²⁴ Protest planners became so frustrated by pre-convention harassment by police that they sued the city of Los Angeles to get it to stop taking actions “aimed at chilling [their] speech.”¹²⁵ The police officers questioned the protestors about their identification, told them walking the streets without identification was illegal, buzzed their planning center with low-flying helicopters, and taunted

¹²² National Lawyers Guild v. City of Los Angeles, No. CV-01-6877 FMV (C.D. Cal. Dec. 2, 2003), available at http://www.nlg-la.org/NLG_v._City.pdf (last visited Dec. 3, 2004).

¹²³ Chris Ford, *Commission Praises LAPD for Handling of Protest Marches*, L.A. DAILY J., Aug. 23, 2000, at 1.

¹²⁴ Nicholas Riccardi & Jeffrey L. Rabin, *Protesters Say L.A. Will Be Used as a Model of Injustice*, L.A. TIMES, July 13, 2000, at B1.

¹²⁵ D2K Convention Planning Coalition v. Parks, CV-00-08556 (C.D. Cal., filed Aug. 8). See also Chris Ford, *Lawyers Will Be Keeping a Close Eye on the LAPD*, L.A. DAILY J., Aug. 11, 2000, at 1. (“The complaint accuses the LAPD of carrying out an ‘intense, well-orchestrated campaign of intimidation and harassment’ and seeks a temporary injunction against the police actions.”).

them with threats of planning center raids.¹²⁶ During the convention, police, with their uniforms bristling with pepper-spray canisters, tear-gas guns, and other weaponry, menaced would-be protesters.¹²⁷ The city sent overwhelming numbers of heavily armed officers even to small gatherings.¹²⁸ One Los Angeles City Council member noted, "There were demonstrations I was at where there were more police than demonstrators."¹²⁹

Police frequently project a menacing presence at demonstrations by showing up in heavy riot gear, which critics deride as "Darth Vader" uniforms.¹³⁰ After examining how police handled the demonstrations during the FTAA meeting, a Miami police review board conceded that "[t]he overwhelming riot-clad police presence, when there was no civil disturbance, chilled some citizen participation in permitted and lawful demonstrations and

¹²⁶ *Id.*

¹²⁷ Ford, *supra* note 123.

¹²⁸ *Id.*

¹²⁹ Chris Ford, *Council Rails at Heavy DNC Police Presence*, L.A. DAILY J., Dec. 4, 2000, at 2 (internal quotation marks omitted). Another City Council member emphasized the heavy cost the city of Los Angeles bore to police the convention, calling it a "fraud on the taxpayers from the moment it started." *Id.* (internal quotation marks omitted). City officials had estimated that the policing tab would be \$8.3 million, but it reached nearly \$36 million, with almost \$10 million going just toward overtime pay for police officers. *Id.* The difference between the estimated and ultimate policing cost was "more than [Los Angeles] spends to fix sidewalks in the city, trim trees in the city and clean up every neighborhood in the city." *Id.* (internal quotation marks omitted). The police presence during convention week was compared to that of an occupying army and criticized as "staggering, inappropriate and over the edge." *Id.* (internal quotation marks omitted).

¹³⁰ "Having witnessed the . . . outrageous overreaction to the minor protests of the Trans-Atlantic Business Dialogue, I now know what it feels like to live in a police state. The horde of officers in their Darth Vader costumes dominated the streets, dwarfing and menacing the few hundred peaceful protesters." John Schauer, Letter to the Editor, *Failure of Pot Initiatives a Victory Anarchy vs. Liberty Protesting Overkill Silencing Free Speech Not-so-Sweet Deal Who's Typical? Curing What Ails Docs Throw the Bums Out Tax the Aldermen*, CHI. SUN-TIMES, Nov. 18, 2002, at 34.

events.”¹³¹ At one point, Miami police in riot gear blocked access to a church service, even though there was no demonstration at the time.¹³²

The intimidation of protesters is not always pressed at the tip of a billy club. In 2002, the Justice Department lifted FBI restrictions imposed in 1976 and began allowing this federal agency to spy on Americans’ everyday lives.¹³³ The FBI encouraged its agents to enhance “paranoia” by increasing the number of interviews it conducted with anti-war activists.¹³⁴ The FBI claimed that doing so would “get the point across that there is an FBI agent behind every mailbox.”¹³⁵

2. Use of Force Causes Injuries

While the so-called Miami Model came under some criticism from the police review panel, the panel’s report does not tell the full story. According to those present, Miami police employed extraction teams, described as squads of plain-clothes officers in full body armor, “wearing ski masks . . . jumping out of vans and dragging protesters off.”¹³⁶ Other snatch squads would drag protesters behind three-row police lines, preventing legal observers and medics from identifying the detainees and gaining access to them.¹³⁷ Moreover, legal observers in Miami obtained arrest reports listing “brutality, beatings and such—tasers, wooden and rubber bullets, many cops

¹³¹ *Id.*

¹³² *Id.*

¹³³ Bovard, *supra* note 114.

¹³⁴ *Id.* (quoting from an internal FBI newsletter) (internal quotation marks omitted).

¹³⁵ *Id.* (internal quotation marks omitted).

¹³⁶ Christopher Getzan, *Infamous ‘Miami Model’ of Protest Clampdown, Coming to a Town Near You*, THE NEW STANDARD, June 8, 2004, available at http://newstandardnews.net/content/?action=show_item&itemid=488 (last visited Nov. 9, 2004) (internal quotation marks omitted).

¹³⁷ BOGHOSIAN, *supra* note 1, at 53.

beating one person, concussion grenades, electrical shields, etc.”¹³⁸

In Los Angeles, the police department’s policy-making board questioned officers’ use of “less-lethal” weapons at a demonstration protesting police brutality in October 2000.¹³⁹ There, police shot demonstrators with weapons designed, according to their manufacturer, for use against “subjects heavily dressed and in a violent mindset.”¹⁴⁰ Among the weapons used that day was one intended for use against armed or violent individuals, which was described as “an excellent tool” for cell extractions or cellblock-clearing operations in prisons.¹⁴¹

Police in Portland, Oregon used not only less-than-lethal weapons during a protest coinciding with a 2002 political fundraiser for President Bush but also used pepper spray.¹⁴² Police claimed that protesters were interfering with the ability of attendees to reach the event site and ordered the crowd to move back 120 feet.¹⁴³ After demonstrators allegedly ignored the order, officers assaulted the crowd with pepper spray and shot crowd members with rubber bullets.¹⁴⁴ In the resulting civil rights lawsuit, the plaintiffs alleged that officers sprayed peaceful

¹³⁸ *Id.* at 54.

¹³⁹ Chris Ford, *Panel Checks ‘Less-Lethal’ Weapons*, L.A. DAILY J., Dec. 20, 2000, at 1. (on file with author).

¹⁴⁰ *Id.* at 9. (internal quotation marks omitted). It should be noted that while the weapons are designed for use against “heavily dressed” subjects, in October the sun in Los Angeles typically generates summer-like temperatures. In fact, the average high temperature in Los Angeles in October is 78 degrees and rarely is it necessary to be heavily dressed. See National Weather Service, Downtown Los Angeles Climate Page, 1921-2004 Data, Observed and Average Monthly/Annual, Max Temp, <http://www.wrh.noaa.gov/lox/climate/cvc.php> (last visited Feb. 13, 2005).

¹⁴¹ Ford, *supra* note 139, at 9 (internal quotation marks omitted).

¹⁴² *Marbet v. City of Portland*, No. CV-02-1448-HA, 2003 U.S. Dist. LEXIS 25685 at *2 (D. Ore. Sept. 8, 2003).

¹⁴³ *Id.* at *2-*3.

¹⁴⁴ *Id.*

protesters in the face with pepper spray and other chemical agents.¹⁴⁵ Police forcefully blocked the exit of one family with small children, including an 11-month-old who had been pepper sprayed, even though they were screaming in pain and seeking medical attention.¹⁴⁶ Police sprayed the parents and their three children without warning.¹⁴⁷

¹⁴⁵ Second Amended Complaint, *Marbet v. City of Portland*, No. CV-02-1448-HA, at paras. 5.6, 5.8-5.11 (D. Ore. Sept. 8, 2003).

¹⁴⁶ *Id.* In one incident, officers, without audible warning, “doused and soaked” protesters with pepper spray, aiming the weapons directly into the faces of the protesters, and caused one protestor to sustain extreme pain and chemical burns. *Id.* paras. 4.5-4.6. In another incident, the family with children ages 6, 3, and 11 months, who were concerned that they had been surrounded by officers as the demonstration wound down, sought to exit the protest area but were twice denied by police. *Id.* paras. 6.4-6.6. Later, an officer “took aim” at the mother and sprayed chemical agents into her face, also hitting her 11-month-old child. *Id.* para. 6.8. The father was sprayed in the eyes, so both parents were debilitated and kneeling or prone on the ground in pain. *Id.* paras. 6.7, 6.9. Meanwhile, their three children were crying in pain and fear and left “unattended by their parents for a period due to the effects of the chemical agents and their parents’ incapacitation from the chemical agents.” *Id.* para. 6.9. The complaint further alleges that the Portland police officers’ assault on the demonstrators violated the First Amendment because “[t]he mass spraying of chemical agents caused a large number of peaceful protesters to leave the area and abandon their lawful free speech and assembly activities.” *Id.* at para. 5.11.

¹⁴⁷ Ryan Frank, et al., *Cleanup, Questions Begin*, THE OREGONIAN, Aug. 23, 2002, at A01. “There was no warning, no ultimatum, nothing,” the father told a newspaper reporter as he tried to comfort his wailing 11-month-old son, whose eyes were red and swollen. “They picked the guy with three kids to spray first.” *Id.* (internal quotation marks omitted). In a more recent and similar episode in Pittsburgh, police used Tasers, pepper spray, batons, and dogs against people demonstrating in front of a military recruitment station. Pittsburgh Organizing Group, Press Release, Save Our Civil Liberties, Pittsburgh Police Attack Non-Violent Protestors With Tasers, Pepper Spray and K-9 Units, [available at http://www.saveourcivilliberties.org/en/2005/08/1180.shtml](http://www.saveourcivilliberties.org/en/2005/08/1180.shtml) (last visited Jan. 30, 2006). Two of the demonstrators required hospitalization. *Id.* One of those hospitalized was a grandmother who was bitten from behind by a police dog, arrested, and kept in an unventilated police van in the hot sun for 45 minutes. The other person hospitalized was a young woman who police officers pepper sprayed directly in the face and then “Taser[ed] her mercilessly as she lay on the street screaming.” *Id.* Police also pepper-sprayed a four-year-old girl and toppled a man with multiple sclerosis in his motorized

3. Checkpoints and Denial of Access to Public Fora

During some events which drew strong opposition from protesters, police erected barriers or thwarted public passage to spaces that clearly are public fora. For example, armed officers staffed checkpoints outside the FTAA meeting site in Miami, and several streets were off limits to anyone without meeting credentials.¹⁴⁸ One reporter observed, "Security fences cut up downtown like a jigsaw puzzle, with numerous checkpoints."¹⁴⁹

Police in Los Angeles during the 2000 Democratic National Convention protests, as well as at another demonstration later that year, used a slightly different tactic, blocking ingress to and egress from ongoing demonstrations in public places.¹⁵⁰ A district court found credible evidence that Los Angeles police "prevented people from joining [a] demonstration, standing on the sidewalk, or leaving the march for any reason, including to use the restroom or disperse [sic] leaflets."¹⁵¹ The court found that those actions permitted a reasonable inference that police unconstitutionally chilled the demonstrators'

wheelchair. *Id.*

¹⁴⁸ BOGHOSIAN, *supra* note 1, at 44.

¹⁴⁹ *Id.* (quoting John Pacenti, *Miami Trade Summit Security Hailed, Reviled*, PALM BEACH POST, Nov. 22, 2003, at A1).

¹⁵⁰ *Nat'l Lawyers Guild*, No. CV-01-6877 FMV (order granting in part and denying in part defendants' motion for summary judgment). New York police also have limited ingress to and egress from ongoing demonstrations. See *Stauber v. City of New York*, No. 03 Civ. 9162, 2004 U.S. Dist. LEXIS 13350, at *14-*15 (S.D.N.Y. July 19, 2004).

¹⁵¹ *Nat'l Lawyers Guild*, No. CV-01-6877 FMV, at 10 (granting in part and denying in part defendants' motion for summary judgment). Plaintiffs, a coalition of protest groups and a human rights bar association, alleged that along with blocking ingress to and egress from demonstrations in August and October 2000, police improperly terminated legal political protests "without cause," used excessive force against those engaged in free expression, and drowned out participants' speech by flying helicopters at low altitudes "without a legitimate law enforcement justification to do so." *Id.* at 5.

First Amendment right to free expression.¹⁵²

4. Mass Arrests, Exaggerated Charges

During events that attract large numbers of protesters, police have engaged in mass arrests or round-ups and file exaggerated charges—or even charges for crimes that do not exist—against those arrested. For example, during the 2004 Republican National Convention, New York police arrested more than 1,800, suddenly sweeping protesters, legal observers, members of the media, and even bystanders from the street in orange plastic nets.¹⁵³

¹⁵² *Id.* at 9. A New York court related the account of a family whose participation at a 2003 anti-war demonstration was effectively thwarted, and thus their expression chilled, by the New York City police department's use of barricades and protest pens. Trapped blocks from the event, the family decided to go home because the mother did not believe that "there was going to be any way ever of getting anywhere close to the demonstration." *Stauber*, 2004 U.S. Dist. LEXIS 13350, at *13 (internal quotation marks omitted).

¹⁵³ Dan Janison, et al., *There was order, but at what price?*, *NEWSDAY*, Sept. 4, 2004, at A04; Diane Cardwell, *Lawyers' Group Sues City Over Arrests of Protestors*, *N.Y. TIMES*, Oct. 8, 2004, at B3. *See also* MacNamara Complaint, paras. 87A., 87B (noting police used "orange nets[]" to arrest groups of people lawfully standing on sidewalks in Times Square, including legal observers and members of the media"). *Id.* paras. 87B (stating police used the orange nets to round up and arrest "individuals who were either participating in, observing, or were merely in the vicinity of a march which began in Union Square"). *Id.* paras. 87D, 142 (pointing out that one march had not even proceeded a full block when police officers surrounded more than 200 people, used the orange nets, and arrested them all, even though they had remained on the sidewalk without blocking it and had complied with police instructions). *Id.* para. 161 (explaining that a group was assembling for a permitted march when a police officer screamed and officers rounded up the participants with plastic orange netting and handcuffed them). *Id.* para. 185 (noting that officers surrounded a group of demonstrators after an officer shouted, "Arrest them all!" The group included protesters "as well as non-protesting bystanders") (internal quotation marks omitted). *See also* First Amended Complaint Schiller v. New York, No. 04 Civ. 07922, para. 24 (S.D.N.Y. filed 2004), available at http://nyclu.org/pdfs/rmc_lawsuit_schiller.pdf ("At Convention-related

In addition, while posting smaller numbers of arrestees, during the 2000 Democratic National Convention, the Los Angeles police carried out mass arrests, forcing detainees to wait hours to be processed, strip searching some of the detainees, and filing charges that either were thrown out for lack of probable cause or were based on nonexistent law.¹⁵⁴ An attorney representing a group of animal rights activists, who were arrested *en masse* during the Los Angeles Convention, characterized the round-up as “an unlawful effort to suppress expressions of dissent.”¹⁵⁵ The forty-two animal rights activists were arrested after they marched into a

demonstrations there were nearly 1,800 arrests, many of them mass arrests of people lawfully on public sidewalks or streets, with law-abiding demonstrators and innocent bystanders alike being swept up.”). Another New York case arising from the 2004 Republican National Convention contains this account of a violent mass arrest:

[A] group of demonstrators carrying signs and playing drums and other instruments left its gathering place at the southern end of Union Square Park and proceeded north on Union Square East. They were followed by curious observers. After the police prevented the demonstrators and observers from proceeding north on Union Square East, the group moved east on 16th Street. Using mesh nets and large numbers of officers, the police then sealed off both ends of the block . . . and refused to allow anyone inside to leave. Many of those trapped between the police lines had been walking lawfully on the sidewalk, and some had not even been following the demonstrators but were simply caught in the crowd when the police sealed the entire block. Without giving any opportunity for people to disperse, the police began systematically arresting people on the block, throwing some people to the ground.

First Amended Complaint, *Dinler v. New York*, No. 04 Civ. 07921 para. 3 (S.D.N.Y. filed 2004), available at http://nycclu.org/pdfs/rmc_lawsuit_dinler.pdf (last visited Jan. 30, 2006).

¹⁵⁴ See *infra* notes 155-61, 165-70 and accompanying text.

¹⁵⁵ “It’s very obvious what was going on here,” the attorney added. “They arrested these kids on Tuesday [the second of the four days the convention lasted] and they planned to hold them until Friday after the convention.” David Houston, *Animal Rights Activists Plan to Sue City*, L.A. DAILY J., Sept. 22, 2000, at 2.

commercial area of downtown Los Angeles and approached a jewelry store they mistook for a furrier while chanting that it is harmful to wear animal fur.¹⁵⁶ The store owner became frantic and closed the metal security grate, prompting some to kick or bang on the grate.¹⁵⁷ Police rounded up these protesters, sixteen of whom were juveniles, forced them against a wall with their hands up, forced them to sit in the hot sun and in a police bus for hours, and charged them with conspiracy to commit vandalism.¹⁵⁸ A judge threw out the charges for all but two of the protestors for lack of probable cause.¹⁵⁹ In another incident shortly before the beginning of the 2000 DNC Convention, Los Angeles police arrested two young women who had been participating in the protest planning, handcuffed them, interrogated them, and threw them into holding cells.¹⁶⁰ Their alleged crime: jaywalking.¹⁶¹

While police lacked probable cause to arrest the animal rights demonstrators, they charged a group of

¹⁵⁶ Ted Rohrlich & Henry Weinstein, *Convention-Related Arrests Cause Little Stir in Legal System*, L.A. TIMES, Aug. 19, 2000, at A22.

¹⁵⁷ *Id.* Anne La Jeunesse, *DNC Anti-Fur Activist Pleads No Contest*, L.A. DAILY J., Nov. 16, 2000, at 2.

¹⁵⁸ Houston, *supra* note 155; Anne La Jeunesse, *Observers See Protest Photos Taken by Police*, L.A. DAILY J., Aug. 18, 2000, at 11 (stating that an ACLU attorney pointed out that police arrested legal observers and journalists along with the protesters, contending that the police were engaged in “a pattern to try to eliminate observers of their . . . misconduct”); Susan McRae, *Volunteer Cameraman Sees the Rougher Side*, L.A. DAILY J., Aug. 18, 2000, at 1. A student filming the animal rights protest and subsequent arrest was clubbed by a police officer in full riot gear and not informed of the charges against him. *Id.* at 11; Rohrlich & Weinstein, *supra* note 156.

¹⁵⁹ Anne La Jeunesse, *Court Drops Charges in Ant-Fur Protest Case*, L.A. DAILY J., Sept. 26, 2000, at 2. Two others, who allegedly kicked the store-front grate, were charged with felony vandalism, and one of these later pleaded guilty to the charge. *Id.*

¹⁶⁰ Ford, *supra* note 123.

¹⁶¹ *Id.* An ACLU lawyer commented, “Obviously, it’s unheard of for somebody to be hauled off to [the police station] and handcuffed . . . for jaywalking. This sort of repression of people for their political views is to be expected in a police state, but it has no place in a democratic country.” Ford, *supra* note 125, at 1.

bicyclists with reckless driving, a violation that does not apply to bike riders under California law.¹⁶² Advocating the increased use of bicycles instead of cars, seventy one bicyclists were riding through downtown Los Angeles as part of a sanctioned demonstration, when they suddenly were swarmed by motorcycle officers, who shouted, “Put your bikes down!”¹⁶³ The bicyclists were subjected to mass arrest;¹⁶⁴ yet unsurprisingly, all charges were later dropped.¹⁶⁵ Additionally, bicyclists in a similar event in New York in 2004 endured the same treatment.¹⁶⁶

5. Abuses in Detention

The twenty three women among the bicyclists in Los Angeles were strip-searched twice—once after a judge had already ordered their release.¹⁶⁷ Los Angeles County

¹⁶² Flynn McRoberts, *Dear Mother Tribune, Send Bail Money*, CHI. TRIB., Aug. 17, 2000, at 17. Realizing that police had wrongly charged the bicyclists, the Los Angeles City Attorney’s Office revised the charges to misdemeanor obstructing a public way and two traffic infractions. *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* (internal quotation marks omitted). McRoberts, a Chicago Tribune reporter who bicycled with the group known as Critical Mass to report on the event, further described the process: “With their hands on their holstered batons, officers in riot gear told us to get ‘up against the fence!’” *Id.* Most officers acted professionally, but they “cuffed us behind our backs with hard plastic ‘flex cuffs’ and kept us at the fence under [an] overpass for an hour or so,” and made the group wait in a bus for another hour. *Id.* “Out of the blue, they cornered the riders and ordered them off their bikes. . . . There was no warning, no message to disperse. It was very scary. I mean, we just went on a bike ride. How did we end up in jail?” Sue Fox, *\$2.75 Million Proposed for Cyclists Arrested in Protest*, L.A. TIMES, March 25, 2003, at B1 (internal quotation marks omitted).

¹⁶⁵ Fox, *supra* note 164, at B1.

¹⁶⁶ During the 2004 Republican National Convention in New York, once-cooperative police officers turned on participants in the bicycling event. Police “used orange nets to trap and arrest scores of people participating in [the] bicycle event that [police] had allowed to take place for nearly one and one-half hours before the mass arrests were made without warning.” MacNamara Complaint, para. 87A.

¹⁶⁷ Fox, *supra* note 164. Also, after the judge ordered their release, the

sheriff's deputies walked the women, many in biking shorts and tank tops, past holding cells filled with jeering male prisoners.¹⁶⁸ They were taken to a chilly cinder-block hallway and ordered to face the wall and undress, whereupon "belligerent uniformed officers" conducted visual body cavity searches of the women.¹⁶⁹ Los Angeles-area taxpayers shelled out \$3.625 million to settle lawsuits that arose from this treatment.¹⁷⁰ In 2003, FTAA protesters were also strip-searched.¹⁷¹ They accused Miami jailers of violating their Fourth Amendment rights by requiring them to undergo strip and visual body cavity searches without reasonable suspicion that such searches would disclose contraband or weapons.¹⁷²

Aside from strip searches, denial of access to medicine and phone calls,¹⁷³ and being held beyond their release date, members of the public who have participated in political speech have experienced other abuses in detention. They have been denied access to restroom facilities and forced to endure lengthy detention in cold,

women participants were denied telephone calls and access to medication. *Id.* Even the judge himself could not resist over-restricting protesters by requiring as a condition of their bail that they refrain from riding bicycles, prompting criticism from a criminal lawyer. Rohrlich & Weinstein, *supra* note 156. "Ordering someone not to ride a bicycle has nothing to do with guaranteeing the person will appear in court," the lawyer said. *Id.* The lawyer further questioned the constitutionality of the judge's order that a bicycle messenger not ride his bike, because he is being deprived of his livelihood. *Id.*

¹⁶⁸ Rohrlich & Weinstein, *supra* note 156.

¹⁶⁹ *Id.* (internal quotation marks omitted); Elizabeth Fernandez, *Strip-search claims spur immediate outcry; Women's lawsuits inspire calls for reform*, S.F. CHRON., Sept. 6, 2003, at A13.

¹⁷⁰ The women received \$70,000 apiece and the men \$5,000 each in the \$2.75 million settlement with Los Angeles County. Fernandez, *supra* note 169, at A13; Fox, *supra* note 161, at B1. In addition, the City of Los Angeles paid \$875,000 to settle a lawsuit from the same group of bicyclists based on lack of probable cause for their arrest. *Council OKs Settlement Over Convention Protest*, L.A. TIMES, Feb. 27, 2004, at B3.

¹⁷¹ *Haney v. Miami-Dade County*, No. 04-20516-CIV, 2004 U.S. Dist. Lexis 19552, *4-*6 (S.D. Fla. Aug. 24, 2004).

¹⁷² *Id.*

¹⁷³ *E.g.*, MacNamara Complaint.

toxin-suffused quarters.¹⁷⁴ Protesters and others who were corralled in orange nets and arrested in New York during the 2004 Republican National Convention were hauled to Pier 57, a filthy bus storage and repair facility, where they allegedly were exposed to a variety of toxic and carcinogenic chemicals and substances for up to 50 hours.¹⁷⁵ Environmental inspections of this facility in 2001 and early 2004 revealed a lack of fire protection systems, asbestos particles, and “floors covered with black oily soot.”¹⁷⁶

The New York arrestees, furthermore, were caged in chain-link fence enclosures topped with razor wire that did not have enough benches for sitting or sleeping, requiring detainees to rest on the grime- and chemical-covered floor, which caused skin rashes and blisters.¹⁷⁷ The facilities not only lacked adequate restroom facilities, but also lacked toilet paper and a place to wash up.¹⁷⁸ During the arrest process, demonstrators and bystanders were handcuffed for hours, causing pain, numbness, and swelling, as well as denied access to restroom facilities and medical attention.¹⁷⁹ Some plaintiffs contended that the

¹⁷⁴ See *supra*, Part III.B.4.; Gorov, *supra* note 102 (Seattle police arrested hundreds, holding them “face-down on the wet streets, their hands bound with plastic handcuffs”). All arrestees were fingerprinted, even if accused of only “minor offenses for which fingerprinting is unnecessary.” *Id.* at para 64.

¹⁷⁵ MacNamara Complaint, paras. 66, 78, 90, 95, 110, 126, 176, 193.

¹⁷⁶ *Id.* at para. 67.

¹⁷⁷ Moreover, although detainees were dressed for hot summer weather, the facilities were kept cold with fans blowing at top speed, and they were not given blankets or other means to keep warm. *Id.* at paras. 67, 77, 78, 93.

¹⁷⁸ *Id.* at para. 93.

¹⁷⁹ *Id.* at paras. 92, 93 (plaintiff complained of handcuff tightness, but officer said nothing could be done; she suffered three weeks of numbness, pain and swelling of her left hand); *Id.* at paras. 95, 96, 97, 98 (plaintiff a Ph.D. and vice-president at J.P. Morgan, was arrested while merely walking home from a bookstore and despite lack of probable cause for her arrest; officer told her, “Sorry but you were at the wrong place at the wrong time”; she suffered extreme pain in her shoulder and swelling in her hand due to the handcuffing); MacNamara

City of New York deliberately and needlessly detained protesters and others for lengthy periods even when they could have processed them more quickly using existing booking facilities around the city.¹⁸⁰

IV. Intent to Silence Implied: How Governmental Actions Chill Free Expression

The plaintiffs further asserted that the mass round-ups, arrests allegedly without probable cause, and unnecessarily long detentions in cruel and inhumane conditions were intended “to punish and retaliate against individuals who were engaging in political protest.”¹⁸¹ Consequently, the city deterred the expression of core political speech.¹⁸²

It is true that city officials at least need to be prepared to maintain order in case crowds—or even a small

Complaint paras. 102, 107-08, 112-14, 118-19, 123-24, 133-34, 137-38, 143-44, 146, 151-52, 173-74, 177-78, 182, 186, 191, 195 (noting that extremely tight handcuffing for many hours caused plaintiffs extreme pain, discomfort, and numbness); Cardwell, *supra* note 152, at B3. (“marchers suddenly swept into orange nets, languishing on buses in tight handcuffs without medical attention, and one woman, panicked, in convulsions after being corralled into a mass arrest as she walked to work”). See also First Amended Complaint, *Dinler v. New York*, No. 04 Civ. 07921, para. 3 (S.D.N.Y. filed 2004), available at http://nyclu.org/pdfs/rmc_lawsuit_dinler.pdf (last visited Jan. 30, 2006); First Amended Complaint, *Schiller v. New York*, No. 04 Civ. 07922, para. 24 (S.D.N.Y. filed 2004), available at http://nyclu.org/pdfs/rmc_lawsuit_schiller.pdf (last visited Jan. 30, 2006).

¹⁸⁰ Some of the plaintiffs further pointed out that in 1982 the city processed 1,600 demonstrators and usually released them the same day, often within several hours. MacNamara Complaint, at paras. 63, 65. Protesters argued that the city held arrestees too long to avoid embarrassing city leaders during the convention. Sabrina Tavernise, *City to Pay \$150 a Person in G.O.P. Arrest Settlement*, N.Y. TIMES, April 16, 2005, at B3. The city settled one dispute over arrest and detainment methods for \$231,200, and the city’s comptroller office stated that 570 notices of claim totaling \$859 million had been filed. *Id.*

¹⁸¹ *Id.* at para 61.

¹⁸² *Id.*

percentage of a crowd—should decide to abandon the peaceful methods that most tend to follow. The vast majority of protesters at the Seattle WTO demonstration in 1999 were peaceful, but a small contingent appeared willing to engage in property destruction.¹⁸³ In New York in 2004, city leaders were attempting to ensure that the streets remained safe for city residents and visiting politicians alike, a concern overlain by the specter of a reprisal of the September 11, 2001 terrorist attack on the city.¹⁸⁴ But while a government justifiably concerns itself with public safety, it may not limit speech based on mere conjecture that vandalism (which courts, elected officials and the media frequently characterize as “violence”) or disruption might occur.¹⁸⁵ It follows that “First Amendment jurisprudence teaches that banning speech is an unacceptable means of planning for potential misconduct.”¹⁸⁶ Moreover, “[t]he courts have held that the

¹⁸³ Kaiser & Burgess, *supra* note 102.

¹⁸⁴ *Nat’l Council of Arab Ams.*, 331 F. Supp. 2d at 265.

¹⁸⁵ According to the Ninth Circuit,

Although the government legitimately asserts that it need not show an actual terrorist attack or serious accident to meet its burden, it is not free to foreclose expressive activity in public areas on mere speculation about danger. Otherwise, the government’s restriction of first amendment expression in public areas would become essentially unreviewable.

Bay Area Peace Navy, 914 F.2d at 1228 (citations and internal quotation marks omitted).

¹⁸⁶ *Serv. Employee Int’l Union v. City of Los Angeles*, 114 F. Supp. 2d 966, 972 (C.D. Cal. 2000) (citing *Collins v. Jordan*, 110 F.3d 1363, 1373 (9th Cir. 1997)).

The law is clear that First Amendment activity may not be banned simply because prior similar activity led to or involved instances of violence. There are sound reasons for this rule. Demonstrations can be expected when the government acts in highly controversial ways, or other events occur that excite or arouse the passions of the citizenry. The more controversial the occurrence, the more likely people are to demonstrate. Some of these demonstrations may become violent. The

proper response to potential and actual violence is for the government to ensure an adequate police presence and to arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure.”¹⁸⁷

Therefore, the aggressive tactics undertaken by police, as well as governmental acts blocking access to the public forum, arguably violate this principle, because they curtail free expression based on the possibility that mischief may erupt rather than based on actual wrongdoing by those engaged in political speech. Furthermore, the government’s ignoble and rough treatment of dissidents violates the First Amendment by discouraging participation.

A. “Ordinary Firmness” Standard

To successfully allege a First Amendment violation under such circumstances, a plaintiff must show that the defendant’s actions deterred or chilled the plaintiff’s speech and that the deterrence was a substantial or motivating factor in the defendant’s conduct.¹⁸⁸ While this statement “might be read to suggest that a plaintiff must demonstrate that his speech was actually inhibited or suppressed [the court] requires only a demonstration that defendants *intended* to interfere with [plaintiffs’] First Amendment rights.”¹⁸⁹ A court, thus, will examine “whether an

courts have held that the proper response to potential and actual violence is for the government to ensure an adequate police presence and to arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure.

Collins, 110 F.3d at 1372 (citations omitted).

¹⁸⁷ *Collins*, 110 F.3d at 1372.

¹⁸⁸ *Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999).

¹⁸⁹ *Id.* (internal quotation marks omitted). The court looks to intent “[b]ecause it would be unjust to allow a defendant to escape liability

official's acts would chill or silence a person of ordinary firmness from future First Amendment activities.”¹⁹⁰

The intent component of this principle was at issue in *Mendocino Environmental Center v. Mendocino County*.¹⁹¹ There, a bomb went off under the car of an environmental activist while she was driving it, severely injuring her.¹⁹² Police and FBI agents ascribed responsibility for the explosion to the activist, then her passenger and released incriminating information about them that later proved to be false; charges against the activists were never filed.¹⁹³ The activist and her passenger sued, alleging *inter alia* that the police and FBI agents conspired to falsely accuse them in connection with the bombing, chilling their First Amendment activities.¹⁹⁴ The court found intent on the part of the police and FBI because their actions included describing the environmental activists as “members of a violent terrorist group,”¹⁹⁵

for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity.” *Id.*

¹⁹⁰ *Id.* (citing *Crawford-El v. Britton*, 93 F.3d 813, 826 (D.C. Cir. 1996), *vacated on other grounds*, 523 U.S. 1273 (1997)) (internal quotation marks omitted); *accord*, *Keenan v. Tejada*, 290 F.3d 252 (5th Cir. 2002). It is settled law among federal appellate courts that

to establish a First Amendment retaliation claim against an ordinary citizen, [plaintiffs] must show that (1) they were engaged in constitutionally protected activity, (2) the defendants' actions caused them to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendants' adverse actions were substantially motivated against the plaintiffs' exercise of constitutionally protected conduct.

Id. at 258.

¹⁹¹ 192 F.3d 1283.

¹⁹² *Id.* at 1287.

¹⁹³ *Id.* at 1287-88.

¹⁹⁴ *Id.* at 1288.

¹⁹⁵ *Id.* at 1302 (internal quotation marks omitted). Note how law enforcement officials characterize the activists' group Earth First!, an avid environmental group known for acts of vandalism and civil disobedience, as a “violent terrorist” organization. *Id.*

spreading misinformation, evincing a desire to cast their group in a negative light, and thus harming its activities.¹⁹⁶

B. Applicability in Protester Cases

Following *Mendocino Environmental Center*, a federal court in Oregon concluded that a high school football coach's abuses toward a student whose parents had complained of earlier mistreatment would lead ordinary people in the parents' position to refrain from further condemnation of the coach's practices to protect their son from further harm.¹⁹⁷ Denying the football coach's motion to dismiss, the court found that the coach had engaged in "verbal tirades and emotionally abusive conduct" toward the plaintiffs' son and other players during a summer training camp.¹⁹⁸ After the plaintiffs complained, the coach turned the student's teammates against him, encouraged other parents to verbally attack the plaintiffs, and called the student into an equipment room, locked the door, and verbally abused the boy.¹⁹⁹

Many of the cases applying the "ordinary firmness" standard involve retaliation. However, this standard was recently followed in a protester case as well.²⁰⁰ A district court in Los Angeles found that the LAPD's preventing ingress to and egress from demonstrations during the 2000 Democratic National Convention, blocking protesters from

¹⁹⁶ *Id.*

¹⁹⁷ *Cain v. Tigard-Tualatin Sch. Dist.* 23J, 262 F. Supp. 2d 1120, 1130 (D. Ore. 2003).

¹⁹⁸ *Id.* at 1123.

¹⁹⁹ The coach turned the teammates against the plaintiffs' son by falsely telling them that his parents had accused him of racism. This is significant because the plaintiffs' son was one of five African-American players on a team of 120 students. Team members threatened the plaintiffs' son with physical harm, chastised and isolated him, and the coached harassed him during school hours in front of his friends. *Id.* at 1124.

²⁰⁰ *E.g., Crawford-El*, 93 F.3d 813. See *Mendocino Env'tl. Ctr.*, 192 F.3d at 1300 (collecting decisions).

using sidewalks, and using low-flying helicopters that interfered with speakers' ability to communicate "permits a reasonable inference that [the LAPD's] acts would deter a person of ordinary firmness from participating in future First Amendment activities."²⁰¹

If government intent to chill speech can be found when law enforcement officials call environmental activists "terrorists" and otherwise spread misinformation about their group,²⁰² it is equally likely that the intent to chill could be found when mayors and police officials liken protesters to terrorists and say that they take to the streets to get arrested.²⁰³ If a person of ordinary firmness would be chilled from engaging in free speech because a coach is harassing her son,²⁰⁴ then a partygoer would be deterred from protected expression because he was arrested after saying "I can't believe what is happening" while police were breaking up a party.²⁰⁵ If a mayor's campaign against topless bars and their owners, silences the expression of a policeman's paramour,²⁰⁶ then surely assaulting

²⁰¹ *Nat'l Lawyers Guild*, No. CV-01-6877 FMV (granting in part and denying in part defendants' motion for summary judgment).

²⁰² *Mendocino Envtl. Ctr.*, 192 F.3d at 1287-88.

²⁰³ See *supra* Part III.A.

²⁰⁴ *Cain*, 262 F. Supp. 2d at 1130.

²⁰⁵ *Tatro v. Kervin*, 41 F.3d 9, 12 (1st Cir. 1994).

²⁰⁶ *Connell v. Signoracci*, 153 F.3d 74 (2d. Cir. 1998). To be accurate, the court here did not find a First Amendment violation, in part because the plaintiff's 89-page complaint was "an omnium gatherum, obsessively repetitious, overwrought in tone, and organized like a front hall closet." *Id.* at 82. But the court affirmed in part the lower court's judgment denying the public official defendants' motion to dismiss on grounds of qualified immunity, giving the plaintiff another chance to plead "in a way that would organize the issues." *Id.* In another case decided on the same doctrine, neighbors opposed to a Berkeley, California, multi-family housing proposal expressed their concerns publicly that the project would house substance-abusing or mentally disabled persons. *White v. Lee*, 227 F.3d 1214, 1220 (9th Cir. 2000). The neighbors wrote the Berkeley City Council, spoke out at public meetings, and published a newsletter critical of the project, prompting an eight-month investigation by local officials of the U.S. Department of Housing and Urban Development (HUD), who believed that the neighbors had violated the Fair Housing Act by distributing

demonstrators with pepper spray, shooting them with rubber bullets, rounding them up in plastic orange nets, and detaining them in substandard conditions would deter a person of ordinary firmness from returning to the streets to engage in protected expression.²⁰⁷ As previously mentioned, a court found it plausible that some LAPD actions did just that during the 2000 Democratic National Convention.²⁰⁸ Therefore, even taking into account the need to maintain street order and security, the vast array of recent government actions taken against protesters, as described in Part III, *supra*, so chill expression that they readily could be found to deter a person of ordinary firmness from engaging in future protected speech. Thus, these actions arguably violate the First Amendment.

V. Fencing the Public Forum: Protest Pens, Viewpoint Exclusion, Privatization

Harsh street tactics are not the only governmental acts that have taken a toll on First Amendment expression. The government has further muted voices of dissent in

“discriminatory” newsletters and flyers. *Id.* at 1220, 1221 (internal quotation marks omitted). During the investigation, HUD officials interrogated the neighbors

under threat of subpoena about their views and public statements regarding the challenged project; directed them to produce an array of documents and information, including all involved parties’ names, addresses, and telephone numbers and all correspondence or other documents relating to their efforts in opposition to the project; informed them and a major metropolitan newspaper that they had violated the Fair Housing Act; and advised them to accept a “conciliation proposal” that required them to cease all litigation and the distribution of “discriminatory” newsletters and flyers.

Id. at 1220. The court concluded that the HUD’s actions “would have chilled or silenced” a person of ordinary firmness from engaging in future activities protected by the First Amendment. *Id.* at 1229.

²⁰⁷ See *supra* Part III.B.

²⁰⁸ See *supra* notes 200-01 and accompanying text.

public places by eliminating key portions of the public forum, relegating dissenters to portions of the public forum that are less visible to the targets of their speech than portions accorded supporters of the government's policies or non-allied members of the public, and yanking the forum for expression out from under the public's feet through privatization.

A. Protest Pens: The Ghettoization of Demonstration²⁰⁹

Protest pens, otherwise known as protest zones or demonstration zones, essentially are a legacy of the WTO protests in Seattle.²¹⁰ Courts have split on the constitutionality of their use. To the extent to which they keep protesters at a distance from their intended audience and hinder the protestors' ability to communicate their message, they have been struck down. For example, in *Bay Area Peace Navy v. United States*,²¹¹ a case that preceded the WTO protests by nearly a decade, the plaintiffs, a group of boaters, displayed their disagreement with U.S. military policy by displaying signs, having children sing anti-war songs, and conducting a theatrical production on their vessels in front of a San Francisco pier from which high government officials were watching a parade of Naval ships.²¹² The government claimed that a 75- to 100-yard buffer around the pier imposed by the Coast Guard was needed to protect against terrorist acts.²¹³ However, the court found that the buffer zone was not narrowly tailored because it "burden[ed] substantially more speech than

²⁰⁹ Mitchell, *supra* note 11 at *38.

²¹⁰ *Coalition*, 327 F. Supp. 2d at 74.

²¹¹ 914 F.2d 1224.

²¹² The demonstrators paraded in formation in pleasure craft ranging from kayaks to 30-foot boats while the Naval display took place farther out in the San Francisco Bay. *Id.* at 1225-26.

²¹³ *Id.* at 1227.

[was] necessary to further the government's legitimate interests."²¹⁴ The court found the government's argument unpersuasive because its references to terrorist or other violent incidents were unrelated to events in the San Francisco area (or even in the United States). It upheld a lower court injunction limiting the buffer zone to no more than 25 yards.²¹⁵ Some subsequent decisions have followed this court's reasoning.

1. Protest Zones Found Unconstitutional

Haunted by images of Seattle in 1999, Los Angeles officials the following year developed a 185-acre security zone around the venue for the Democratic National Convention, relegating demonstrators to a protest pen 260 yards away.²¹⁶ In *Service Employee International Union v. City of Los Angeles*, the court granted an injunction against the security zone because its vastness did not render it narrowly tailored enough to serve the government's significant interest in delegate safety. The court also reasoned that the distant protest pen did not provide an adequate alternate means of communication.²¹⁷ According to the court, "although it may be more convenient for delegates to have exclusive access to the immediate area, *convenience can never predominate over the First Amendment*."²¹⁸ The court further noted that the time restriction against speech would have been "absolute" had the 185-acre security zone been built because it would have

²¹⁴ *Id.* at 1227 (quoting *Ward*, 491 U.S. at 799). The Peace Navy's message could not effectively be conveyed at a distance of 75 yards "because the audience on the pier could neither read the banners nor hear the boatload of children singing." *Id.* at 1226.

²¹⁵ *Id.* at 1226, 1227-28, 1231.

²¹⁶ *Service Employee Int'l Union*, 114 F. Supp. 2d at 968, 971.

²¹⁷ *Id.* at 971-72.

²¹⁸ *Id.* at 971 (emphasis added).

blocked expressive activities 24 hours a day.²¹⁹ Acknowledging that the content neutrality of the security area was not argued, the court nonetheless noted that it “ha[d] its doubts regarding the zone’s neutrality” because free speech would have been permitted in the zone only to those with access.²²⁰ The court in *Stauber v. City of New York*²²¹ also shared this view.²²²

The *Stauber* court agreed that the use of protest pens is not narrowly tailored to serve the government’s interest in public order because it places an unreasonable limit on the movement of demonstrators.²²³ The New York Police Department (NYPD) has created large pens using interlocking metal barricades that run the length of the

²¹⁹ *Id.*

²²⁰ *Id.* at 970 n.1.

²²¹ 2004 U.S. Dist. LEXIS 13350.

²²² “Had the plaintiffs objected that particular police officers were making decisions relating to the provision of access information or to ingress and egress [to the protest pens used in a 2003 anti-war demonstration in New York] for reasons relating to the content of the demonstrator’s speech, the objection would be appropriate. The plaintiffs, however, have made no such objection.” *Id.* at *60. Professor Mitchell expresses a similar view, offering the following provocative queries:

If the streets ‘from time immemorial’ have been the place where people debate and discuss, protest and rally, then how is it that now it is only on *some* streets (or even *some parts* of the streets) where this is possible, while on other streets – the streets where the decisions are made that direct our lives – the right to dissident speech is outlawed outright? Indeed, in the end, isn’t protest zoning really just a way of controlling the *content* of debate without really acknowledging that that is what is being done, by, for example, privileging the right of WTO ministers to meet [in Seattle] and to speak over the right of protest groups to contest that speech?

Mitchell, *supra* note 11, at *39.

²²³ *Stauber*, 2004 U.S. Dist. LEXIS 13350, at *80. Because the court found that the city’s restriction was not narrowly tailored, it declined to reach whether the city provided adequate alternative means of expression. *Id.*

block and have an exit at one end.²²⁴ When a pen fills up with protesters, the police physically close off the entrance and require participants to enter a pen farther from the center of the demonstration.²²⁵ As a result, protesters cannot leave the pens, even to use the restroom or to get food or water, without risking separation from those with whom they attended; at times, police block access altogether, driving people to give up and leave.²²⁶ Thus, some groups have tried to keep their events small and omit the use of a sound system to avoid NYPD involvement.²²⁷ The *Stauber* court enjoined the NYPD's use of the pens because the practice unreasonably restricted access to and participation in protests.²²⁸

While the constitutionality of the use of protest pens frequently turns, in significant part, on whether those engaged in political speech are able to effectively reach their audience,²²⁹ the Court of Appeals for the Ninth Circuit also considered the importance of the location of speech as a component of its content in determining the constitutionality of time, place, and manner restrictions.²³⁰ The court in *Galvin* ruled that the government's relegation of a San Francisco prayer group that was protesting the demolition of housing on federal land to a protest pen 150 to 175 yards away from the originally selected location was not narrowly tailored to serve the government's interest.²³¹ The court found that where location is "an essential part of the message sought to be conveyed," a court must consider

²²⁴ *Id.* at *6, *25-*26. Protesters are expected to assemble in the pens, which may hold about 4,000 people "shoulder-to-shoulder" per block. *Id.* at *25.

²²⁵ *Id.* at *25-*27.

²²⁶ Furthermore, "once pens are full, people experience considerable problems getting out of the pens." *Id.* at *26.

²²⁷ *Id.* at *28.

²²⁸ *Id.* at *95.

²²⁹ See *infra* Part V.B.1.

²³⁰ *Galvin v. Hay*, 374 F.3d 739, 749-56 (9th Cir. 2004).

²³¹ *Id.* at 743.

the degree to which the regulation in question distorts the message.²³² The court concluded that “there [was] a strong First Amendment interest in protecting the right of citizens to gather in traditional public forum locations that [were] critical to the content of their message, just as there [was] a strong interest in protecting speakers seeking to reach a particular audience.”²³³

²³² *Id.* at 754 (internal quotation marks omitted). The U.S. Supreme Court has recognized that choice of communicative aspects, message, and manner are best left to the individual. *Id.* at 750 (citing *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781 (1988)) (presuming that speakers, not the government, best know what they want to say and how to say it). Unfortunately, a New York district court failed to follow this policy, allowing the government to determine how a protest was to be held, rather than allowing the planners to decide. *United for Peace & Justice v. City of New York*, 243 F. Supp. 2d. 19 (S.D.N.Y. 2003). Specifically, the court upheld New York City’s restriction of an antiwar demonstration in a plaza rather than a march along city streets. *Id.* at 20-21, 30-31. The plaintiffs argued that a march is a “time honored tradition in New York City and perhaps the single most important method of demonstrating large public support for a particular cause.” *Id.* at 30 (internal quotation marks omitted). It is true that a district court in New York, located in the Second Circuit, need not follow the Ninth Circuit in which the *Galvin* case was decided. However, the view expressed in *Galvin* that a court must consider the extent to which a regulation distorts a group’s message, where location is an essential part of the message, is persuasive authority in a case with facts such as those in *United for Peace & Justice*. The demonstrators chose the street as a venue for their march, and they did so to communicate that as many as 100,000 or more New Yorkers are so opposed to the war in Iraq that they are willing to brave the frigid February weather to communicate this sentiment. *Id.* at 20, 30. Under the rule in *Galvin*, the government has no business taking that choice away. Perhaps this New York court is too caught up in the fear of terrorism that has pervaded government since the September 11, 2001 attacks on New York and Washington, D.C. The court cited “heightened security concerns due to September 11th” as a reason for upholding the city’s prohibition on the antiwar march. *Id.* at 28-29. Because they live at the site of the major portion of the September 11th attacks, it is understandable that some New Yorkers continue to live in fear that their city may be targeted for another attack producing a mass loss of life. However, that does not rightly provide an excuse for the government to place excessive limits on core political expression, as allowed by the court in *United for Peace & Justice*.

²³³ *Id.* at 752.

2. Hollow Victory: Dissenters Reduced to Negotiating for the Public Forum

Both the *Stauber* and the *Service Employees International Union* courts reached the correct result by finding that the cities' practices unconstitutionally restricted free expression. Professor Mitchell argues that the latter case, which was decided in 2000 just months after the WTO protests in Seattle, turned out to be a hollow victory for free-speech advocates.²³⁴ While the Los Angeles protesters won the ability to demonstrate near the targets of their speech, the case leaves future groups in the position of having to negotiate with government officials over which part of the public forum the government will allow them to engage in protected speech.²³⁵

One protest group that sought to demonstrate on the Great Lawn in New York's Central Park declined to negotiate over geography. The court refused to grant an injunction overturning the city's denial of a permit to use the Great Lawn for a protest against the 2004 Republican National Convention.²³⁶ The court seemed almost huffy at the groups' refusal to negotiate stating, "Simply because

²³⁴ Mitchell, *supra* note 11, at 37.

²³⁵ As a result of the case,

[A]dvocates of speech rights [are reduced] to arguing the fine points of geography, pouring [sic] over maps to determine just *where* protest may occur. Protesters are put entirely on the defensive, always seeking to justify why their voices should be heard and their actions seen, always having to make a claim that it is not unreasonable to assert that protest should be allowed in a place where those being protested against can actually hear it, and always having to "bend" their tactics—and their rights—to fit a legal regime that in every case sees protest subordinate to "the general order" (which, of course, really means the "established order").

Mitchell, *supra* note 11, at *37.

²³⁶ *Nat'l Council of Arab Ams.*, 331 F. Supp. 2d at 260.

Plaintiffs feel that no other location in New York City is worthy of their cause . . . does not make it so.”²³⁷ In another case, an organization of dissenters in Philadelphia found themselves having to negotiate with police and Secret Service agents for “the right to demonstrate on [a] public sidewalk” across the street from a facility that the President was expected to visit.²³⁸ And another group that attempted to negotiate a protest route for the 2004 Democratic National Convention in Boston got stuck with a deal so raw that the court itself wrote, “A written description cannot begin to convey the ambience of the [demonstration zone] a space redolent of the sensibility conveyed in Piranesi's etchings published as *Fanciful Images of Prisons*.”²³⁹

3. Protest Zones Upheld

Perhaps the most significant protest zone case is that in which the Court of Appeals for the Ninth Circuit upheld a 50-block “No Protest Zone” in Seattle during the 1999 WTO meeting in a split decision.²⁴⁰ The court held that the Local Proclamation of Civil Emergency Order No. 3, which imposed a limited curfew on downtown Seattle streets, was a valid time, place, and manner restriction.²⁴¹

²³⁷ *Id.* at 271.

²³⁸ Amended Complaint, *Acorn v. City of Philadelphia*, No. 03-4312, para. 40 (E.D. Pa. May 6, 2004), *available at* <http://homepage.ntlworld.com/jksonc/docs/acorn-edpa-d10.html> (last visited Jan. 30, 2006) [hereinafter *Acorn Complaint*].

²³⁹ *Coalition*, 327 F. Supp. 2d at 67.

²⁴⁰ *Menotti*, 409 F.3d at 1156. The term “No Protest Zone” was used by city officials, police, and demonstrators to refer to the area in which anti-WTO demonstrations expressions were banned, but the dissent in *Menotti* noted that city officials changed its name to “restricted zone” once “word came out” that “No Protest Zone” was an “inappropriate term.” *Id.* at 1158 n.1 (Paez, C.J., dissenting).

²⁴¹ *Id.* at 1124-25, 1142-43 (internal quotation marks omitted). Upon determining that the “No Protest Zone” was a valid time, place, and manner restriction, the court declined to consider whether banning protest in downtown Seattle constituted a prior restraint.

The majority in *Menotti* argued that demonstrators had ample alternate means of communicating their message both via the media, and because hotels where some WTO delegates were staying were located outside the “No Protest Zone.”²⁴² But Judge Paez, writing in dissent, had the better argument, calling Order No. 3 an “affront to First Amendment protections.”²⁴³ Specifically, Judge Paez found that Order No. 3 was not narrowly tailored to serve the government’s interest in security because the “No Protest Zone” “purposely encompassed every place [where protesters] could hope to communicate to delegates.”²⁴⁴ Moreover, Judge Paez pointed out that the court had struck down much smaller buffer zones in the past.²⁴⁵ The dissent also found that Order No. 3 did not leave open ample alternate venues for speech, concluding that “an entire medium of speech was foreclosed and the WTO protestors were silenced and relegated to the sidelines.”²⁴⁶ Furthermore, the order was sufficiently vague as to allow the official charged with enforcing the regulation unduly broad discretion.²⁴⁷ As to this latter point, the examples

²⁴² *Id.* at 1139 n.49, 1142 n.54.

²⁴³ *Id.* at 1170. It appears that the majority in *Menotti* may have felt either that the dissent was persuasive or was not so secure in its own reasoning. The majority opinion is peppered with an unusual number of lengthy footnotes disputing points made by the dissent.

²⁴⁴ *Id.* at 1168. Judge Paez points out that Order No. 3 lasted longer than necessary, and that Mayor Schell signed the order in the early morning hours of December 1, 1999, “long after both violence and protest activity had subsided.” *Id.* at 1168 n. 9.

²⁴⁵ *Id.* at 1168, 1168 n.11 (citing *Bay Area Peace Navy*, 914 F.2d at 1127 (75-yard buffer zone surrounding naval ships in a parade too large, and 25-yard zone would suffice to serve security interests); *United States v. Baugh*, 187 F.3d 1037, 1044 (9th Cir. 1999) (rejecting 150- to 175-yard distance from entrance to visitor center); *Kuba v. 1-A Agric. Ass’n*, 387 F.3d 850, 862 (9th Cir. 2004) (restricting protesters to small locations more than 200 feet from venue entrance which was not narrowly tailored)).

²⁴⁶ *Menotti*, 409 F.3d at 1173.

²⁴⁷ *Id.* at 1174. Seattle’s then-Police Chief Stamper admitted that Order No. 3 was sufficiently vague that “it made it difficult from a working cop’s point of view to distinguish between who should and who should

Judge Paez proffered in his dissent show that the police used this discretion to practice *de facto* viewpoint discrimination, keeping anyone who evinced any sort of anti-WTO message out of the "No Protest Zone."²⁴⁸

Five years later, city leaders of Boston, with ghosts of Seattle no doubt dancing in their heads, put forth a cavalcade of restrictions that could serve as a checklist of schemes designed to abridge free expression. First, the city shut down a federal building adjacent to the convention venue, as well as the subway, the principal railway station serving routes to other parts of New England, the Charles River, and even an Interstate highway for several hours before and after the convention's daily activities.²⁴⁹ On the

not be left out." *Id.* at 1175.

²⁴⁸ See *id.* at 1162-67. The story of Martha Ehman is illustrative; she was an attorney who worked within the "No Protest Zone." Dressed casually, she was walking to work behind three people in business suits who passed into the zone without incident. *Id.* at 1163. Officers asked where she was going, then allowed her to pass when she told them where she worked. *Id.* Once they noticed the words "No WTO" written in masking tape on her backpack, officers required her to remove the message or face arrest. *Id.* In another example, police refused entry into the zone for a partner at a downtown law office while he carried an anti-WTO sign, even after he explained that he owned a business within the zone; yet, after getting rid of the sign, he walked through another checkpoint without incident. *Id.* A schoolteacher carrying signs that read "Free Trade is Slave Trade" and "Global Cops for Global Corps" was stopped even though she was outside the "No Protest Zone." She was surrounded by four or five officers, who ripped anti-WTO signs off her clothing and backpack, took the signs she was carrying and broke them, then threatened her with arrest if she did not "be quiet and leave." *Id.* at 1164-65 (internal quotation marks omitted). Ironically, the city could have used mobile police teams known as "flying squads" whose duty was to identify and arrest vandals and violent protesters while leaving the tens of thousands of non-violent demonstrators to engage in free expression. *Id.* at 1172. Instead, these squads were pulled off that duty and ordered to join fixed police lines within an hour of arriving on the street. *Id.* "As a result, the relatively small number of vandals could destroy property without threat of arrest." *Id.* (quoting internal police report) (internal quotation marks omitted).

²⁴⁹ *Coalition*, 327 F. Supp. 2d at 65. Surely, if all public transportation is shut down and auto traffic is compromised by actions as severe as freeway closures, fewer individuals inclined to express dissenting

few public streets surrounding the convention site that were not cut off from public access, the city placed a severe limit on the number of people allowed to demonstrate.²⁵⁰ Only a twenty-foot strip of a main street leading to the convention site was made available to the public but was cut off from delegates and officials by an eight-foot-high fence covered with a material designed to prevent visibility, therefore even those small demonstration groups located in streets open to the public were not seen by their intended audience, the delegates and officials on the other side.²⁵¹

If that was not enough to deter those intent on expressing dissent, the worst horrors were reserved for participants with the fortitude to enter the demonstration zone. The zone “conveys the symbolic sense of a holding pen where potentially dangerous persons are separated from others.”²⁵² It is “a place . . . not just on the wrong side of the tracks but literally under them.”²⁵³ Its capacity was a paltry 1,000 people.²⁵⁴ The “roof” of the zone was, at best, as high as an average adult and was supported by a “forest of girders.”²⁵⁵ The tracks above were bedecked with razor wire and patrolled by armed police and National Guard officers.²⁵⁶ The portion of the zone not located under the tracks was covered overhead by mesh netting.²⁵⁷ More significant than the demonstration zone’s profoundly

views will be willing or even able to transport themselves to the convention venue to protest.

²⁵⁰ “Anywhere in the soft zone, leafleting and small stationary demonstrations of 20 persons or less may be conducted without a permit. Demonstrations of between 21 and 50 people require a permit.” *Id.* Police would not let any more than 12,000 protestors in all of the side streets combined. *Id.* at 66.

²⁵¹ *Id.* at 65-66.

²⁵² *Id.* at 74-75.

²⁵³ *Id.* at 74.

²⁵⁴ The city calculated that 4,000 protestors would fit, but under questioning by the court, conceded that it “must limit the capacity . . . to no more than 1,000 persons.” *Coalition*, 327 F. Supp. 2d at 67.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

oppressive nature, however, the remote chance the delegates would see or hear demonstrators, because the demonstration zone was set off by a double set of cement barriers, each topped by eight-foot chain-link fences.²⁵⁸ The outer fence was covered with mesh supposedly to prevent liquids from being squirted into the protected area, but which actually had the effect of impairing visibility, and altogether preventing leafleting.²⁵⁹ This last effect of the city's multitude of restrictions, that no one was able to pass leaflets to delegates and their guests, should fail constitutional scrutiny because the "[f]reedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved."²⁶⁰ Banishing participants behind a double fence that resembles a prison holding area goes well beyond the reasonable police and health regulations suggested by the *Struthers* court.²⁶¹

²⁵⁸ *Id.*

²⁵⁹ According to the court,

Delegates and invited guests arriving or departing via buses on the opposite or eastern bus row of the terminal will have essentially no visibility from or to the [demonstration zone] because of the distance and the mesh screen. By contrast, those arriving or departing via buses in the western row may be able to hear and, to some extent, see demonstrators in the [demonstration zone], depending on precisely which bus they take and whether they walk in relative proximity to the [demonstration zone] fence. It will be, however, completely impossible to pass a leaflet . . . to a delegate or other [convention] guest, even one who wants to approach the edge of the [demonstration zone] to receive the literature.

Id. at 68.

²⁶⁰ *Struthers*, 319 U.S. at 146-47.

²⁶¹ See *id.* *Struthers* concerned an ordinance prohibiting door-to-door distribution of leaflets. If the state is constitutionally disallowed from prohibiting distribution of circulars door-to-door, then arguably it cannot, with constitutional blessing, completely prevent dissidents from passing handbills to important government officials and their guests.

Nonetheless, in *Bl(a)ck Tea Society*, the court upheld Boston's security scheme,²⁶² even though it admitted that it could not find that the restrictions on prospective protesters were narrowly tailored.²⁶³ The court reached this conclusion despite its acknowledgement that the *Stauber* court "considered detailed evidence" before enjoining the use of protest pens in New York,²⁶⁴ and despite the design of the Boston demonstration zone being labeled "an offense to the spirit of the First Amendment" and "a brutish and potentially unsafe place for citizens who wish to exercise their First Amendment rights."²⁶⁵ To justify its decision, the court cited a 1986 case upholding barricades to protect those exercising their First Amendment rights "from those who would prevent its exercise."²⁶⁶ The court also based its decision on "past experience at comparable events" such as the 2000 Democratic National Convention in Los Angeles.²⁶⁷ These latter reasons do not provide strong support for issuing a ruling that the court admits falls shy of constitutional scrutiny, especially since newspaper accounts from Los

Id. at 149.

²⁶² *Coalition*, 327 F. Supp. 2d. at 77. A more recent case distinguished *Coalition*, finding that a regulation which kept demonstrators between 260 and 265 feet away from the targets of their speech was unconstitutional. *Kuba*, 387 F.3d at 854, 863. The *Kuba* court found that the government's interest in preventing traffic congestion and ensuring public safety were significant, but "less weighty" than the "substantial" interest found in the *Bl(a)ck Tea Society* case. *Id.* at 858 n.9 (citing *Bl(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8, 12 (1st Cir. 2004)).

²⁶³ *Coalition*, 327 F. Supp. 2d at 75.

²⁶⁴ *Id.* at 74.

²⁶⁵ *Id.* at 76.

²⁶⁶ *Id.* at 74 (quoting *Oliveri v. Ward*, 801 F.2d 602, 607 (2d Cir. 1986)) (internal quotation marks omitted).

²⁶⁷ *Id.* at 75. The court also based its decision on affidavits from law enforcement personnel and information the United States government gave the court regarding specific intelligence concerning security threats kept under seal. Because the plaintiff was unable to confront the information, the court did not rely on it in making its decision. *Id.* at 75 n.2.

Angeles in 2000 reveal that there were no major injuries and minimal property damage during the Convention protests.²⁶⁸

The First Circuit expressed its disagreement with this viewpoint by upholding the *Bl(a)ck Tea Society* decision, but the court should be criticized for doing so. First, while it correctly characterized time, place, or manner analysis as “intermediate scrutiny,”²⁶⁹ the court applied a standard closer to a rational basis test.²⁷⁰ Second, the appellate panel raised the same concerns as the lower court regarding harm done during past large gatherings such as those in 2000 in Los Angeles, which amounted to little more than injuries sustained by protesters and journalists.²⁷¹ Yet, the court failed to list specific violent incidents to justify its concerns.²⁷² Therefore, unlike the

²⁶⁸ The only injuries reported in Los Angeles were to demonstrators at the hands of police. See, e.g., William Booth & Rene Sanchez, *2,000 Rally in Streets Against Sweatshops*, THE WASH. POST, Aug. 18, 2000, at A25 (“Dozens of protesters . . . have been struck by rubber bullets that police have fired into crowds twice this week.”); Paul Pringle, *Week of Demonstrations Closes with Minor Injuries, 190 Arrests*, THE DALLAS MORNING NEWS, Aug. 18, 2000, at A23 (“Some demonstrators threw rocks and bottles at the police. Officers dispersed the crowd with batons, pepper spray and rubber bullets, injuring numerous protesters and journalists.”). See also Jim Newton, *Police, Critics Clash Over Use of Force*, L.A. TIMES, Oct. 24, 2000, at A1 (“no serious injuries, a smattering of property damage”); V. Dion Haynes & Vincent J. Schodolski, *Immigrants, The Rights of Workers Top Final Rally*, CHI. TRIB., Aug. 18, 2000, at 15 (indicating no reports of serious injury).

²⁶⁹ *Bl(a)ck Tea Society*, 378 F.3d at 12.

²⁷⁰ *Id.* at 13 (“We turn next to the City’s goal, mindful that the government’s judgment as to the best means for achieving its legitimate objectives deserves considerable respect.”).

²⁷¹ See *supra* note 268.

²⁷² See, e.g., *Bl(a)ck Tea Soc’y*, 378 F.3d at 14. According to the court,

While a government agency charged with public safety responsibilities ought not turn a blind eye to past experience, it likewise ought not impose harsh burdens on the basis of isolated past events. And in striking this balance, trial courts should remember that heavier burdens on speech must, in general, be justified by more cogent evidentiary predicates. On this hastily assembled record, the quantum of “threat”

decisions in *Stauber* and *Service Employees International Union*,²⁷³ the First Circuit found that Boston's security measures, "though extreme," were narrowly tailored and left open viable alternative means of communication.²⁷⁴ This conclusion is open to question.²⁷⁵

B. Viewpoint Discrimination in "Pro-Con" Cases

Besides employing the constitutionally dubious tactic of corralling protesters into fenced-off *cordons*

evidence was sufficient to allow the trier to weigh it in the balance.

Id. The court continued:

The City claims that the risk of harm was substantial. It designed the elaborate security measures here at issue in light of recent past experience with large demonstrations, including those at the 2000 Democratic National Convention in Los Angeles. The double ranks of fencing were meant to deter attempts to break through the fence; the liquid dispersal mesh was intended to protect the delegates from being sprayed with liquids; and the overhead netting was added to prevent demonstrators from hurling projectiles. Conduct of this type admittedly has occurred at a number of recent protests.

Id. at 13. Note that there was no report of attempts to break through the security fence in Los Angeles in 2000. On the other hand, the author of this article, then a reporter covering the demonstrations at the 2000 convention, interviewed one man who had been shot six times with plastic bullets for attempting to climb the fence to post a sign. The bullets caused quarter-sized welts on his shirtless torso.

²⁷³ See *supra* Part V.A.1.

²⁷⁴ *Bl(a)ck Tea Soc'y*, 378 F.3d at 14.

²⁷⁵ The alternate means of communication mentioned by the court are dubious. Principally, the court said the delegates could get the dissidents' message through the television, radio, the press, the Internet, and other outlets. *Id.* But for reasons discussed in Part II.B., *supra*, these methods do not constitute a viable alternative for citizens of modest means and are no substitute for street advocacy. Professor Mitchell concludes, "[N]o matter what the courts say and no matter how carefully police and the courts together draw the lines of protest, creating a geography of rights . . . can be frankly oppressive." Mitchell, *supra* note 11, at *42.

sanitaires,²⁷⁶ the government has also engaged in obvious viewpoint discrimination²⁷⁷ by creating special protest pens into which dissidents are shunted. The special protest pens are distant and often hidden from the protesters' target of speech, while demonstrators who favor government policy are allowed within view of elected officials. A variant from this "pro-con" approach would be to simply banish all demonstrators of whatever stripe from the public official's view and allow only those who do not express an opinion to be located closer to the official.²⁷⁸ While this trend has accelerated where opponents of President George W. Bush's policies have attempted to make their views known to the President, the practice is rooted in the early years of the Clinton administration.

In *Johnson v. Bax*,²⁷⁹ a critic of Clinton stood at a New York street corner near where the President was speaking, bearing a sign that read "Mr. Clinton: STOP

²⁷⁶ Mitchell, *supra* note 11, at *39.

²⁷⁷ Justice Kennedy reminds us that viewpoint discrimination is "an egregious form of content discrimination." *Rosenberger*, 515 U.S. at 829. See also *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("The principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'") (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).

²⁷⁸ This happened, for example, in Seattle following the 1999 WTO protests that were marred by a small minority's vandalism spree. See *supra* note 102. Seattle's mayor called in the National Guard to clear the streets, declared a state of emergency, and closed public spaces in a 25-block area of the city to all including those who objected to WTO globalization policies except residents, owners and employees of businesses, emergency personnel, and, more interestingly from a viewpoint-discrimination standpoint, WTO delegates (presumably advocates of WTO policies) and shoppers (presumably voicing no opinion regarding WTO policies). Mitchell, *supra* note 11, at *33-*34. Thus, the mayor's street-closure order amounted to a pro-con scheme whereby pro-WTO delegates and those with no opinion were allowed in the very public places from which WTO opponents were excluded.

²⁷⁹ No. 93 Civ. 3530, 1996 U.S. Dist. LEXIS 8850, at *2 (S.D.N.Y. June 25, 1996) (granting an order for a preliminary injunction).

CAMPAIGNING AND LEAD!”²⁸⁰ Police told the critic he had to go to a designated protest zone. When he resisted, the police took away his sign, thereby committing a “clear violation” of his free-speech rights.²⁸¹ The critic made another sign, returned to the street corner, was again told to leave and refused, and was subsequently arrested.²⁸² Police set up “pro” and “anti” demonstration areas, with which the court had no quarrel, but because police, rather than the demonstrators themselves, were the ones directing demonstrators into the pens based on the content of their speech, the court found the practice impermissible.²⁸³

The *Bax* court noted that while “spectators” who cheered in support were allowed to stand across the street from the President, dissenters were kept at least 75 yards away at all times.²⁸⁴ This practice, the court indicated, appeared to be an unconstitutional discrimination, but the court was not prepared to rule on this issue.²⁸⁵ While the police in *Bax* kept dissidents 75 yards from President Clinton, which would appear to be unconstitutional under *Bay Area Peace Navy*,²⁸⁶ the George W. Bush Administration has required dissenters to be as far as one half mile away from where the President is speaking, while allowing supporters and those expressing no opinion to remain closer.²⁸⁷ Faithful to Orwellian tradition, these

²⁸⁰ *Id.* at *2.

²⁸¹ *Id.* at *1-*2. “The fact that the destruction of Mr. Johnson’s sign was a violation of his First Amendment rights has not been disputed and the fact that the police officers knowingly violated his right is evidenced by the professed inability of any of the officers to remember who took the sign.” *Id.* at *3-*4.

²⁸² The court also found the arrest a “clear violation” of the plaintiff’s First Amendment rights. Police claimed they arrested him for blocking the sidewalk, but the court found that the record “clearly refutes” the claim, in part because one of the officers gave testimony that “is not true.” *Id.* at *3, *4-*6.

²⁸³ *Id.* at *8.

²⁸⁴ *Id.* at *9-*10 (granting an order for a preliminary injunction).

²⁸⁵ *Id.* at *10.

²⁸⁶ See *supra* notes 212-15 and accompanying text.

²⁸⁷ “These zones routinely succeed in keeping protesters out of

remote protest pens have been dubbed “designated free speech” or “First Amendment” zones.²⁸⁸

1. Dissenters Hidden from Presidential Motorcade

In 2002, for example, police cleared the motorcade path of all protest signs when President Bush went to Pittsburgh. While the police allowed supporters to line the route, they required dissidents to move to a distant baseball field designated especially for them.²⁸⁹ Furthermore, police confiscated the sign of one participant, who was arrested for disorderly conduct and detained until the President had left town.²⁹⁰ A court threw out the disorderly conduct charge.²⁹¹ During a hearing, the arresting officer admitted that he had been instructed by the Secret Service to direct some protesters, but not others, into the fenced-in zone.²⁹² Regarding the zone, the arrestee later told a reporter for *Salon*, “I could see these people behind the fence, with their faces up against it, and their hands on the wire. . . . It looked more like a concentration camp than a free speech area to me, so I said, ‘I’m not going in there. I thought the whole country was a free speech area.’”²⁹³

The Pittsburgh case is not an isolated incident. One

presidential sight and outside the view of the media covering the event.” Bovard, *supra* note 114.

²⁸⁸ *Id.*; Complaint, *Elend v. Sun Dome Inc.*, No. 8:03-CV-1657-T-23TGW, para. 14 (M.D. Fla. 2005), *available at* <http://www.voiceoffreedom.com/archives/protestzonefinalcomplaint/fn1protestzone.html> (last visited Aug. 22, 2005).

²⁸⁹ Bovard, *supra* note 114.

²⁹⁰ *Id.*; Transcript of Proceeding, *Commonwealth v. Neel*, (Oct. 31, 2002) *available at* <http://homepage.nflworld.com/jksonc/docs/neel-2002-10-31.html#fn> (last visited Aug. 19, 2005) [hereinafter “Neel Transcript”].

²⁹¹ Neel Transcript.

²⁹² *Id.*

²⁹³ David Lindoff, *Keeping Dissent Invisible*, http://archive.salon.com/news/feature/2003/10/16/secret_service/index_np.html (last visited Aug. 19, 2005).

protest group provided a court with fifteen examples from all over the country.²⁹⁴ For example, two grandmothers were arrested for displaying handwritten signs critical of President Bush after declining to go to a designated zone hundreds of yards from the entrance to the venue the president visited.²⁹⁵ In South Carolina, police arrested a man on “trespassing” charges for holding a “No War For Oil” sign among hundreds of Bush supporters.²⁹⁶ He had refused to remove himself to the designated zone a half mile from where President Bush was to speak.²⁹⁷ Although the state dropped the trespassing charges because they did not apply to public property, the federal government remained undaunted and charged the defendant with entering a restricted area around the President of the United States, a rarely-enforced law carrying a penalty of six months incarceration or a \$5000 fine.²⁹⁸ There could not be a clearer case of content discrimination, considering a police officer told the defendant, “[I]t’s the content of your sign that’s the problem.”²⁹⁹

In addition, an Indiana man who stood near the entrance to a venue at which Vice President Dick Cheney was to speak displayed a sign that read “Cheney, 19th Century Energy Man.” He was arrested on disorderly conduct charges after refusing to move to a protest zone 500 feet from the entrance.³⁰⁰ In this case, the court found that the protest zone was not narrowly tailored to serve the government’s interest in safety at the event.³⁰¹ Moreover, the court concluded that the protest zone did not constitute an adequate alternate channel of communication because its

²⁹⁴ *Acorn v. City of Philadelphia*, No. 03-4312, 2004 U.S. District LEXIS 8446, at *5 (E.D. Pa. May 5, 2004).

²⁹⁵ Bovard, *supra* note 114.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.* (internal quotation marks omitted).

³⁰⁰ *Blair v. City of Evansville*, 361 F. Supp. 2d 846 (S.D. Ind. 2005).

³⁰¹ *Id.* at 859.

500-foot distance from the venue's parking facilities and entrance "significantly curtailed" the plaintiff's ability to convey his message to event patrons, a key component of his intended audience.³⁰² The government has engaged in blatant viewpoint discrimination, as the foregoing examples illustrate, by relegating dissenters to distant designated zones while allowing supporters and others to be within view of the President. Furthermore, in at least one instance, police even forbade the media from entering a protest area to speak to dissidents and banned protestors from exiting the zone to express themselves to the media.³⁰³

2. Court Declines to Enjoin Practices

In Philadelphia, a dissident organization sought to enjoin the government from keeping its members further away from the President than where supporters were allowed.³⁰⁴ In one instance, a police line forced dissenting protesters to stay a third of a block from where a presidential motorcade was to pass, but allowed supporters to stand closer.³⁰⁵ In another, police parked several large vans directly in front of dissenting protesters, ensuring that the President was unlikely to see them.³⁰⁶ Government officials in Philadelphia were subject to a consent decree, issued in 1988, permanently enjoining them from barring leafleting and sign-carrying based on the messages communicated.³⁰⁷ The plaintiffs in *Acorn* sought declaratory, as well as injunctive relief and an order requiring government officials to comply with the 1988

³⁰² *Id.*

³⁰³ Bovard, *supra* note 114.

³⁰⁴ *Acorn*, 2004 U.S. Dist. LEXIS 8446, at *2-*3.

³⁰⁵ *Acorn* Complaint at paras. 25, 34, 35, 37, 44-46.

³⁰⁶ *Id.*

³⁰⁷ *Acorn*, 2004 U.S. District LEXIS 8446, at *1-*2.

consent decree.³⁰⁸ The court rejected the plaintiffs' claim based on a lack of standing,³⁰⁹ despite conceding that the government "may indeed have violated" the protesters' rights.³¹⁰ The plaintiffs were unable to show a concrete likelihood that the government would violate their constitutional rights, or to specify future dates and times of official events at which violations were likely to occur.³¹¹

While the *Acorn* court denied a dissident group standing for purposes of an injunction, the court in *Stauber v. City of New York*³¹² found that the New York Civil Liberties Union (NYCLU) had standing because it sponsored protest events in the past and planned to do so in the future.³¹³ The *Stauber* court further found that the plaintiffs in that case sufficiently alleged impairment for the purposes of standing by demonstrating that the challenged government practices "may prevent the NYCLU from expressing its message as forcefully as it would in the absence of the practices."³¹⁴ Clearly, the standard followed in *Stauber* requiring that plaintiffs show they are in the business of sponsoring political-speech events and that the government may impair their expressions, is less stringent than the specification of future events by time and date required in *Acorn*. Thus, *Stauber* enunciated the more correct and just standard. The *Acorn* court effectively conceded that its standard is unlikely to be met when it noted that plaintiffs "usually cannot learn of the scheduling of such events in sufficient time to enable them to obtain judicial relief."³¹⁵

Moreover, the *Acorn* court appears to improperly

³⁰⁸ *Id.* at *3-*4

³⁰⁹ *Id.* at *7.

³¹⁰ *Id.* at *7.

³¹¹ *Id.* at *6-*7. "In my view, plaintiffs' claims are too amorphous to be justiciable at this point in time." *Id.* at *7.

³¹² See *Stauber*, 2004 U.S. Dist. LEXIS 13350.

³¹³ *Id.* at *40.

³¹⁴ *Id.*

³¹⁵ *Acorn*, 2004 U.S. District LEXIS 8446, at *5.

rely on the fact that Secret Service regulations forbid its agents from regulating speech based on viewpoint.³¹⁶ Essentially, the court instructs the plaintiffs to sue individual Secret Service agents over First Amendment violations, finding that “no useful purpose would be served” by entering a declaratory judgment to the effect that the Secret Service must not engage in viewpoint discrimination.³¹⁷ This finding is questionable, as “the internal guidelines of a federal agency, that are not mandated by statute or the constitution, do not confer substantive rights on any party.”³¹⁸ Because the internal regulations of the Secret Service were unlikely to confer rights on the plaintiffs, the declaratory judgment that the *Acorn* plaintiffs sought would have served a useful purpose.

Courts in the future should not follow *Acorn*, but should look to *Stauber* for guidance. If courts follow *Acorn*, most protest groups will be unable to specify a future likelihood of viewpoint discrimination required by that court, despite ample evidence that the Secret Service is engaging in a practice of banishing dissenters to remote fields or pens while allowing supporters to congregate much closer to the President. Furthermore, this issue should be heard by the Supreme Court; otherwise, the President could elude dissenters by avoiding or rarely visiting those jurisdictions which, through their equitable powers, might forbid the Secret Service from violating the Constitution. Better yet, Congress could accomplish the goal of requiring equal treatment of all who engage in political speech by passing a statute that punishes government officials who discriminate by viewpoint with

³¹⁶ *Id.* at *6. “[T]he Secret Service has elaborate written guidelines which specifically provide for non-discrimination on the basis of the views sought to be expressed by the protesters.” *Id.*

³¹⁷ *Id.* at *6. Agents who violate Secret Service policy cannot successfully assert a qualified-immunity defense. *Id.*

³¹⁸ *See, e.g.,* United States v. Craveiro, 907 F.2d 260, 264 (1st Cir. 1990).

sanctions like incarceration or stiff fines.

C. Privatization: Theft of the Public Forum

While determining whether an outdoor space is a street, sidewalk, or park, and thus a traditional public forum, should not raise many questions, the advent of public-private partnerships as a substitute for public investment has begun to blur the line between public and private spaces. While the Supreme Court is not likely to countenance an outright ban on expression in traditionally public places, it has allowed speech restrictions on private property, even if heavily trafficked by the public. For example, after Congress stripped certain free-speech activities from the Supreme Court building and grounds, the Court responded by declaring the law unconstitutional when applied to the sidewalks surrounding the building.³¹⁹ The Court pointed out that there was no fence or other form of delineation that marked the sidewalks surrounding the Court's grounds as "some special type of enclave."³²⁰ Congress "may not by its own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public forums."³²¹

³¹⁹ "The public sidewalks forming the perimeter of the Supreme Court grounds, in our view, are public forums and should be treated as such for First Amendment purposes." *United States v. Grace*, 461 U.S. 171, 180 (1983). The statute at issue provided, "It shall be unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." *Id.* at 173 (quoting 63 Stat. 617 § 6) (codified at 40 U.S.C. § 13k).

³²⁰ *Id.* at 180.

³²¹ *Id.* (quoting *United States Postal Service v. Greenburgh Civic Assns.*, 453 U.S. 114, 133 (1981)) (internal quotation marks omitted). According to the court,

The inclusion of the public sidewalks within the scope of [section] 13k's prohibition, however, results in the destruction of public forum status that is at least presumptively

On the other hand, the Supreme Court treats private spaces differently. For example, despite the increased function of shopping malls during the late 20th century as a central gathering place for Americans, the Court has ruled that these private properties lie outside the scope of First Amendment protection. In *Lloyd Corp. v. Tanner*,³²² the Court reversed an Oregon district court's injunction prohibiting a shopping mall owner from interfering with peaceful, noncommercial handbilling by draft and anti-war demonstrators. The Court held that private property, such as a mall, does not "lose its private character merely because the public is generally invited to use it for designated purposes."³²³ In doing so, it distinguished *Marsh v. Alabama*.³²⁴ Writing in 1972 for the four

impermissible. Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression. *Nor may the government transform the character of the property by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property.*

Id. (emphasis added). Interestingly, in dissent Justice Stevens counseled judicial restraint, contending that the Court should not have ruled on section 13k's constitutionality, because the statute did not reach the activities in which either defendant allegedly engaged. *Id.* at 188-89 (Stevens, J., concurring in part and dissenting in part). One of the defendants was threatened with arrest for distributing leaflets and handbills, which has nothing to do with the display of "any flag, banner or other device" proscribed in the statute, because "only after the material left [defendant's] possession would his message have become intelligible." *Id.* at 188 (Stevens, J., concurring in part and dissenting in part) (internal quotation marks omitted). The other defendant did display a device, Justice Stevens reasoned, but because her sign merely recited verbatim the text of the First Amendment, it could not be said to have been "designed or adapted to bring into public notice any party, organization, or movement." *Id.*

³²² 407 U.S. 551 (1972).

³²³ *Id.* at 569. The Court reasoned, "The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center." *Id.*

³²⁴ 326 U.S. 501, 507-08 (1946) (upholding the right to distribute

dissenting votes in *Lloyd*, Justice Marshall sounded a prophetic note when he concluded:

It would not be surprising in the future to see cities rely more and more on private businesses to perform functions once performed by governmental agencies. The advantage of reduced expenses and an increased tax base cannot be overstated. As governments rely on private enterprise, public property decreases in favor of privately owned property. It becomes harder and harder for citizens to find means to communicate with other citizens. . . . When there are no effective means of communication, free speech is a mere shibboleth. I believe that the First Amendment requires it to be a reality.³²⁵

Four years later, the Court extended *Lloyd* and held that strikers were not allowed into a shopping mall to picket their employer, a shoe retailer.³²⁶ Nonetheless, some jurists have urged that because shopping malls do function as public gathering places, mall owners have a reduced expectation of privacy and therefore must allow political expression.³²⁷ Answering the Supreme Court's invitation

leaflets in company-owned towns).

³²⁵ *Lloyd Corp.*, 407 U.S. at 586 (Marshall, J., dissenting). Justice Marshall further advocated that the court continue to follow *Marsh* and hold that "the more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Id.* (quoting *Marsh*, 326 U.S. at 506) (internal quotation marks omitted).

³²⁶ *Hudgens v. NLRB*, 424 U.S. 507, 520-21 (1976).

³²⁷ *E.g.*, *Eastwood Mall v. Slanco*, 626 N. E. 2d 59, 62 (Ohio 1994) (Wright, J., dissenting) (advocating the application of a time, place, or manner analysis to achieve an appropriate balance between the mall owner's property rights and the public's free-speech rights). Justice

to employ alternate analyses or read their own constitutions more broadly than the Supreme Court interprets the federal Constitution,³²⁸ a few states, namely California, Colorado, Massachusetts, New Jersey, New York, Pennsylvania, and Washington, have recognized a limited right to free expression at privately owned shopping malls.³²⁹ The California Supreme Court held that that state's Constitution "protects speech and petitioning, reasonably exercised" in privately owned shopping centers.³³⁰ Professor O'Neill predicted that because the First Amendment does not reach private spaces, the battle over the contours of speech-related access to the increasingly privatized public space will be fought on a state-by-state basis.³³¹

1. Hoarding Horton Plaza

One such battle over privatized public space took place over Horton Plaza Park in San Diego, California.³³²

Wright noted:

When one thinks about how a shopping mall actually functions, the enclosed common areas within the mall are comparable to the town square of yesteryear surrounded by downtown stores. . . . [C]itizens, because of the public nature of a mall, have a heightened expectation that they are permitted to engage in some forms of speech activities.

Id. at 67.

³²⁸ *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 294 (1982).

³²⁹ O'Neill, *supra* note 82, at 455. *See also Horton Plaza Assoc. v. Playing for Real Theatre*, 228 Cal. Rptr. 817, 823 (Cal. App. 1986) (collecting decisions). Ten other states have not recognized this limited right. O'Neill, *supra* note 82, at 455-56.

³³⁰ *Robbins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979). This is based on CAL. CONST. art. I, § 2(a) (granting every person the right to "freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right") and CAL. CONST. art. I, § 3(a) (granting right to "petition government for redress of grievances"). *See also id.* at 345-46.

³³¹ O'Neill, *supra* note 82, at 456.

³³² *Horton Plaza Assoc.*, 228 Cal. Rptr. 817. *See also Mitchell, supra* note 11, at *17-*26 (reviewing *Horton Plaza*).

In an attempt to revitalize commercial activity in the downtown area, San Diego leaders permitted the development of a shopping mall adjacent to Horton Plaza Park, designed to serve as the mall's pedestrian entrance.³³³ To increase the odds of the mall's financial success, the city altered the park's landscaping and furniture by removing benches and replacing lawn areas with prickly plants, attempting to make the park a less inviting place to gather, thereby encouraging people to pass through Horton Plaza Park and into the eponymous shopping mall.³³⁴ Thus, the effect of the mall's opening in 1985, as well as the owner's goal in opening it, "was to move public life inside, to capture it really, for its own commercial interests."³³⁵

In a nod to *Pruneyard*, the shopping mall owners set up highly restrictive permit limitations to govern political expression.³³⁶ The Playing for Real Theatre applied for a

³³³ Mitchell, *supra* note 11, at *22.

³³⁴ The redesign "simply made it impossible to hang out in the park."
Id.

³³⁵ *Id.* at *21-*22, *26.

³³⁶ *Horton Plaza Assoc.*, 228 Cal. Rptr. at 820-21. Restrictions recited by the court include:

- (1) Only one permit to any one person or group or organization will be issued per day. (2) A permit shall allow the holder to use only the portion of center property expressly designated and specified in the permit. (3) The office of the Center manager shall have the power to deny a request for a permit if the manager in good faith believes the proposed Political Expression to be profane, indecent, disturbing, offensive, in poor taste, or otherwise not conducive to the controlled business environment of the shopping center. (4) The number of persons who may engage in Political Expression in the Center at the same time shall be determined by the owner. Such number shall be determined with reference to the space provided in the designated area and the number of separate groups engaged in such activity at the same time. In no event shall more than two persons from any one group occupy space in the designated area at the same time. (5) *No permits will be issued between Thanksgiving and December 31st of any calendar year.*

permit to perform a ten-minute skit in the mall re-enacting the U.S. bombings of El Salvador. The skit involved eight actors and included leafleting as part of the skit.³³⁷ The mall manager denied the request for the play, but approved the leafleting.³³⁸ The theater group neither dispersed handbills nor put on the play, yet based on a tip from an unnamed police informant that the group planned to create a disturbance and engage in violence in the shopping mall, its owner sued the group. The mall owner won a preliminary injunction against any dramatic performances by the group and required 72 hours advance notice for any leafleting.³³⁹ In *Horton Plaza*, the court distinguished *Pruneyard* and similar cases, limiting their holdings to protect only leafleting and signature-gathering, and not “expressive conduct” such as putting on plays.³⁴⁰ The dissent in *Horton Plaza* chided the majority for upholding a prior restraint of political speech and for buying the story, “based on double and triple hearsay statements,” that the theater group planned to create a disturbance.³⁴¹ Therefore, *Horton Plaza* serves as a warning that creeping privatization of public spaces heralds a concomitant muting

Id. at 821 (emphasis added).

³³⁷ *Id.* at 828 (Butler, J., dissenting).

³³⁸ *Id.*

³³⁹ *Id.* at 820-22, 828.

³⁴⁰ *Id.* at 824.

³⁴¹ *Horton Plaza Assoc.*, 228 Cal. Rptr. at 828 (Butler, J., dissenting). Justice Butler added, “Chicken Little and Henny Penny are alive and well.” *Id.* Justice Butler further noted:

Finally, this case comes to us in a plain wrapper. The content is sterile. [Defendant] Phipps and his Theatre cohorts did not protest the denial of the permit to put on the play and they did not leaflet as allowed by issuance of the second permit. Hearing bumps in the night, Horton Plaza seeks to exorcise phantoms of its imagination. Our review should await an actual controversy.

Id. at 832-833 (Butler, J., dissenting).

of dissenting voices.³⁴²

2. New York: The Great Grass Debate

As the twentieth century progressed, courts came to the conclusion that property rights, though vital, were not as important as personal rights when considering whether to rule in equity. Relatively early in the century, a Texas court announced that “personal rights of citizens are infinitely more sacred and by every test are of more value than things that are measured by dollars and cents.”³⁴³ Toward the middle of the twentieth century, the California Supreme Court commented that treating property rights more favorably than personal rights bespeaks a doctrine “wholly at odds with the fundamental principles of democracy,”³⁴⁴ especially in cases involving First Amendment rights.³⁴⁵ This doctrinal development

³⁴² See Mitchell, *supra* note 11, at *26.

³⁴³ Hawkes v. Yancey, 265 S.W. 233, 237 (Tex. Civ. App. 1924). See also *Whitney*, 274 U.S. at 374 (Brandeis, J., concurring) (“The powers of the courts to strike down an offending law is no less when the interests involved are not property rights, but the fundamental personal rights of free speech and assembly.”).

³⁴⁴ Orloff v. Los Angeles Turf Club, Inc., 180 P.2d 321, 325 (1947). Whether to grant equitable relief “should not in logic or justice turn upon the sole proposition that a personal rather than a property right is involved. . . . These concepts of the sanctity of personal rights are specifically protected by the Constitutions, both state and federal, and the courts have properly given them a place of high dignity, and worthy of especial protection.” *Id.*

³⁴⁵ In one of those cases, the Supreme Court observed:

When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion . . . we remain mindful of the fact that the latter occupy a preferred position. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment “lies at the foundation of free government by free men.”

Marsh, 326 U.S. at 509 (citation omitted). See also *Robbins*, 592 P.2d

represented a move away from the common law requirement that a plaintiff assert a property interest before a court would grant an injunction.³⁴⁶ Yet, in this nascent century, especially where the rights of dissidents are concerned, what is old apparently is new again.

For example, in *National Council of Arab Americans v. City of New York*, the court denied protest groups the use of the Great Lawn in New York's Central Park, made extensive reference to the threat posed by a mass rally on the Great Lawn, and appeared far more concerned about the condition of the grass than about the groups' free-speech rights.³⁴⁷ The court expressly pointed out that the Great Lawn was restored in 1997 at a cost of more than \$18 million.³⁴⁸ Whether the city got its money's worth is questionable because it was only after the restoration that the city imposed restrictions on the size of crowds allowed in the park and required that events be canceled if they take place during or shortly following rainy weather.³⁴⁹ What the court did not mention was that

at 347 ("the public interest in peaceful speech outweighs the desire of property owners for control over their property").

³⁴⁶ See *Hawkes*, 265 S.W. at 237. Here, the court noted:

The rule that equity will not afford relief by injunction except where property rights are involved is known chiefly by its breach rather than by its observance; in fact, it may be regarded as a fiction, because courts with greatest uniformity have based their jurisdiction to protect purely personal rights nominally on an alleged property right, when, in fact, no property rights were invaded. This is, in our opinion, as it should be . . .

Id.

³⁴⁷ *Nat'l Council of Arab Ams.*, 331 F. Supp. 2d at 261-64, 270.

³⁴⁸ *Id.* at 263.

³⁴⁹ *Id.* at 261, 263-64. The court, shown "dramatic photographs" by city officials of a pre-restoration Great Lawn in a beleaguered state, appeared concerned that the park not return to those "dust bowl" days. *Id.* at 264 (internal quotation marks omitted). However, other park areas such as East Meadow offer all-weather capability. *Id.* at 262. The cancellation requirement in rainy weather for events scheduled on the Great Lawn is especially puzzling given that Central Park

some of the \$18 million needed to complete the restoration came largely from private corporate donors, who were allowed to use the Great Lawn for their large events, unless the grass was wet.³⁵⁰ In communicating with the plaintiffs, the city emphasized that underlying its use-restriction plan was the idea that “restoration accomplished through significant public and private investment can be preserved.”³⁵¹ Thus, while *National Council of Arab Americans* is a decision ostensibly based on a time, place, or manner analysis under which the court found the city’s restriction reasonable, the subtext of the decision appears to be that where private donors help or principally fund an improvement to a public park, private functions will receive precedence over free-speech activities.³⁵² Most

experiences frequent wet weather, averaging approximately an inch of rain a week during summer months. See National Weather Service, Normals and Extremes, Central Park, New York, 1869 to present, available at

<http://www.erh.noaa.gov/okx/climate/records/nycnormals.htm>.

³⁵⁰ *Nat’l Council of Arab Ams.*, 331 F. Supp. 2d at 263; Complaint, *Nat’l Council of Arab Ams. v. City of New York*, No. 04 Civ. 6602, paras. 8, 16, 47, 59, 331 F. Supp. 2d 258 (S.D.N.Y. 2004), available at http://www.arab-american.net/pdf/First_Amended_Complaint.pdf (last visited Jan. 30, 2006) [hereinafter “*Nat’l Council of Arab Ams. Complaint*”].

³⁵¹ *Nat’l Council of Arab Ams. Complaint*, at para. 51 (internal quotation marks omitted).

³⁵² City officials contended that the predicted 250,000 rally participants that the plaintiffs sought to permit would “decimate” the Great Lawn and require a lengthy closure. *Nat’l Council of Arab Ams.*, 331 F. Supp. 2d at 264. On the other hand, the city boasted in a press release, cited in the opinion, that the restored lawn “consist[ed] of approximately twelve acres of ‘hearty’ Kentucky blue grass,” soil engineered to resist compaction, and more than four linear miles of subsurface drainage infrastructure. *Id.* at 263. The plaintiffs challenged the propriety of the apparent partial privatization of Central Park:

Although the corporate donors may feel a sense of private ownership over the Park and do not want to be ‘paying’ to host a demonstration that may strongly advocate against their perceived interests the [Central Park Conservatory] may not act to deny protest permits on the Great Lawn in order to protect its relationships with such donors. The Park remains a

disconcerting, however, is that the court seemed to bolster its decision not to grant an injunction by noting that if the city permitted protestors to use the Great Lawn, dissident groups might encourage more people to attend their event.³⁵³ This approach appears to be little more than a pretext to quell dissent. After all, a primary function of a public forum such as Central Park is to accommodate political expression, and the city's decision to close the park to expressive activity, in part, because opening the park might encourage more expression, offends the very interest in free speech that a public forum is supposed to accommodate.

3. Leaving Las Vegas to the Privateers

Much like New York City did in obtaining private money to refurbish the Great Lawn, Las Vegas, attempting to reverse the declining economic fortunes of its “frumpy” and dated downtown, redeveloped the area using a private-public financing scheme.³⁵⁴ The result was a five-block pedestrian zone closed to traffic, dubbed the “Fremont

public forum for all and is not privatized or subject to the discriminatory urges of [the conservatory's] corporate sponsors.

Nat'l Council of Arab Ams. Complaint, at para. 59.

³⁵³ The court quoted the following statement that plaintiffs made at trial in their opinion:

If this Court was to rule that the Great Lawn is not off limits for political legal mass assembly protest, there would be a surge of excitement and enthusiasm, and we don't know what the palpable impact of that would be . . . a lot of people who might not at this moment think about coming to Central Park a week before would find a way to get there.

Nat'l Council of Arab Ams., 331 F. Supp. 2d at 272.

³⁵⁴ *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1094-95 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 1077 (2004).

Street Experience.” Wishing to minimize interference with commercial activity such as shopping in the new pedestrian zone, however, the city outlawed various free-speech activities, including leafleting, solicitation, and setting up a table in a public space to distribute literature or collect signatures (a practice called “tabling”).³⁵⁵ After police dispersed a small rally called to protest the restrictions, the American Civil Liberties Union of Nevada sued.³⁵⁶

The district court that declared a pedestrian mall is a nonpublic forum, upheld the solicitation, and tabled the bans while denying summary judgment to the city on the leafleting prohibition. The court reasoned that the leafleting prohibition probably violated the First Amendment even under the more relaxed standard of scrutiny for nonpublic fora.³⁵⁷ The lower court determined that the pedestrian mall was a nonpublic forum because: (1) the city had created it for the purpose of stimulating economic growth and “not for the purpose of promoting expression”; (2) the \$70 million spent on the redevelopment project represented a “great expense”; and (3) the textured pavement and overhead canopy distinguished the redeveloped area from surrounding streets and sidewalks.³⁵⁸

The Court of Appeals for the Ninth Circuit rejected this reasoning, holding that the Fremont Street Experience was a public forum as were other commercialized pedestrian malls, such as the Venice Beach Boardwalk and Olivera Street in Los Angeles, and Fisherman’s Wharf and Union Square in San Francisco.³⁵⁹ Although United States appellate courts apply “a jumble of overlapping factors” when determining public forum status, they typically

³⁵⁵ *Id.* at 1095, 1096.

³⁵⁶ *Id.*

³⁵⁷ *Id.* at 1096.

³⁵⁸ *Id.*

³⁵⁹ In such determinations, courts consider historical use. *Id.* at 1103-04, 1106.

consider compatibility of the uses of the forum with expressive activity.³⁶⁰ Public thoroughfares, such as the Fremont Street pedestrian mall in Las Vegas, are “inherently compatible” with free speech.³⁶¹ Courts also seek to protect the reasonable expectation that speech will be protected where a location in question is indistinguishable from other public fora.³⁶² Even the use of distinctive pavement and landscaping is not sufficient to change the character of a public forum.³⁶³ The appellate court concluded, “The Fremont Street Experience is still a street.”³⁶⁴

Perhaps more noteworthy than the court’s holding was that it echoed the concern voiced thirty-one years earlier by Justice Marshall, which states that as cities are drawn unresistingly down the path of financing public projects with private funds, citizens may encounter greater difficulty in effectively communicating their views.³⁶⁵ “Although governmental attempts to control speech are far from novel, they have new potency in light of societal

³⁶⁰ *Id.* at 1099-1100.

³⁶¹ *Id.* at 1101.

³⁶² “The recognition that certain government-owned property is a public forum provides open notice to citizens that their freedoms may be exercised there without fear of a censorial government, adding tangible reinforcement to the idea that we are a free people.” *Id.* at 1100 (quoting *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 696 (1992) (Kennedy, J., concurring)).

³⁶³ *Id.* at 1102.

³⁶⁴ *Id.* at 1103. This reasoning echoes that of an earlier U.S. Court of Appeals for the Ninth Circuit case, in which the city of Los Angeles sought to limit a man’s leafleting in El Pueblo de Los Angeles State Historic Park, which encompasses Olivera Street, a tourist-oriented commercial area. *Gerritsen v. City of Los Angeles*, 994 F.2d 570, 572-74 (9th Cir. 1993). The city argued that Olivera Street “is a distinctive section of the park, with a unique historic and cultural atmosphere which is designed to foster commercial exchange.” *Id.* at 576. The court found this argument “unconvincing,” noting that the Olivera Street area “is still part of the park and it is indistinguishable from other sections of the park in terms of visitors’ expectations of its public forum status.” *Id.*

³⁶⁵ See *supra* note 325 and accompanying text.

changes and trends toward privatization.”³⁶⁶ Unfortunately, this new potency has had a negative impact on the ability of dissidents to express themselves, as seen with respect to the Great Lawn in New York³⁶⁷ and the Horton Plaza in San Diego.³⁶⁸

D. Sistrunk and Schwitzgebel: Viewpoint Discrimination Meets Privatization

While the Supreme Court in *United States v. Grace* cut governmental attempts to destroy the public forum status of places traditionally used as public fora, more recent attempts by private actors, typically political campaigns, to temporarily privatize a traditional public forum by obtaining a permit to use a park for an event have drawn mixed judicial responses.³⁶⁹ During such events, the campaign committee typically treats the park as private property and excludes dissidents or limits admittance to the venue to those who do not support the campaign’s opponent.³⁷⁰ Two cases, both arising from a Republican campaign rally using the public commons in an Ohio town, demonstrate the split in authority concerning these viewpoint discrimination-meets-privatization schemes.

In *Schwitzgebel v. City of Strongsville*,³⁷¹ the campaign committee for then-President George H. W. Bush obtained a permit to use a park for a campaign rally and restrict entrance to those holding tickets to the event.³⁷² A police officer and a Secret Service agent guarded each entrance to the fenced-off park, requiring entrants to set aside any signs whether favorable or unfavorable to the

³⁶⁶ *ACLU of Nev.*, 333 F.3d at 1097.

³⁶⁷ *See supra* Part V.C.2.

³⁶⁸ *See supra* Part V.C.1.

³⁶⁹ *See generally* O’Neill, *supra* note 82, at 459-62.

³⁷⁰ *Id.* at 459.

³⁷¹ 898 F. Supp. 1208 (N.D. Ohio 1995).

³⁷² Tickets generally were made available to whomever wanted them. *Id.* at 1211-12.

campaign.³⁷³ The plaintiffs entered with concealed signs criticizing Bush's AIDS policy. When they displayed the signs, a brouhaha ensued, resulting in their ejection from the park and arrest on various misdemeanor charges.³⁷⁴ The *Schwitzgebel* court found that, despite the issuance of the permit, the park was a traditional public forum and the government could not convert it into something less protective of free speech.³⁷⁵ The court noted:

In essence, public fora serve as bulwarks protecting the right of all persons, especially those who have no access to any other outlet, to speak their minds freely. Courts must not allow the government to overcome the bastions protecting such an important right through so simple an exercise as the granting of a permit.³⁷⁶

The court found that when a permitted event, the admittance to which is restricted to ticket-holders, is held at a public park, the park retains its public forum status. Nonetheless, the court upheld the exclusion of the plaintiffs from the event by applying what Professor O'Neill characterizes as a "tortured time, place, and manner analysis."³⁷⁷ Following *Saunders v. United States*,³⁷⁸ the *Schwitzgebel* court found a significant government interest in preventing, by use of the permitting scheme, an individual from physically intruding on and interfering with another's event to inject his or her own beliefs.³⁷⁹ Through

³⁷³ *Id.* at 1212. The campaign provided its own signs for participants to use during the rally.

³⁷⁴ The charges were later dropped. *Id.* at 1212-13.

³⁷⁵ *Id.* at 1216.

³⁷⁶ *Id.*

³⁷⁷ O'Neill, *supra* note 82, at 461 n.262.

³⁷⁸ 518 F. Supp. 728, 729-30 (D.D.C. 1981), *aff'd without op.*, 679 F.2d 262 (D.C. Cir. 1982).

³⁷⁹ *Schwitzgebel*, 898 F. Supp. at 1218.

its ruling, the court also sought to avoid “cacophony” by barring opponents from holding events in the public fora.³⁸⁰ The court’s reasoning, however, flies in the face of the Supreme Court’s recognition of the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,”³⁸¹ and that free debate may carry with it “verbal tumult, discord, and even offensive utterance.”³⁸² Thus, the *Schwitzgebel* court’s justification for using a permit system to stifle dissent lacks validity. Essentially, the government is using a privatization scheme to do an end-run around the First Amendment’s ban on viewpoint discrimination³⁸³ by handing a traditional public forum to a private entity that discriminates. Courts should not countenance this practice.

If the *Schwitzgebel* court came to an improper result even while reaching the proper finding that permitting the use of a park does not strip the park of public forum status, then the court in *Sistrunk v. City of Strongsville*³⁸⁴ failed even to reach an appropriate finding. In *Sistrunk*, a high school student was required to surrender her button showing support for Bill Clinton before entering a Bush

³⁸⁰ *Id.* at 1219. In deciding that the permitting scheme was a valid time, place, or manner restriction on the plaintiffs, the court found content-neutrality because the issuance of the permit was not based on content of the speech involved in the event; once issued, the permit could be enforced “in a way that protects the expression of the permitted message, even to the exclusion of some other message.” *Id.* However, the court here is allowing a governmental agency to issue a permit on a content-neutral basis that gives an entity the ability to take over a public forum and exclude speech on the basis of content in that public forum. *Pinette*, 515 U.S. at 761 (holding that a state may regulate expressive content “only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest”).

³⁸¹ *Sullivan*, 376 U.S. at 270.

³⁸² *Cohen*, 403 U.S. at 24-25. Within established limits, the court added that these effects are “in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength.” *Id.* at 25.

³⁸³ *Lamb’s Chapel*, 508 U.S. at 394.

³⁸⁴ 99 F.3d 194 (6th Cir. 1996).

rally. The court, analogizing the case with *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*,³⁸⁵ found that the Bush campaign had a right to exclude the student's button because allowing her to wear it would unconstitutionally deprive the campaign of autonomy over its message.³⁸⁶ In *Hurley*, the Supreme Court enunciated the principle underlying the *Sistrunk* court's decision when it ruled that Massachusetts could not require Boston war veteran parade organizers to include a gay-rights group that would have imparted a message in discord with what the organizers sought to communicate.³⁸⁷ The *Sistrunk* court likened the plaintiff in that case to the gay-rights group and the campaign to the veterans, reasoning that compelling the Bush campaign to allow the plaintiff to attend its rally wearing a Clinton button would be analogous to requiring the veterans group to permit gay-rights activists to march in the Boston parade. The court stated this would be the same because "participating in the rally as a member of the audience is more akin to marching in the parade itself as one of the less visible marchers."³⁸⁸

The *Sistrunk* dissent contended that this analysis "turned the narrow holding of *Hurley* on its head."³⁸⁹ According to the dissent, the *Sistrunk* plaintiff's attendance at the rally was not akin to marching in the parade, but to standing in the crowd lining the parade route; marching in the parade, instead, is equivalent to standing at the podium and speaking at the rally.³⁹⁰ The dissent in *Sistrunk* promotes the better view because an audience member at a

³⁸⁵ 515 U.S. 557 (1995).

³⁸⁶ *Sistrunk*, 99 F.3d at 199.

³⁸⁷ *Hurley*, 515 U.S. at 559, 574.

³⁸⁸ *Sistrunk*, 99 F.3d at 199. The court further supported the proposition that the campaign could exclude dissenting voices from the public forum that they occupied by finding that the campaign sought attendees to "send the media a message" that Bush was going to win the election. *Id.* (internal quotation marks omitted).

³⁸⁹ *Id.* at 200 (Spiegel, J., dissenting).

³⁹⁰ *Id.* at 201.

rally wearing a campaign opponent's button or even carrying a sign has no more effect on the message the speaker at the podium conveys than a dissenter standing along a parade route, who is part of the parade's audience.³⁹¹ More significantly, the fundamental question in *Sistrunk* was "how much control over a traditional public forum may a municipality cede to a private group."³⁹² The Strongsville, Ohio campaign rally cases, thus, present an intriguing question of whether, in temporarily privatizing a public forum by issuing a permit to a political speaker, a governmental entity is able to turn the public forum into a location allowing viewpoint discrimination. Considering the extent to which courts protect free expression in the public fora and the proposition that "the nature of certain public forums cannot be altered, either by government fiat or private will,"³⁹³ the answer to this question should be a resounding "No."³⁹⁴

³⁹¹ See *id.*

³⁹² *Id.* at 202. The record was not sufficient to determine this issue.

³⁹³ *Id.* (quoting *Bishop v. Reagan-Bush '84*, No. 86-3287, 1987 U.S. App. LEXIS 6669, at * 6 (6th Cir. May 22, 1987) (internal quotation marks omitted)).

³⁹⁴ To be fair, limiting speech-making in a public forum with the purpose of facilitating simultaneous expression of views by groups hostilely opposed to one another—as opposed to merely handing a public forum to proponents of one point of view by the act of granting a permit to use a park, as was the case in *Sistrunk* and *Schwitzgebel*—may be more readily justified. For example, in *Grider v. Abramson*, 994 F. Supp. 840 (W.D. Ky. 1998), Louisville, Kentucky authorities used fencing and a buffer zone to separate simultaneous rallies by the Ku Klux Klan and an opposing group in a downtown public park and the adjacent courthouse steps. *Id.* at 841-43. The purpose was to ensure that each group could express views "violently opposed" to the other, within sight of the other, while reasonably secure that violence would not break out. *Id.* at 843, 848. The plaintiffs challenged the safety regime, in part, because it barred anyone besides scheduled speakers from making a speech. *Id.* at 843. The court upheld this provision, reasoning that the state should guarantee citizens "the right to participate in events or demonstrations of their own choosing without being subjected to interference by other citizens." *Sanders v. United States*, 518 F. Supp. 728, 730 (D.D.C. 1981). This limit on speech-making is more justifiable than the limits upheld in *Sistrunk* and *Schwitzgebel* because its purpose was to facilitate the simultaneous

Fortunately, a more recent case, *Parks v. City of Columbus*,³⁹⁵ rejected the denial of First Amendment speech in a public forum that was temporarily privatized. The court distinguished the facts in that case from those in *Sistrunk* and *Schwitzgebel* because the event for which a public forum was privatized did not convey any particular message.³⁹⁶ In *Parks*, the city issued a permit to the Arts Council to close a city street to vehicular traffic for an arts festival that was free and open to the public.³⁹⁷ As the plaintiff walked on the city street during the arts festival wearing a sign bearing a religious message and distributing literature, a fully-uniformed off-duty police officer who was hired to provide security told him that the event sponsors “did not want him there” and threatened to arrest the plaintiff if he did not leave.³⁹⁸ The court found state

expression of deeply disparate views, the kind of “uninhibited, robust and wide-open” debate that the First Amendment, at its core, protects. *See id.* at 848 (quoting *Sullivan*, 376 U.S. at 270) (internal quotation marks omitted). One court indicated that when a governmental entity grants a private entity the use of a public forum, the private entity’s right to constrain speech and have such constraints enforced by the governmental entity should be limited to situations where the restricted speech is disruptive. *Garthright v. City of Portland*, 315 F. Supp. 2d 1099, 1105 (D. Or. 2004). This reflects reasonable thinking, so long as it is applied to speech-making that actually disrupts. Merely wearing a button or holding a sign while standing mute in a public forum that was temporarily privatized (as was the case in *Sistrunk* and *Schwitzgebel*, respectively) should not be considered disruptive under such a doctrine.³⁹⁵ 395 F.3d 643 (6th Cir. 2005).

³⁹⁶ *Id.* at 651. The court concluded:

While it is unclear that the Arts Festival was actually expressing a particular message, the City “submitted that the collective message of the Greater Columbus Arts Council is to bring visual and performing artists to the City to be enjoyed by those who wish to go to the festival.” This is not an expressive message, but merely a purpose for the event. The Arts Festival is an event that most likely has many artists who are expressing various messages of their own.

Id. (internal citation omitted).

³⁹⁷ *Id.* at 645.

³⁹⁸ *Id.* at 646.

action on the part of the city and concluded that “it [was] difficult to conceive that Parks’s removal was based on something other than the content of his speech.”³⁹⁹ Because the restriction was content-based, the city had to show that its action was “necessary to serve a compelling state interest and [was] narrowly drawn to achieve that end.”⁴⁰⁰ The city failed to make such showing because it had “not offered an interest, let alone a compelling one, to explain why it prohibited Parks from exercising his First Amendment rights in a traditional public forum.”⁴⁰¹

VI. Conclusion

In its frenzied rush to fortify its bellicose foreign policy, the government in recent years has turned a cold shoulder not only towards dissenters, but the teachings of earlier generations of American jurists. Not all modern thinkers are guilty of following this trend, however. As a New York judge recently noted, “We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”⁴⁰² Even—and especially—in wartime, the search for truth carried out through unbridled political expression and robust debate is critical to the continued political freedom of the nation. According to Justice Harlan:

The constitutional right of free expression is powerful medicine in a society as diverse

³⁹⁹ *Id.* at 654.

⁴⁰⁰ *Id.* (quoting *Perry Educ. Ass’n*, 460 U.S. at 45) (internal quotation marks omitted).

⁴⁰¹ *Parks*, 395 F.3d at 654. “The City offered no explanation as to why the sponsor wanted the [plaintiff] removed. There is no evidence that the Arts Council had a blanket prohibition on the distribution of literature or that others engaging in similar constitutionally protected activity were removed from the permitted area.” *Id.*

⁴⁰² *Hamdi v. Rumsfeld*, 542 U.S. 507, 603 (2004) (citing *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 587 (1952)).

and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.⁴⁰³

Concomitant with the right of free expression is the right to gather in public places to give voice to political views in order to convey them to authorities.⁴⁰⁴ In modern times, however, authorities demean public gathering for the expression of political views because they assume that such gatherings will take a violent form, thus presuming guilt until innocence is proven.⁴⁰⁵ Ironically, it can be argued that the greater the constraints the government places on dissidents through penning protesters, discriminating by viewpoint, and privatizing away the public forum, the greater the likelihood of civil disobedience to express views the public otherwise would have voiced lawfully.⁴⁰⁶ Yet, along with the general perils inherent in civil disobedience comes a newer, harsher threat of lengthy incarceration in federal penitentiaries should the government choose to employ section 802 of the Uniting and Strengthening America by Providing Tools Required to Intercept and

⁴⁰³ *Cohen*, 403 U.S. at 24.

⁴⁰⁴ "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *Cruikshank*, 92 U.S. at 552.

⁴⁰⁵ Mitchell, *supra* note 11, at *39.

⁴⁰⁶ *Id.* at *44 ("closing off of space to protest has made civil disobedience all the more necessary").

Obstruct Terrorism Act of 2001 (the “Patriot Act”)⁴⁰⁷ against demonstrators. This prospect is no flight of fancy.⁴⁰⁸

The government has already so compromised the free use of the public forum that the only way to take it back may be through widespread civil disobedience. But because such a course would put many in danger, and because, in a civilized democracy, the citizenry should not have to resort to such extremes to engage in speech activity the Constitution already protects, a better course would be to rethink current policy toward those who use public places to express their political views. Courts, no doubt, have a significant role to play in this process and should remain astute to governmental attempts to displace dissidents by restricting access to the public forum. Specifically, courts should be particularly wary of and should treat with great suspicion schemes that: (1) corral or pen protesters so they effectively are unable to get their message across to the targets of their speech; (2) discriminate according to viewpoint by banishing opponents of government policies to distant or unseen locations; and (3) propose to accomplish, through privatization what the First Amendment otherwise would not permit. By remaining vigilantly against such free expression-compromising schemes, courts can hold the other two branches of government to a constitutional standard so that the people of this country may reclaim the public forum.

⁴⁰⁷ Uniting and Strengthening America by Providing Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. 107-56, 115 Stat. 272.

⁴⁰⁸ Section 802 of the Patriot Act reaches those who violate a criminal law in the commission of an act dangerous to human life the purpose of which is to influence government policy through intimidation or coercion. See NANCY CHANG, *SILENCING POLITICAL DISSENT* 112-13 (Seven Stories Press 2002); Mitchell, *supra* note 11, at *44-*45.

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

Dannye W. Holley

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

I. Introduction

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

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

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

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

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

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

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

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

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

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

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

³ See *infra* notes 10-21, 24-26 and accompanying text.

⁴ See *infra* notes 10-31 and accompanying text.

⁵ See *infra* notes 22-23 and accompanying text.

⁶ See *infra* notes 32-163 and accompanying text.

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

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

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

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

⁸ See *infra* notes 41-163 and accompanying text.

⁹ See *infra* notes 164-232 and accompanying text.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁵ See discussion *infra* notes 192-99 and accompanying text.

¹⁶ FED. R. EVID. 609(a) (1975).

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

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

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

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

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

¹⁹ FED. R. EVID. 609(a)(1) (1975).

²⁰ *Id.*

²¹ *Id.*

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

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

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

²³ *Id.* at 511-24.

²⁴ FED. R. EVID. 609 (1990).

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

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

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

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

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

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

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

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

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

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

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

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

Fourth, and most importantly to this study of federalism, the federal standard has been the only pervasive benchmark referred to by state lawmakers in considering or reconsidering the appropriate standard to adopt since 1975.³¹ The next section of this article reports on what the state rule makers have decided, bearing in mind, that each state had the option of retaining their pre-1975 rule, or adopting, modifying, or rejecting each of the three federal rule standards for admitting convictions to impeach.

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

³⁰ *Id.*

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

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

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

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

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

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

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

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

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

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

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

³³ See *supra* notes 29-30 and accompanying text.

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

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

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

³⁵ See Holley, *supra* note 2.

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

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

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

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

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

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

Note: Assumption crimes of "Dishonesty or False Statement"

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

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

Point allocation for each of above 10 categories

0	6 8 10	16	0	6 8 10	16
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FRE Score = 41.4

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

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

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

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

State Scores

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

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

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

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

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

substantive amendment effective in 1992).

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

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

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

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

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

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

another evidence rule allowed admission of such conduct.⁴³

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

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

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

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

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

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

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

⁴⁴ HAWAII R. EVID. 609 (2004).

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

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

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

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

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ ALASKA R. EVID. 609 (2004).

⁵⁰ *Id.*

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

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

⁵¹ KAN. STAT. ANN. § 60-421 (2004).

⁵² *Id.*

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

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

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

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

⁵⁵ *Id.*

⁵⁶ The official commentary to the rule does not define these concepts.

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

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

⁵⁷ MICH. R. EVID. 609 (2004).

⁵⁸ *Id.*

⁵⁹ *Id.*

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

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

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

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

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

⁶² IND. R. EVID. 609(a) (2004).

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

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

⁶⁵ *Id.* See discussion *infra* notes 197-99 and accompanying text.

⁶⁶ IND. CODE § 35-41-5-1.

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

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

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

⁶⁸ See *supra* notes 17, 25 and accompanying text.

⁶⁹ See *supra* note 57 and accompanying text.

⁷⁰ W. VA. EVID. 609.

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

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

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

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

⁷² W. VA. EVID. 609.

⁷³ *Id.*

⁷⁴ VT. R. EVID. 609.

⁷⁵ *Id.*

⁷⁶ VT. R. EVID. 609 reporter’s cmt.

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

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

⁷⁷ *Id.*

⁷⁸ VT. R. EVID. 609.

⁷⁹ *Id.*

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

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

⁸⁰ *Id.*

⁸¹ IDAHO R. EVID. 609.

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

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

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

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

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

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

⁸⁴ *Id.* See discussion *supra* notes 50, 56 and accompanying text.

⁸⁵ IDAHO R. EVID. 609.

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

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

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

⁸⁷ See *supra* notes 32-35 and accompanying text.

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

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

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

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

⁹⁰ See *supra* notes 17-18 and accompanying text.

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

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

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

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

⁹³ ARIZ. R. EVID. 609 cmt.

⁹⁴ CONN. CODE EVID. § 6-7 (2004).

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

⁹⁶ CONN. CODE EVID. § 6-7 (2004).

underlying the conviction to prove a propensity to lie.⁹⁷

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

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

⁹⁷ CONN. CODE EVID. § 4-3 (2004).

⁹⁸ See *supra* note 73 and accompanying text.

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

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

⁹⁹ GA. CODE ANN. §§ 24-9-20, 24-9-84 (2004).

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

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

¹⁰² GA. CODE ANN. § 24-9-20 (2004).

¹⁰³ *See supra* notes 25, 26 and accompanying text. The federal rule

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

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

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

¹⁰⁴ TENN. R. EVID. 609(a).

¹⁰⁵ TENN. R. EVID. 609(a)(3).

¹⁰⁶ *Id.*

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

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

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

¹⁰⁷ *Id.*

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

¹⁰⁹ See discussion *supra* notes 55, 57 and accompanying text.

¹¹⁰ TENN. R. EVID. 609(a)(2).

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

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

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

¹¹¹ TENN. R. EVID. 609 advisory commission's cmt.

¹¹² *Id.*

¹¹³ ARK. R. EVID. 609; DEL. R. EVID. 609; MINN. R. EVID. 609; WASH. R. EVID. 609.

¹¹⁴ ARK. R. EVID. 609; DEL. R. EVID. 609; MINN. R. EVID. 609; WASH.

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

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

R. EVID. 609.

¹¹⁵ ARK. R. EVID. 609; DEL. R. EVID. 609; MINN. R. EVID. 609; WASH. R. EVID. 609.

¹¹⁶ ARK. R. EVID. 609; DEL. R. EVID. 609; MINN. R. EVID. 609; WASH. R. EVID. 609.

¹¹⁷ MINN. R. EVID. 609.

¹¹⁸ See *supra* notes 41, 50, 67, 88, and 103 and accompanying text.

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

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

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

¹¹⁹ ARK. R. EVID. 609; DEL. R. EVID. 609; MINN. R. EVID. 609; WASH. R. EVID. 609.

¹²⁰ MISS. R. EVID. 609.

¹²¹ *Id.*

¹²² *Id.*

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

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

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

¹²⁵ *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹³¹ *Id.*

¹³² N.J. R. EVID. 609 (enacted in 1993).

¹³³ *Id.*

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

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

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

¹³⁴ See *supra* text preceding note 17.

¹³⁵ See *supra* notes 25, 26 and accompanying text.

¹³⁶ LA. CODE EVID. ANN. art. 609, 609.1 (2004).

¹³⁷ LA. CODE EVID. ANN. art. 609, 609.1 (2004).

¹³⁸ LA. CODE EVID. ANN. art. 609 (2004).

¹³⁹ *Id.*

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

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

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

¹⁴⁰ LA. CODE EVID. ANN. art. 609.1 (2004).

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

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

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

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

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

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

punishable by more than a year in prison.

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

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

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

¹⁴⁵ OR. REV. STAT. § 40-355(1) (2004).

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

¹⁴⁷ *Id.*

¹⁴⁸ OR. REV. STAT. § 40-355(2) (2004).

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

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

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

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

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

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

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

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

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

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

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

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

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

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

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

¹⁵⁷ See *supra* notes 25, 26 and accompanying text.

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

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

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

¹⁵⁸ N.H. R. EVID. 609.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

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

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

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

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

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

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

¹⁶³ N.H. R. EVID. 609, reporter's notes.

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

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

only five states (unspecified) have identical rules to FRE 609, while twenty-one other states and the Texas Criminal Evidence Rules have rules similar to FRE 609, while ten states and Texas Civil Evidence Rules are different or significantly modify FRE 609. Colorado is stated to have no Rule comparable to FRE 609, while Montana is asserted to have a rule “opposite” to that of FRE 609.¹⁶⁵

Second, and even more significant, having twenty-

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

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

eight different standards is an invitation for further parochialism or for the “regression to the mean” principle to operate when state supreme courts’ interpretations of these diverse standards are factored in to determine the current array of standards being employed by state criminal and civil trial judges each year.¹⁶⁶ The twenty-eight standards lead to state supreme court decisions that further balkanize the status of the law on this issue, and open the door for state supreme courts to interpret these diverse standards based on judicially crafted junk science heuristics, with an apparent eye to sanctioning admission of a vast array of convictions against persons accused of crimes.¹⁶⁷

B. Identifying Possible Reasons for the Twenty-Eight Standards

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

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

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

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

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

¹⁶⁸ See *supra* notes 10, 128 and accompanying text.

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

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

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

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

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

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

¹⁷² *See infra* notes 192-99 and accompanying text.

¹⁷³ *See infra* notes 200-08 and accompanying text.

¹⁷⁴ *See infra* notes 209-18 and accompanying text.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁸³ *Id.* at 528, 530.

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

¹⁸⁵ *Gropi*, 400 U.S. at 511 n.12.

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

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

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

¹⁸⁶ See *infra* notes 196-98, 209-18 and accompanying text.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

property interest of other litigants.¹⁹⁹

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

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

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

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

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

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

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

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

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

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

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

steps towards approval by the appropriate regulatory agency.

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

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

Id. at 990-91.

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

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

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

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

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

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

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

²⁰⁶ See discussion *supra* notes 193-98 and accompanying text.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²²² See *supra* notes 181-82 and accompanying text.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. Conclusions and Recommendations

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

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

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

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

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

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

²³³ See *supra* notes 10-31 and accompanying text.

²³⁴ See *supra* notes 39-40 and accompanying text.

²³⁵ See *supra* note 10 and accompanying text.

²³⁶ See *supra* notes 32-38 and accompanying text.

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

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

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

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

²³⁹ See *supra* note 166 and accompanying text.

²⁴⁰ See *supra* notes 29-30 and accompanying text.

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

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

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

²⁴¹ See *supra* notes 164-167 and accompanying text.

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

²⁴³ See *supra* notes 168-174 and accompanying text.

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

²⁴⁵ See *supra* notes 175-218 and accompanying text.

²⁴⁶ See *supra* note 170-71 and accompanying text.

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

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

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

²⁴⁷ See *supra* notes 175-91, 199 and accompanying text.

²⁴⁸ See *supra* notes 172 and accompanying text.

²⁴⁹ See *supra* notes 193-98 and accompanying text.

²⁵⁰ See *supra* notes 191, 199 and accompanying text.

²⁵¹ See *supra* note 173 and accompanying text.

²⁵² See *supra* notes 200-01 and accompanying text.

²⁵³ See *supra* notes 202-03 and accompanying text.

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

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

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

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

²⁵⁴ See *supra* notes 204-08 and accompanying text.

²⁵⁵ See *supra* note 174 and accompanying text.

²⁵⁶ See *supra* notes 209-18 and accompanying text.

²⁵⁷ See *supra* notes 219-32 and accompanying text.

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

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

²⁵⁹ See *supra* note 211 and accompanying text.

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

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

to prove propensity to lie.

THE CLEAR ACT: WHEN THE WARS ON TERRORISM AND IMMIGRATION COLLIDE

Maha M. Ayesh

I. Introduction

In the summer of 2003, Representative Charles Norwood (GA) first introduced the controversial house bill titled the Clear Law Enforcement for Criminal Alien Removal Act (hereinafter “the CLEAR Act”).¹ Though the original Act expired with the 108th Congress, Representative Norwood reintroduced the bill in the summer of 2005.² The CLEAR Act was designed to address “the growing U.S. criminal alien crisis.”³ In particular, the Act focuses on perceived inadequacies in the current system of enforcing immigration laws.⁴ It seeks to improve immigration enforcement by incorporating the help of state and local police in applying stricter penalties to those who violate immigration laws.

The present legislation grew largely out of concerns following the September 11, 2001 terrorist attacks. While there had been a perceived crisis of illegal immigration

¹ Clear Law Enforcement For Criminal Alien Removal (CLEAR) Act of 2003, H.R. 2671, 108th Cong. (2003), *available at* <http://thomas.loc.gov/cgi-bin/query/z?c108:H.R.2671>: (last visited May 24, 2006); *See* Press Release, Congressman Charlie Norwood, Norwood Introduces the CLEAR Act (July 9, 2003), *available at* http://www.house.gov/apps/list/press/ga09_norwood/CLEARAct.html (last visited May 24, 2006).

² Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act of 2005, H.R. 3137, 109th Cong. (2005), *available at* <http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.3137>: (last visited May 24, 2006). *See* Press release, Congressman Charlie Norwood, CLEAR Act 2005 Introduced in U.S. House (June 30, 2005), *available at* http://www.house.gov/apps/list/press/ga09_norwood/CLEAR05.html (last visited May 24, 2006).

³ Press Release, Norwood, July 9, 2003, *supra* note 1.

⁴ *Id.* (referring to “[t]oday’s broken enforcement system”).

predating this time,⁵ the horrifying and unexpected attacks of 2001 drew national attention to immigration issues because all nineteen hijackers were foreign nationals.⁶ After news broke just days later that at least sixteen of the hijackers entered the country on legal visas, and that some remained in violation of their visas, many began to feel uneasy about terrorists taking “advantage of America’s open society.”⁷ In the months following the attacks, many people blamed the inefficiencies on the Immigration and Naturalization Service (INS), the federal agency charged with regulating immigration.⁸ Furthermore, news that three of the hijackers had encounters with local police officers in the weeks preceding the attacks led many to question whether increased communication and cooperation between various law enforcement agencies could have foiled the terrorist plot.⁹ The CLEAR Act addresses this latter issue by affirming the authority of state and local law

⁵ See *Clear Law Enforcement for Criminal Alien Removal Act of 2003 (CLEAR Act): Hearing Before the Subcomm. on Immigration, Border Sec., and Claims of the House Comm. On the Judiciary*, 108th Cong. 1 (2003) [hereinafter *CLEAR Act 2003 Hearing*] (statement by Rep. Hostetler, Chairman, House Subcomm. on Immigration, Border Sec., and Claims) (referring to the “illegal immigration crisis of epic proportions” and citing INS illegal immigrant statistics from 1996); see also discussion *infra* Part II.B.

⁶ *CLEAR Act 2003 Hearing*, *supra* note 5, at 22 (prepared statement of Kris W. Kobach, Assoc. Professor of Law).

⁷ See Peter Slevin & Mary Beth Sheridan, *Suspects Entered U.S. on Legal Visas*, WASH. POST, Sept. 18, 2001, at A6; see also Donna Leinwand, *Foreigners Linked to Terror Tricked INS, Report Says*, USA TODAY, May 22, 2002, at 8A (reporting that at least half of forty-eight terrorism suspects since 1993 “manipulated or violated immigration laws”).

⁸ Leinwand, *supra* note 7 (citing report’s “unflattering portrayal of the INS”).

⁹ See *State and Local Authority to Enforce Immigration Law: Evaluating a Unified Approach for Stopping Terrorists*, Testimony before the United States Comm. on the Judiciary, Subcomm. on Immigration, Border Sec., and Citizenship (Apr. 22, 2004) (prepared statement by Michelle Malkin), available at <http://judiciary.senate.gov/hearing.cfm?id=1156> (last visited May 24, 2006).

enforcement officers to enforce federal immigration laws;¹⁰ by providing states and local agencies with incentives to enforce immigration laws;¹¹ and by establishing a system to facilitate communication about immigration violators among federal, state, and local agencies.¹² In addition, the CLEAR Act amends existing immigration laws by creating and increasing criminal and civil penalties for immigration violations.¹³

Supporters of the CLEAR Act applaud it as a solution to the limited resources of federal immigration officials and as a measure to stop the growing number of “illegal aliens.”¹⁴ On the other hand, immigration advocates and many others oppose the measure, fearing that it represents a growing assault on immigration, has negative civil rights repercussions, and frustrates current police objectives.¹⁵ To be sure, the CLEAR Act has

¹⁰ H.R. 3137 § 2.

¹¹ *Id.* §§ 3, 7.

¹² *Id.* §§ 5-6.

¹³ *Id.* § 4.

¹⁴ See, e.g., NumbersUSA, *HOT TOPIC: State and Local Police in Immigration Law Enforcement*, <http://numbersusa.com/hottopic/clearact.html> (last visited May 24, 2006). Many immigrant advocates object to the categorization of certain non-citizens as “illegal.” See Ruben J. Garcia, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 118 n.1 (1995); Margot Mendelson, *The Legal Production of Identities: A Narrative Analysis of Conversations with Battered Undocumented Women*, 19 BERKELEY WOMEN'S L.J. 138, 202-03 (2004). While I prefer using the phrase “undocumented immigrants” to refer to non-citizens in the country without authorization of federal immigration officials, I also use the terms “illegal alien” and “illegal immigrant” when referring to specific provisions of legislation and to public debate. It should be noted, however, that the terms “alien” and “immigrant” have different legal meanings. See generally 3A AM. JUR. 2D *Aliens and Citizens* § 901 (2005).

¹⁵ See ACLU Statement on H.R. 2671, the “Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act of 2003” before the House Subcomm. on Immigration, Border Sec. and Claims (Oct. 1, 2003), available at <http://www.aclu.org/ImmigrantsRights/ImmigrantsRights.cfm?ID=13881&c=22> (last visited May 24, 2006).

provided another avenue of discussion in the highly debated field of immigration policy. Although this debate preceded the 9/11 attacks, it has gained strength in its aftermath.

This comment will briefly review the development of relevant immigration law, focusing particularly on legislation aimed at solving the “illegal immigration problem.” It will also discuss how the 9/11 attacks impacted immigration policy by framing the immigration debate in the language of national security. As a result, immigration policy has become inextricably linked with anti-terrorism policy and no longer has “an independent policy agenda.”¹⁶ The CLEAR Act exemplifies this intertwining; it represents the combination of post-9/11 terrorism concerns and pre-9/11 anti-immigration sentiment. Although the legislation is promoted as a measure to increase the security and welfare of America’s citizens, it has the potential to promote racial and ethnic profiling and to actually frustrate local law enforcement efforts. This comment does not address the important legal question of whether local and state law enforcement agencies do indeed have the authority to enforce federal immigration laws, as the CLEAR Act maintains.¹⁷ Rather, it focuses on the CLEAR Act’s policy implications. This comment attempts to show that not only is the CLEAR Act potentially dangerous legislation in and of itself, but

¹⁶ Karen C. Tumlin, Comment, *Suspect First: How Terrorism Policy is Reshaping Immigration Policy*, 92 CAL. L. REV. 1173, 1228 (2004).

¹⁷ For information on whether federal law preempts local and state authorities from enforcing immigration law, see generally Jill Keblawi, Comment, *Immigration Arrests by Local Police: Inherent Authority or Inherently Preempted?*, 53 CATH. U. L. REV. 817 (2004); see also, April McKenzie, Comment, *A Nation of Immigrants or a Nation of Suspects? State and Local Enforcement of Federal Immigration Laws Since 9/11*, 55 ALA. L. REV. 1149, 1151-55 (2004); Craig B. Mousin, *A Clear View from the Prairie: Harold Washington & the People of Illinois Respond to Federal Encroachment of Human Rights*, 29 S. ILL. U. L.J. 285, 305-06 (2005); Jeff Sessions & Cynthia Hayden, *The Growing Role for State & Local Law Enforcement in the Realm of Immigration Law*, 16 STAN. L. & POL’Y REV. 323 (2005).

perhaps more importantly, it is premised on bad policy—the policy of equating immigrants with terrorists and criminals.

II. Historical and Legal Development

A. Federal Government's Broad Exclusion Powers

Immigration has been an area of law governed almost exclusively by federal legislation and executive regulations.¹⁸ In fact, courts have taken a decisively hands-off approach to most immigration matters through the use of the plenary power doctrine, which limits judicial oversight.¹⁹ Viewed as a nation's right to control who enters and remains within its territory, immigration laws have long been perceived as intimately related to the sovereign powers of the federal government.²⁰ In addition,

¹⁸ But see Hiroshi Motomura, *The Curious Evolution of Immigration Laws: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1627-28 (1992) (noting that in recent years the judiciary has been involved in an increasing number of cases involving immigrants, particularly cases related to equal protection of the laws and freedom from detention).

¹⁹ Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833, 840 (1997); Motomura, *supra* note 18, at 1626.

²⁰ See, e.g., *Galvan v. Press*, 347 U.S. 522, 530 (1954) (finding the power of Congress to control immigration to be "very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security"); *Shaughnessy v. United States ex rel. Mezel*, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."); *Ekiu v. United States*, 142 U.S. 651, 659 (1892) ("[E]very sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."); *Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606 (1889) (reasserting "the power of the government to

immigration laws are often seen as inextricably linked to and impacting the nation's foreign relations.²¹

At the most fundamental level, illegal immigration has existed since legal immigration has been restricted, and has existed since groups of non-citizens have been excluded from legal entry into, or continued residence within, the United States.²² Early immigration enactments in the United States sought to restrict immigration by certain ethnic or national groups.²³ In the nineteenth century, for example, lawmakers enacted the "Chinese exclusion laws," which placed a moratorium on entry by Chinese laborers.²⁴ In 1924, Congress passed a comprehensive immigration policy based on a national origins quota system,²⁵ which apparently was intended to regulate the ethnic composition of immigrants.²⁶ This national quota system remained the underlying principle of U.S. immigration law until 1965.

exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion").

²¹ See *Galvan*, 347 U.S. at 530; see also Victor Romero, *Race, Immigration, & the Department of Homeland Security*, 19 ST. JOHN'S J. LEGAL COMMENT. 51, 53-54 (2004) (noting that immigration issues have been ruled political matters in part because of "the extent that the migration of noncitizens impacts foreign relations").

²² Illegal immigrants fall into two general categories: those who enter the country without passing through inspection and being granted permission from federal authorities and those who lawfully enter the country on legal visas but remain in violation of their visas.

²³ For a discussion of the historic role of race in U.S. immigration law, see David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 988-94 (2002); Romero, *supra* note 21, at 54.

²⁴ See *Ting v. United States*, 149 U.S. 698 (1893); *Ping*, 130 U.S. 581. The Supreme Court found such exclusion, which was based on the presence of "foreigners of a different race" whose lack of assimilation presented a danger to peace and security, to be within the sovereign powers of the national government. *Ping*, 130 U.S. at 606.

²⁵ 43 Stat. 153 (1924), *repealed by* INA Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911.

²⁶ Cole, *supra* note 23, at 991 (recounting statement of the Commissioner of Immigration in 1925 that "virtually all immigrants now 'looked' like Americans") (citing THOMAS ALEXANDER ALIENIKOFF, DAVID A. MARTIN, & HIROSHI MOTOMURA, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 165 (4th ed. 1998)).

Early immigration laws also sought to prevent alleged politically subversive foreigners from infiltrating society.²⁷ Many scholars argue that immigration laws were constructed, and groups of immigrants excluded, in response to domestic social change and international conflict.²⁸ For example, Congress responded to the assassination of President McKinley in 1902 with immigration laws excluding anarchists.²⁹ Anarchists were also the target of legislation in the early twentieth century in response to such events as the Haymarket Square rally in Chicago and the rise of the Wobblies.³⁰ By the 1940s and 1950s, immigration legislation focused on deporting and excluding Communists.³¹

In 1952, Congress passed the comprehensive Immigration and Nationality Act (INA), which continues to be the foundation of U.S. immigration law today.³² The INA originally retained the “national origins formula” that was established in 1924 for regulating immigration and included earlier acts governing the exclusion and deportation of certain immigrants. In 1965, Congress amended the INA to exclude discrimination based on such criteria as race and national origins.³³

²⁷The earliest examples of laws limiting “politically undesirable persons” may have been the Alien and Sedition Acts of the late-eighteenth century. Johnson, *supra* note 19, at 834.

²⁸*Id.*

²⁹Cole, *supra* note 23, at 994.

³⁰Johnson, *supra* note 19, at 845-47.

³¹*Id.* at 850-51.

³²Immigration & Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C. (2003)).

³³Pub. L. No. 89-236, 79 Stat. 911 (1965).

B. Tackling the “Illegal Immigration Problem”

1. Development of the Immigration Reform and Control Act

Until the 1970s, legislation dealing with illegal immigration focused primarily on enforcing penalties against those who smuggled and harbored illegal immigrants. Under the INA, it was a felony to willfully import, transport, or harbor an undocumented immigrant, though it specifically exempted employers from penalties.³⁴ Over time, lawmakers increasingly focused on the growing number of undocumented immigrants in the country, the majority of whom came from Mexico.³⁵ Legislative activity in this area increased, and in 1971, the ninety-second Congress began holding hearings on the issue.³⁶ Much attention was given to the effects of immigration, particularly undocumented immigration, on the nation’s labor market.³⁷ The common understanding was that immigrant laborers from economically deprived countries depressed the American labor market and increased unemployment among low-skill citizens by taking low-wage jobs.³⁸ Thus, lawmakers decided that legislation

³⁴ H.R. REP. NO. 99-682(I), at 51-52 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5655-56 (citing INA (1952) §§ 274, 287(a)(3)).

³⁵ *See* Barry R. Chiswick, *The Illegal Immigration Policy Dilemma*, in *ESSAYS ON LEGAL AND ILLEGAL IMMIGRATION* 73, 75 (Susan Pozo ed., W.E. Upjohn Inst. for Employment Research 1986). *But see* Charles J. Ogletree, Jr., Conference Paper, *America’s Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755, 767 (2000) (“While the stereotypical image of an illegal immigrant is of a Latino crossing the U.S. border at night, more than 40% of illegal immigrants are actually people who entered the country legally but overstayed their visas.”).

³⁶ H.R. REP. NO. 99-682, at 52.

³⁷ *See generally* George J. Borjas, *Immigrants and the U.S. Labor Market*, in *ESSAYS ON LEGAL AND ILLEGAL IMMIGRATION* 7 (Susan Pozo ed., W.E. Upjohn Institute for Employment Research 1986).

³⁸ *But see* Thomas J. Espenshade, *Unauthorized Immigration to the*

aimed at decreasing the flow of illegal immigration was necessary "both to protect U.S. labor and economy, and to assure the orderly entry of immigrants into this country."³⁹

Various bills dealing with illegal immigration were introduced in the House and Senate throughout the 1970s and into the 1980s.⁴⁰ Little headway was made, however, often because the two branches of the legislature could not agree on final resolutions.⁴¹ One law that did pass was the Act of October 5, 1978.⁴² This Act created the Select Commission on Immigration and Refugee Policy to study the current state of immigration law and to report its findings and recommendations for reform to the President and Congress.⁴³

In March 1981, the Commission published its final report,⁴⁴ which affirmed the notion that undocumented immigrants are attracted primarily by employment opportunities.⁴⁵ It discussed the "pernicious effects" of undocumented immigration on society, which it argued led to the creation of an underclass of workers who are "at the mercy of unscrupulous employers and coyotes who smuggle them across the border."⁴⁶ The Commission saw the most devastating impact of widespread undocumented

United States, 21 ANN. REV. SOC. 195, 210 (1995) (arguing that undocumented immigrants actually "help generate employment for others through their work and consumption" and that studies show undocumented immigrants to have contributed to federal budgetary surpluses, rather than deficits).

³⁹ See H.R. REP. NO. 99-682, at 52 (citing H.R. REP. NO. 94-506, at 3 (1975)).

⁴⁰ See *id.* at 52-55.

⁴¹ *Id.*

⁴² Pub. L. No. 95-412, 92 Stat. 907 (1978).

⁴³ H.R. REP. NO. 99-682, at 53.

⁴⁴ SELECT COMM'N ON IMMIGRATION & REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NAT'L INTEREST: THE FINAL REPORT AND RECOMMENDATIONS OF THE SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY WITH SUPPLEMENTAL VIEWS BY COMM'RS (U.S. Gov't Printing Office 1980).

⁴⁵ *Id.* at 41.

⁴⁶ *Id.* at 41-42.

immigration to be “the disregard it breeds for other U.S. laws,” including minimum wage, occupational safety, and anti-smuggling laws.⁴⁷ To counter this perceived problem, the Commission recommended a three-part program that included enhanced border and interior enforcement, economic deterrents—specifically employer sanctions, and a program for legalizing certain undocumented immigrants.⁴⁸

The Commission’s recommendations and the previous attempts at passing legislation culminated in the enactment of the Immigration Reform and Control Act of 1986 (IRCA).⁴⁹ This Act emphasized employer sanctions as a mechanism for decreasing illegal immigration. It made the knowing employment of undocumented immigrants unlawful, required employers to check certain documents verifying legal status, and authorized a system of graduated penalties for employers who violate the Act.⁵⁰ This Act also added an anti-discrimination provision to the INA,⁵¹ in order to prevent employers from discriminating on the basis of national origin or citizenship (except for undocumented immigrants) out of fear of liability.⁵² IRCA further established an amnesty program for certain undocumented immigrants who had continuously resided in the United States since January 1, 1982.⁵³ In passing this provision, Congress reasoned that many undocumented immigrants, who have resided in the country for several years and have become beneficial members of society, continue to live in

⁴⁷ *Id.* at 42.

⁴⁸ *Id.* at 45.

⁴⁹ Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99-603, *reprinted in* 1986 U.S.C.C.A.N. 3359. Upon signing the law, President Reagan called it “the product of one of the longest and most difficult legislative undertakings in recent memory.” Statement by President Reagan upon signing S.1200, 1986 U.S.C.C.A.N. 5856-1, 5856-4.

⁵⁰ IRCA § 101 (codified at 8 U.S.C. § 1324a).

⁵¹ *Id.* § 102 (codified at 8 U.S.C. § 1324b).

⁵² H.R. REP. NO. 99-682, at 68.

⁵³ IRCA § 201 (codified at 8 U.S.C. § 1255a).

fear due to their undocumented status.⁵⁴ Granting legal status to such immigrants would allow the INS to focus on curbing the current flow of illegal arrivals.⁵⁵

2. Immigration Policy in the 1990s

Significant legislation dealing with illegal immigration did not surface again until the mid-1990s. Many people refer to this time as a period of emerging anti-immigration and nativist sentiment,⁵⁶ as the tone of the immigration debate dramatically changed in the decade after the enactment of the IRCA. California Proposition 187, which was voted into law by a large margin of the state's citizens in 1994, was of national significance.⁵⁷ This law was based on the assumption that California's undocumented immigrant community caused economic hardship to citizens and threatened the public through criminal conduct.⁵⁸ Proposition 187 denied publicly funded social⁵⁹ and health care services⁶⁰ and public education to undocumented immigrants.⁶¹ The law also required the state's law enforcement agencies to "fully cooperate" with the INS in its efforts to arrest undocumented immigrants.⁶²

⁵⁴ H.R. REP. NO. 99-682, at 49.

⁵⁵ *Id.* While immigrant advocates generally favor amnesty programs, some fault the IRCA for constructing "the contemporary illegal identity" by distinguishing the category of immigrants whose status could be legalized from others. *See* Mendelson, *supra* note 14, at 203.

⁵⁶ *See generally*, Leo R. Chavez, *Immigration Reform and Nativism: The Nationalist Response to the Transnationalist Challenge*, in IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRATION IMPULSE IN THE UNITED STATES 61 (Juan F. Perea ed., New York Univ. Press 1997); Stephen H. Legomsky, *E Pluribus Unum: Immigration, Race, and Other Deep Divides*, 21 S. ILL. U. L.J. 101 (1996).

⁵⁷ Cal. Prop. 187 (1994).

⁵⁸ *Id.* § 1.

⁵⁹ *Id.* § 5.

⁶⁰ *Id.* § 6.

⁶¹ *Id.* § 7.

⁶² *Id.* § 4. Subsequent court decisions found that some of the provisions

While Proposition 187 was not a piece of federal legislation, its passage was important in shaping the national immigration dialogue,⁶³ especially because California has one of the nation's largest immigrant communities. In fact, Proposition 187 likely influenced the passage of certain provisions in the Personal Responsibility and Work Reconciliation Act of 1996, which limited federal public benefits for legal immigrants and excluded undocumented immigrants from federal benefits programs.⁶⁴ Furthermore, Proposition 187 was passed by such a large margin that it "sent a powerful message to Congress regarding immigration as a powerful national political issue."⁶⁵ Proving that they were "tough on immigrants"⁶⁶ became a politically wise move for lawmakers. Whereas a decade earlier legislators presented an image of undocumented immigrants as victims of merciless employers and smugglers, public discourse shifted to accuse undocumented immigrants of being dangerous elements of society who leached public resources. In addition, the discourse surrounding Proposition 187 and similar enactments carried disturbing racial, particularly anti-Latino, undertones.⁶⁷

of Proposition 187 were unconstitutional or preempted by federal law. See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995), *appeal dismissed in part*, 131 F.3d 1297 (9th Cir. 1997).

⁶³ See Chavez, *supra* note 56, at 65.

⁶⁴ Pub. L. No. 104-193, 110 Stat. 2105, Title IV (1996).

⁶⁵ Barbara Hines, *So Near Yet So Far Away: The Effect of September 11th on Mexican Immigrants in the United States*, 8 TEX. HISP. J.L. & POL'Y 37, 39-40 (2002).

⁶⁶ *Id.* at 40.

⁶⁷ Statements made by supporters of Proposition 187 demonstrated fear that the increasing Latino immigrant population threatened the majority status of the region's white population. For instance, Glenn Spencer, founder of the anti-immigrant group, Voice of Citizens Together, feared that immigrants were "part of a reconquest of the American Southwest by foreign Hispanics." Chavez, *supra* note 56, at 68 (quoting Gabe Martinez & Patrick J. McDonnell, *Prop. 187 Forces Rely on Message—Not Strategy*, L.A. TIMES, Oct. 30, 1994, at A1). See generally Garcia, *supra* note 14.

In 1996, the 104th Congress, feeding off the anti-immigration sentiment present throughout the country, enacted multiple pieces of legislation affecting immigrants. This legislation reflected not only the growing concerns about illegal immigration, but also the growing concerns about terrorism and crime. By 1996, America had experienced two terrorist attacks: the 1993 World Trade Center bombing and the 1995 Oklahoma City bombing. In response to growing concerns about terrorism and crime, Congress passed the Antiterrorism and Effective Death Penalty Act (hereinafter "AEDPA") in April 1996.⁶⁸ Title IV of the AEDPA focuses exclusively on immigrants, in particular on the removal and exclusion of "alien terrorists" and "criminal aliens."⁶⁹ Section 439 of the AEDPA authorizes state and local law enforcement officials to arrest and detain immigrants who had previously been convicted of a felony in the United States.⁷⁰ Interestingly, while the AEDPA focuses largely on excluding and detaining immigrants who pose a potential terrorist threat, an American citizen perpetrated the Oklahoma City bombing—the most devastating terrorist attack the country had suffered by this time.

Also in 1996, Congress signed the Illegal Immigration Reform and Immigrant Responsibility Act (hereinafter "IIRIRA") into law as Division C of the Omnibus Consolidation Appropriations Act of 1996.⁷¹ The IIRIRA was the most significant piece of legislation dealing with illegal immigration since the IRCA. This Act used a system of tougher border patrol⁷² and interior

⁶⁸ Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) 1214.

⁶⁹ *Id.* §§ 401-43.

⁷⁰ *Id.* § 439.

⁷¹ Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) 3009.

⁷² *Id.* §§ 101-12.

enforcement⁷³ to deal with both illegal entry and expired visas. Instead of attempting to deter the employment of undocumented immigrants as the IRCA did, the IIRIRA focused directly on deterring and punishing immigrants through the use of civil, and in some limited instances criminal, penalties against the immigrants themselves.⁷⁴ The IIRIRA also instructed the Attorney General to set up an “automated entry and exit control system” to determine whether temporary residents overstayed their visas.⁷⁵

While the AEDPA discussed local law enforcement’s involvement in apprehending and detaining criminal aliens, the IIRIRA went a step further by discussing local law enforcement’s involvement in apprehending violators of civil immigration laws. The IIRIRA adds a provision to the INA permitting the Attorney General to enter into written agreements with state or local officials to perform the functions of immigration officers.⁷⁶ This provision requires, however, that state or local officers “be qualified to perform” the relevant functions of immigration officers, which includes that they have had “adequate training.”⁷⁷ The IIRIRA also makes it clear that no agreement is necessary for a state or local officer to report information to the Attorney General with regard to someone’s immigration status or to cooperate with the Attorney General in identifying, apprehending, detaining, or removing immigrants “not lawfully present.”⁷⁸ The first state to take advantage of this

⁷³ *Id.* §§ 131-34.

⁷⁴ *Id.* §§ 105, 108 (codified at 8 U.S.C. §§ 1325, 758). Section 105 places fines upon “any alien who is apprehended while entering (or attempting to enter) the United States at any time or place other than as designated by immigration officers” *Id.* § 105. Section 108 imposes criminal penalties on “high speed flight[s] from . . . immigration checkpoint[s].” *Id.* § 108.

⁷⁵ *Id.* § 110 (codified at 8 U.S.C. § 1221).

⁷⁶ *Id.* § 133 (codified at 8 U.S.C. § 1357(g)).

⁷⁷ *Id.*

⁷⁸ *Id.* (codified at 8 U.S.C. § 1357(g)(10)).

provision was Florida, six years after the IIRIRA passed.⁷⁹

Many immigration scholars and immigrant advocates criticize the 1996 laws for being overly inclusive and unnecessarily harsh on immigrants when the primary aim was to prevent terrorism and crime.⁸⁰ In the legislators' drive to tackle "criminal aliens," they created laws which severely penalized immigrants for crimes committed years ago by making certain offenses automatic grounds for deportation, regardless of when the offenses occurred.⁸¹ The 1996 legislation represents what many refer to as the increasing "criminalization" of immigration law, as the fields of criminal law and immigration law became increasingly intertwined.⁸² It also represents the growing tendency to equate illegal immigration with criminality and terrorism.

III. Immigration Policy at the Turn of the Millennium

Despite the growing hostility toward immigrants in the mid-1990s, or perhaps because of it, immigrant advocates appeared to be successful in changing the tone of immigration policy by the end of the twentieth century. The "draconian" 1996 legislation prompted immigrant advocates to increase efforts to liberalize the nation's immigration policy.⁸³ Many lawmakers also began to

⁷⁹ McKenzie, *supra* note 17, at 1156.

⁸⁰ In fact, upon signing the AEDPA into law, President Clinton himself acknowledged the over-inclusiveness of the Act. Johnson, *supra* note 19, at 878 (citing Statement of the President on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 17 WEEKLY COMP. PRES. DOC. 719 (Apr. 24, 1996) (stating that the AEDPA "makes a number of major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism")).

⁸¹ *Id.*

⁸² See generally Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669 (1997).

⁸³ Hines, *supra* note 65, at 39, 40.

second-guess the wisdom of the 1996 laws.⁸⁴ In the beginning of the twenty-first century, the Supreme Court struck down some of the provisions of the IIRIRA as invalid.⁸⁵ Also important, public attitudes toward immigrants improved by 2000.⁸⁶

Barbara Hines and Michael Welch credit two factors for influencing attitudes toward immigrants. In the late twentieth and early twenty-first century, the Hispanic population was growing and it became increasingly clear that this group would constitute an important political constituency.⁸⁷ Second, the nation's economic condition improved toward the end of the 1990s, which made immigrants appear as less of an economic threat.⁸⁸ More people saw low-wage immigrant workers as necessary for filling labor shortages, rather than as workers who were taking away citizens' jobs.⁸⁹ Moves were being made to develop more temporary worker programs for Mexican migratory workers, and as late as September 9, 2001, bilateral talks between Mexico and the United States made a new legalization program for undocumented immigrants seem like a very real possibility.⁹⁰ By the fall of 2001, immigrant advocates had high hopes that they would have much success in reversing the tide of anti-immigration legislation and policy.

⁸⁴ *Id.* at 40; see also MICHAEL WELCH, DETAINED: IMMIGRATION LAWS AND THE EXPANDING INS JAIL COMPLEX 180 (2002).

⁸⁵ Hines, *supra* note 65, at 40 (citing *INS v. St. Cyr*, 533 U.S. 289 (2001); *Zadvydas v. INS*, 533 U.S. 678 (2001)).

⁸⁶ WELCH, *supra* note 84, at 180.

⁸⁷ *Id.*; see also Hines, *supra* note 65, at 41.

⁸⁸ WELCH, *supra* note 84, at 180 (discussing the shift in public opinion polls which showed that in 1994, 63% of the public saw immigrants as "an economic drain on the country," and that in 2000, only 38% held similar views); see also Hines, *supra* note 65, at 41.

⁸⁹ Hines, *supra* note 65, at 41.

⁹⁰ *Id.* at 42.

IV. Immigration Policy in the Aftermath of 9/11

Whatever the hopes of immigrant activists before September 11, 2001, everything changed afterwards. Soon afterward, President Bush announced that the nation would be engaged in an unconventional “war” aimed at defeating “the global terror network.”⁹¹ Part of the domestic manifestation of this conflict was an immediate targeting of immigrants and harshening of immigration laws. The 9/11 criminal investigations immediately focused on immigrants, primarily men from predominantly Muslim countries in the Middle East and South Asia. Although none of the immigrants detained in the initial FBI investigations were charged with connections to terrorism, the INS, working with the FBI, used civil immigration laws to detain, investigate, and deport aliens.⁹² In addition, Congress immediately reacted with legislation aimed at deterring and punishing “terrorist attacks in the United States and around the world” and enhancing “law enforcement investigatory tools.”⁹³ The USA PATRIOT Act dramatically increased the federal government’s surveillance and investigative powers and also contained many provisions affecting immigrants. For instance, it expanded the ability to detain and deport non-citizens who are deemed a “security risk.”⁹⁴

⁹¹ President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001) (transcript *available at* <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>).

⁹² See generally U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (Apr. 2003), *available at* <http://www.fas.org/irp/agency/doj/oig/detainees.pdf> [hereinafter *OIG Report*].

⁹³ The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

⁹⁴ See Patricia Medige, *Immigration Issues in a Security-Minded America*, 33 COLO. LAW. 11, 19 (2004).

While federal policy continued to apply increased scrutiny to Arab and Muslim immigrants,⁹⁵ it appeared that all immigrants came under scrutiny in post-9/11 America. As news reports surfaced suggesting that improved immigration enforcement and communication could have provided clues to the hijackers and their plot,⁹⁶ immigration reform became an important battlefield in the “war on terrorism.”⁹⁷ The AEDPA indicated that policymakers had already drawn a link between terrorism and immigration, but this link was furthered after 9/11. The conceptual link between immigration and terrorism is perhaps made most clear by the abolishment of the INS and the reorganization of its functions in the Department of Homeland Security (DHS), whose primary mission is preventing terrorist attacks and reducing the country’s vulnerability to terrorism.⁹⁸ Furthermore, public opinion seemed to support measures aimed at reducing immigration and more strictly enforcing immigration laws.⁹⁹ Legislators soon began to

⁹⁵ For example, the INS created a system of “special registration” in 2002 for male visa-holders from predominantly Muslim countries. 67 Fed. Reg. 52,584 (Aug. 12, 2002).

⁹⁶ See, e.g., Philip Shenon & David Johnston, *Two Agencies Say Silence Prevented Pair’s Tracking*, N.Y. TIMES, Oct. 2, 2002, at A17.

⁹⁷ Newspaper headlines and story placement reveal the popular association between immigration and the war on terrorism. See, e.g., Matthew L. Wald, *Officials Arrest 104 Airport Workers in Washington Area*, N.Y. TIMES, Apr. 24, 2002, at A13 (discussing the arrests of undocumented immigrant airport employees). Although this story did not indicate that any of the employees were tied to terrorism, it appeared in a feature section titled “A Nation Challenged.”

⁹⁸ Homeland Security Act of 2002, Pub. L. No. 107-296 § 111 (Nov. 25, 2002). The INS was dissolved, and its functions were replaced by three DHS bureaus: the Bureau of Citizenship and Immigration Services (USCIS), which handles immigration services; the Bureau of Immigration and Customs Enforcements, which oversees the interior enforcement functions; and the Bureau of Customs and Border Protection, which polices the nation’s borders. See Medige, *supra* note 94, at 11. Some immigration scholars, while alarmed by the placement of immigration powers in the DHS, believe that the separation of immigration service and enforcement functions into different agencies is a positive change. See, e.g., Romero, *supra* note 21, at 51, 52.

⁹⁹ See Hines, *supra* note 65, at 45 (discussing two public opinion polls

attack any measures aimed at relaxing immigration laws as potential threats to national security.¹⁰⁰

V. The Proposed Legislation

In some ways, the CLEAR Act is a continuation of the IIRIRA. The CLEAR Act seeks to punish immigration violators by increasing the civil and criminal penalties provided in the IIRIRA.¹⁰¹ The 2005 bill goes even further by completely criminalizing the unlawful presence of immigrants; under the CLEAR Act of 2005, it is a felony to be in the country in violation of the INA.¹⁰²

This Act, however, handles the problem of limited resources in a different way from its predecessors. Whereas earlier legislation appropriated increased spending for federal immigration enforcement, particularly border patrol,¹⁰³ the new legislation seeks to incorporate resources from outside federal immigration agencies. By authorizing state and local agencies to carry out the functions of immigration officers, hundreds of thousands of police officers would be able to fill the large gaps left by the limited number of federal immigration investigators.¹⁰⁴

The bill does not stop at merely affirming the authority of state and local law enforcement agencies to enforce immigration laws; it establishes a program to provide incentives for local police to enforce immigration laws. Under the CLEAR Act, any state that has a statute,

conducted in aftermath of September 11th).

¹⁰⁰ *Id.*

¹⁰¹ H.R. 3137 § 4(b), (c).

¹⁰² H.R. 3137 § 4(a). The "felony" language is an addition to the initial CLEAR Act of 2003, H.R. 2671.

¹⁰³ See IRCA § 111; IIRIRA §§ 101-103.

¹⁰⁴ See Press Release, Norwood, June 30, 2005, *supra* note 2; see also *CLEAR Act 2003 Hearing*, *supra* note 5, at 30 (prepared statement of James R. Edwards, Ph.D.) (noting that 2,000 immigration investigators currently cover the entire nation and that funding for interior enforcement is only one-fifth the amount used for border enforcement).

policy, or practice prohibiting law enforcement from enforcing immigration laws will have certain federal funds withheld from it.¹⁰⁵ Any withheld funds would be reallocated to states that do comply with the Act's provisions.¹⁰⁶ Furthermore, the bill requires state and local law enforcement agencies to provide the Department of Justice and the Department of Homeland Security with information on detained immigration violators via the National Crime Information Center database.¹⁰⁷ The CLEAR Act also requires that the DHS produce a training manual, a "pocket guide," and training programs for use by local law enforcement agencies.¹⁰⁸ It does not, however, require that state or local officers have any special training before assisting in federal immigration enforcement.¹⁰⁹ Under the Act, state and local officers are given personal and agency immunity for any liability arising out of the enforcement of federal immigration law.¹¹⁰

The CLEAR Act was first introduced in the House of Representatives in 2003 and was referred to the House Judiciary Committee where a hearing on it was held before the Subcommittee on Immigration, Border Security, and Claims.¹¹¹ Four witnesses were present at the hearing, with all but one testifying in favor of the CLEAR Act.¹¹² Still, the hearing was far from being one-sided, as several committee members spoke fervently against the Act.¹¹³ The CLEAR Act stalled in Congress and died despite

¹⁰⁵ H.R. 3137 § 3(a).

¹⁰⁶ *Id.* § 3(c).

¹⁰⁷ *Id.* § 5.

¹⁰⁸ *Id.* § 10.

¹⁰⁹ *Id.* § 10(e)(3).

¹¹⁰ *Id.* § 110.

¹¹¹ Cong. Index 35,038 (2003-2004) v.2.

¹¹² *CLEAR Act 2003 Hearing, supra* note 5.

¹¹³ *See, e.g., id.* at 3-6 (statements by Rep. Lee, Member, H. Subcomm. on Immigration, Border Sec., and Claims), 6-8 (statements by Rep. Sanchez, Member, H. Subcomm. on Immigration, Border Sec., and Claims), 9 (statements by Rep. Lofgren, Member, H. Subcomm. on Immigration, Border Sec., and Claims).

having 125 co-sponsors.¹¹⁴ However, it was quickly reintroduced in June 2005. The new legislation includes changes that reflect some of the previous concerns expressed about the Act,¹¹⁵ as well as provisions that strengthen its impact.¹¹⁶ At this writing, the CLEAR Act has seventy-four co-sponsors.¹¹⁷

The CLEAR Act's parallel in the Senate is the Homeland Security Enhancement Act (hereinafter "HSEA").¹¹⁸ The HSEA is also a carry-over from the 108th Congress. It was first introduced by Senator Jeff Sessions (AL) on November 20, 2003,¹¹⁹ and reintroduced in June 2005.¹²⁰ The HSEA is substantially similar to the CLEAR Act; in fact, the CLEAR Act of 2005 appears to have been amended to more closely follow the HSEA.¹²¹ At present, the HSEA has three sponsors.¹²²

¹¹⁴ Bill Status & Summary for the 108th Congress, H.R. 2671, <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR02671:@@L&summ2=m&> (last visited May 26, 2006).

¹¹⁵ For example, apparently to address concerns that the legislation would overburden police, the 2005 Act was amended to require the DHS to pay training costs, H.R. 3137 § 10(d), while the 2003 Act allowed for a fee to be charged, H.R. 2671 § 109(b)(1).

¹¹⁶ See *supra* note 104.

¹¹⁷ Bill Summary & Status for the 109th Congress, H.R. 3137, <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:h.r.02671> (last visited May 26, 2006).

¹¹⁸ Homeland Security Enhancement Act (HSEA) of 2003, S. 1906, 108th Cong. (2003), available at <http://www.theorator.com/bills108/s1906.html> (last visited July 6, 2006); Homeland Security Enhancement Act (HSEA) of 2005, S. 1362, 109th Cong. (2005), available at <http://thomas.loc.gov/cgi-bin/query/z?c109:S.1362>: (last visited July 6, 2006).

¹¹⁹ Bill Status & Summary for the 108th Congress, S. 1906, <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:s.01906>: (last visited May 26, 2006).

¹²⁰ Bill Summary & Status for the 109th Congress, S.1362, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:s.01362>: (last visited May 26, 2006).

¹²¹ One key difference is the HSEA makes "unlawful presence" a misdemeanor offense, while the CLEAR Act makes it a felony offense. S. 1362 § 5(a); H.R. 3137 § 4(a).

¹²² Bill Status & Summary, S. 1906, *supra* note 119.

VI. Potential Dangers of the Legislation

Opponents of the CLEAR Act have many complaints and concerns about it.¹²³ Two of the most frequently cited reasons for opposing the CLEAR Act as bad policy are (1) that the Act would have the danger of impairing the jobs of police; and (2) that the legislation would likely lead to the abuse of non-citizens and ethnic minorities.

A. Implications for Law Enforcement

Even those who support stricter penalties on undocumented immigrants and strict enforcement of immigration laws should recognize that the CLEAR Act has the potential to do more harm than good. In particular, the CLEAR Act could have a damaging impact upon state and local law enforcement agencies by placing unnecessary burdens upon them. The new law is unnecessary because earlier legislation allowed room for local police to cooperate with and assist federal immigration agents.¹²⁴ In addition, local police are authorized to enforce criminal laws against anyone, including undocumented immigrants, and courts have held that local police are not precluded from enforcing laws against immigrants.¹²⁵ The primary job of state and local law enforcement, however, is

¹²³ See, e.g., *CLEAR Act 2003 Hearing*, *supra* note 5, at 35-37 (statement of Gordon Quan, Mayor Pro Tem, Houston, TX); ACLU Statement, *supra* note 15; People for the American Way, *State and Local Police Enforcement of Immigration Law: What Are the Issues?* <http://www.pfaw.org/pfaw/general/default.aspx?oid=13338> (last visited May 26, 2006).

¹²⁴ See 8 U.S.C. § 1357(g)(10) (2006).

¹²⁵ See *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983) (holding that federal immigration law does not preempt every state activity involving aliens); *Zapeda v. U.S. Immigration & Nationalization Serv.*, 753 F.2d 719, 731-32 (9th Cir. 1983) (holding that the INS is not prohibited from obtaining assistance from local police agencies).

protecting the public from criminal activity, not getting rid of undocumented immigrants who are not committing crimes.

Thus, the CLEAR Act would unnecessarily add an extra burden to already taxed local agencies.¹²⁶ Not only does it ask local officers to assist with federal immigration investigations, it essentially authorizes them to act as immigration agents. Furthermore, the Act would penalize states and agencies by cutting funds if they chose not to enforce immigration laws.¹²⁷ This essentially amounts to coercing states to carry out supposedly voluntary functions.¹²⁸ Since 9/11, police officers have been asked to be the “first responders” to acts of terrorism.¹²⁹ Placing an extra burden on them would make it increasingly difficult for them both to be “first responders” and to continue the normal duties of their work.

The CLEAR Act may further frustrate the efforts of police by making their criminal investigation tasks more difficult. In particular, many police departments fear that by becoming quasi-immigration agents, they will lose trust and respect within immigrant communities.¹³⁰ As earlier

¹²⁶ *CLEAR Act 2003 Hearing*, *supra* note 5, at 38-39 (prepared statement by Gordon Quan) (discussing the financial burdens state and local police already face).

¹²⁷ H.R. 3137 § 3(a).

¹²⁸ *CLEAR Act 2003 Hearing*, *supra* note 5, at 2 (statement of Rep. Hostetler, Chairman, House Subcomm. on Immigration, Border Sec., and Claims) (discussing the discretion retained by police under the Act); *see also* INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE (IACP), *Enforcing Immigration Law: The Role of State, Tribal and Local Law Enforcement* 5 (Nov. 30, 2004), <http://www.theiacp.org/documents/pdfs/Publications/ImmigrationEnforcementconf%2Epdf> (stating the position of the IACP that any legislation enlisting the assistance of local police in immigration enforcement “be based on completely *voluntary cooperation*” and not “seek to coerce cooperation through the use of sanction mechanisms that would withhold federal assistance funds”).

¹²⁹ *CLEAR Act 2003 Hearing*, *supra* note 5, at 4 (statements by Rep. Lee).

¹³⁰ *See* Laura Parker, *Police Departments Balk at Idea of Becoming “Quasi-INS Agents,”* USA TODAY, May 7, 2002, at 8A.

reports on illegal immigration noted, undocumented immigrants are often afraid to approach police.¹³¹ Many local law enforcement agencies have worked hard, and continue to work hard, to gain the trust of immigrant communities.¹³² This is true even when local police do not actively enforce immigration laws. Undocumented immigrants will become even more hesitant to inform officers of crimes if they know that these officers routinely interrogate people about their immigration status. This would not only put victims at greater risk, but it would also decrease the likelihood of apprehending many criminal offenders.¹³³ For example, some police fear that the CLEAR Act would make battered immigrant women less likely to report domestic abuse.¹³⁴

The 2005 bill was amended to address some of these concerns by clarifying that police are not *required* to report or arrest crime victims or witnesses.¹³⁵ It still, however, gives police the freedom to do so, in part because agencies concerned with preserving their federal funding will want to prove that they are complying with the Act's provisions. Furthermore, even if police do not report victims or witnesses, the reputation of police as immigration enforcers in other contexts likely will be sufficient to deter immigrants from wanting any contact with police. Being seen as immigration officers not only has the potential to damage the police's relationship with undocumented immigrants, but legal immigrants and

¹³¹ See H.R. REP. NO. 99-682, at 49.

¹³² See *CLEAR Act 2003 Hearing*, *supra* note 5, at 185 (letter from Ray Samuels, Chief of Police, Newark, CA).

¹³³ See *id.* at 179-180 (letter from Ellen T. Hanson, Chief of Police, Lenexa, KY).

¹³⁴ IACP, *supra* note 128, at 5; see also Karin Almjeld, *CLEAR Act Threatens Immigrant Women Victims of Violence*, NAT'L NOW TIMES (Winter 2003-04), <http://www.now.org/nnt/winter-2004/clear.html> (arguing that the CLEAR Act "would undermine the Violence Against Women Act" and the Victims of Trafficking and Violence Prevention Act).

¹³⁵ H.R. 3137 § 3(b).

citizens may also lose their trust in the police upon hearing the experiences of people they know being apprehended for immigration offenses.

For such reasons, many police departments and law enforcement organizations throughout the country oppose the CLEAR Act. According to the Chief of Police of Newark, California, “the CLEAR Act would make state and local law enforcement officers’ jobs nearly impossible and move us further from the goal we all share of making our communities safer.”¹³⁶

B. Civil Rights Implications

Another key concern about the CLEAR Act is that it could lead to widespread civil rights violations and ethnic profiling. Presumably, one of the goals of the legislation’s supporters is to put local police officers in a position to discover illegal immigrants during the course of their work. Supporters of the Act appear to support the proposition that police officers could detain and question people based on a suspicion of illegal immigration status.¹³⁷ What qualifies, then, as justifiable or reasonable suspicion? Immigrants today are identified largely by their race and ethnicity. Professor Victor Romero explains that immigration in America has been historically intertwined with race, and a presumption remains that citizens are either white or black,

¹³⁶ *CLEAR Act 2003 Hearing*, *supra* note 5, at 185 (letter from Ray Samuels).

¹³⁷ *See id.* at 40-45 (statements by Gordon Quan and Rep. Hostetler). Rep. Hostetler asked Gordon Quan, Mayor Pro Tem and City Council Member of Houston, a series of questions regarding Houston Police Department policy. Rep. Hostetler seemed unsatisfied with Quan’s answers that officers are not permitted to ask about citizenship status, detain, or arrest someone based solely on a suspicion of illegal status, though they can contact INS regarding someone known to be an illegal immigrant who is arrested on separate criminal charges. Hostetler seems to prefer a policy of questioning, and perhaps even detaining, people based on suspicion.

while non-citizens are Latino or Asian.¹³⁸ To be sure, since the elimination of the national origins quota system in 1965, most immigrants have come from Latin America and Asia.¹³⁹

The CLEAR Act's authorization thus presents the danger that officers, who are under pressure by the Act to uncover immigration violators, may question and even detain people based solely on their ethnicity or assumed ethnicity.¹⁴⁰ Because the Act immunizes local officers and agencies from any civil liability arising from their enforcement of immigration laws,¹⁴¹ it provides a convenient way to bypass judicial limitations on race and ethnicity-based immigration enforcement.¹⁴²

Proponents of the CLEAR Act and related measures argue that police are already trained to avoid racial profiling.¹⁴³ It is true that, prior to the 9/11 attacks, law enforcement agencies around the country appeared increasingly concerned with the problems of racial profiling.¹⁴⁴ It is also true, however, that racial profiling has long been practiced by law enforcement.¹⁴⁵ Furthermore, attitudes toward racial and ethnic profiling

¹³⁸ Romero, *supra* note 21, at 52-54.

¹³⁹ *Id.* at 54.

¹⁴⁰ There is evidence that the INS itself often used ethnic profiling in its immigration enforcement. See Sameer M. Ashar, *Immigration, Enforcement, and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185, 1194 (2002) (discussing a study by NYU School of Law Immigrant Rights Clinic, which revealed that INS agents targeted people playing "Spanish music" and having "Hispanic appearance" in its immigration enforcement).

¹⁴¹ H.R. 2671 § 110.

¹⁴² See *United States v. Brignion-Ponce*, 422 U.S. 873, 885-86 (1975) (holding that while border patrol may take into account a number of factors in deciding whether reasonable suspicion exists to stop a car, suspicion is not reasonable when it is based on ethnicity alone).

¹⁴³ See Sessions & Hayden, *supra* note 17, at 340.

¹⁴⁴ Kevin R. Johnson, *Racial Profiling After September 11: The Department of Justice Guidelines*, 50 LOY. L. REV. 67, 67 (2004).

¹⁴⁵ See Ashar, *supra* note 140, at 1193-94.

changed drastically after 9/11. Prior to 9/11, polls showed that most Americans believed racial profiling should be eliminated.¹⁴⁶ Public opinion changed after 9/11, however, to accept profiling “based on race, national origin, nationality, and religion.”¹⁴⁷ The federal government’s own policies show that in the post-9/11 world, it is acceptable, even expected and desirable, to use ethnicity as the primary cause for suspicion.¹⁴⁸

Furthermore, the lack of training that officers would receive under the CLEAR Act is alarming. The CLEAR Act and HSEA provide for the creation of a “training manual” and “pocket guide” for law enforcement agencies and call for the DHS to make training sessions available through various means.¹⁴⁹ Both acts, however, make clear that these provisions “shall not be construed as making any immigration-related training a requirement for, or prerequisite to” immigration enforcement.¹⁵⁰ Thus, the acts would authorize local police to act in the same capacity as immigration officers, although providing little or no training. Immigration law is one of the most complicated and oft-changing areas of American law.¹⁵¹ It even can be difficult for immigration attorneys and federal immigration agents to keep track of the various nuances that are continually changing in the field of immigration law. How, then, are local and state police officers, whose jobs are not to specialize in immigration matters, to adequately understand the complex laws?

¹⁴⁶ Sharon L. Davies, *Reflections on the Criminal Justice System after September 11: Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45, 46 n.5 (citing Gallup poll in which 81% of respondents revealed a disapproval of profiling practices).

¹⁴⁷ Johnson, *Racial Profiling*, *supra* note 144, at 68; *see also* Davies, *supra* note 146, at 45 n.6.

¹⁴⁸ *See* Ashar, *supra* note 140, at 1191-96.

¹⁴⁹ H.R. 3137 § 10; S. 1362 § 9.

¹⁵⁰ H.R. 3137 § 10(e)(3); S. 1362 § 9(c).

¹⁵¹ *See* Medige, *supra* note 94, at 11 (discussing the “steady stream of federal and state legislation [that] has changed aspects of immigration law and the rights of immigrants over the past several years”).

The lack of adequate training increases the very real potential for mistreatment and civil rights violations. The immunity provisions of the CLEAR Act¹⁵² make the rectification of such problems unlikely. Indeed, supporters of the CLEAR Act are right to worry about the potential liability that local police face when they engage in immigration enforcement. In just one of many prior instances, police officers in Katy, Texas, faced lawsuits in 1994 stemming from the detentions of over eighty Latinos suspected of being illegal immigrants, but who were, in fact, either United States citizens or legal residents.¹⁵³ Such examples also prove that opponents of the CLEAR Act have a basis for their concerns about the potential for abuse at the hands of poorly trained police who are charged with the difficult task of enforcing immigration laws along with their many other duties.

V. The Policy Behind the CLEAR Act

A. The False Presumption that Illegal Immigrants are Terrorists and Criminals

The CLEAR Act also should be rejected because it is premised on bad policy: the equation of illegal immigrants to terrorists and criminals. The presumption that illegal immigrants are dangerous criminals is clear from the title of the legislation: the Clear Law Enforcement for *Criminal* Alien Removal Act. The presumption is also clear from the rhetoric of the Act's supporters. Representative Norwood, the main sponsor of the CLEAR Act, contends that drastic measures are necessary to stop "the hordes of vicious foreign criminals invading our country to murder, rape, and molest

¹⁵² H.R. 3137 § 11.

¹⁵³ IACP, *supra* note 128, at 4.

Americans.”¹⁵⁴ Indeed, proponents of the CLEAR Act and HSEA come to press conferences and legislative sessions equipped with stories of undocumented immigrants who had committed heinous crimes against Americans.¹⁵⁵ Proponents also carry with them the stories of the nineteen foreign hijackers who terrorized America and the three hijackers who had previous encounters with police.¹⁵⁶ Measures like the CLEAR Act, we are to assume, would prevent such terrorists and criminals from infiltrating America.

Little besides anecdotal evidence exists, however, that tackling illegal immigration and removing undocumented immigrants will make the country any safer. Very seldom is any proof presented that immigrants, documented or undocumented, are more likely than others to commit violent crimes.¹⁵⁷ The construction of the debate, though, leads one to believe that undocumented immigrants are by nature terrorists or violent criminals of some kind. Such rhetoric ignores proof that the majority of

¹⁵⁴ Representative Charlie Norwood, A Five-Minute Address to the U.S. House of Representatives (Apr. 29, 2005), *available at* http://www.house.gov/apps/list/speech/ga09_norwood/CLEARspeech.html.

¹⁵⁵ See Prepared Statement of Michelle Malkin, *supra* note 9 (discussing gang rape of a Queens, NY mother by illegal aliens with long criminal records and an illegal alien accused of kidnapping and raping a nine-year old girl); *CLEAR Act 2003 Hearing*, *supra* note 5, at 2 (statements by Rep. Hostetler) (recounting the same stories of Queens mother and nine-year old girl); Press Release, Norwood, June 30, 2005, *supra* note 2 (telling story of “an illegal alien and convicted criminal being sought for the . . . kidnapping, molestation, and murder” of a young girl in Georgia).

¹⁵⁶ See Prepared Statement of Sen. Saxby Chambliss, *State and Local Authority to Enforce Immigration Law: Evaluating a Unified Approach for Stopping Terrorists*, Testimony before the U.S. Comm. on the Judiciary, Subcomm. on Immigration, Border Sec., and Citizenship (Apr. 22, 2004), *available at* http://judiciary.senate.gov/member_statement.cfm?id=1156&wit_id=2624.

¹⁵⁷ See Legomsky, *supra* note 56, at 109 (noting that “[i]mmigrants . . . are neither more nor less law-abiding than the native-born U.S. population”).

undocumented immigrants come to America seeking work,¹⁵⁸ not to wreak havoc.¹⁵⁹ Under the CLEAR Act, even a young child brought to the country by his or her parents could be considered a “criminal.” Furthermore, a large percentage of those considered “illegal immigrants” are actually people who entered the country on legal visas, but who overstayed or otherwise violated the terms of their visas.¹⁶⁰ This could include, for example, those who mistakenly believe they do not need to renew their temporary visas while in the process of having their status adjusted. Under the CLEAR Act, a person would have to prove that “an exceptional and extremely unusual hardship or physical illness” caused his or her visa violation in order to not be charged with a felony offense.

Furthermore, by perpetuating the myth of immigrants as terrorists and criminals, legislation like the CLEAR Act has the potential to increase racial tensions.¹⁶¹ As noted earlier, race and immigration are closely linked in the minds of most Americans.¹⁶² People of certain races and ethnicities are generally presumed to be immigrants. The CLEAR Act, by painting the picture of immigrants in a dangerous light, will possibly lead to increased stereotyping and marginalization of certain races and ethnicities.

¹⁵⁸ See Espenshade, *supra* note 38, at 211.

¹⁵⁹ See *Immigration & Naturalization Services (INS) Interior Enforcement Strategy: Hearing before the Subcomm. on Immigration, Border Sec., and Claims of the H. Comm. on the Judiciary*, 107th Cong. 2 (2002) (statement of Rep. Gekas, Chairman of the Subcomm. on Immigration, Border Sec., and Claims).

¹⁶⁰ Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants & the National Imagination*, 28 CONN. L. REV. 555, 594 n.95 (1996).

¹⁶¹ Romero, *supra* note 21, at 52.

¹⁶² *Supra* notes 140-41 and accompanying text.

B. The Consequences of Co-opting Immigration Policy into Anti-Terrorism Policy

It is clear that immigration policy is inextricably linked with anti-terrorism policy.¹⁶³ As a result, it has become impossible to discuss immigration without reference to national security concerns. The fact that immigration policy is shaped in the context of other policy is not new. Immigration has often been an area of law highly vulnerable to changes in other areas that have little to do with immigration. For example, immigration became a key issue during the heated welfare debate of the mid-1990s. California's Proposition 187 reflects this attitude because the legislation was aimed at denying public benefits to "undeserving" aliens.¹⁶⁴ Congress also included provisions excluding immigrants from public benefits in its anti-welfare legislation, the Personal Responsibility and Work Reconciliation Act of 1996.¹⁶⁵ In the mid-1990s, immigration policy was co-opted by economic and welfare policy; in post-9/11 America, immigration policy has been co-opted by anti-terrorism policy.

When legislators view immigration exclusively in terms of national security, they lose sight of what really is appropriate *immigration* policy.¹⁶⁶ Consider that immediately preceding the 9/11 attacks, lawmakers were on the verge of enacting measures that would liberalize immigration policy.¹⁶⁷ Immediately after the attacks, however, the direction of immigration policy abruptly changed. This was, more than anything, a reactionary move. The nation was justifiably shaken by the attacks and

¹⁶³ See *supra* Part II.D.

¹⁶⁴ See *supra* notes 59-64 and accompanying text.

¹⁶⁵ Pub. L. No. 104-193, 110 Stat. 2105 (1996).

¹⁶⁶ See Tumlin, *supra* note 16, at 1228 (stating that "immigration policy has lost its independent policy agenda").

¹⁶⁷ See generally, Hines, *supra* note 65.

was left feeling very vulnerable. New immigration proposals were evaluated, first-and-foremost, on the basis of national security policy.¹⁶⁸ Even those legislators who generally support liberalized immigration reform are understandably hesitant to oppose any measure characterized as “necessary” for national security.

At the same time, the CLEAR Act and other immigration legislation in its vein are not merely reactions to the threat of terrorism. Rather, the emergence of what some label a “new nativist” movement, which is characterized by harsh immigration laws, predated 9/11,¹⁶⁹ although the movement lost some steam at the turn of the millennium.¹⁷⁰ The 9/11 attacks created a new incentive to fight illegal immigration, and, for many, the attacks justified disdain toward immigrants. Linking immigration with terrorism, however, merely masks those factors that initially led to the anti-immigration reaction of the previous century.¹⁷¹ Supporters of new, stricter immigration measures now feel justified in arguing that lax immigration enforcement can, and has, produced disastrous effects on the country. It becomes easier for the nation to invoke harsher immigration reform under this guise of national security.

VII. Conclusion

Given the history of United States immigration law and policy, that immigration is playing such a key role in a national security-minded America comes as no surprise.

¹⁶⁸ Tumlin, *supra* note 16, at 1228.

¹⁶⁹ See generally, IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan F. Perea ed., New York Univ. Press 1997).

¹⁷⁰ See *supra* Part II.C.

¹⁷¹ See Chavez, *supra* note 56, at 69 (listing as factors related to increasing anti-immigration sentiment xenophobia as a result of an increasing number of non-white immigrants, economic recession, the failure of previous laws, and emerging nationalism).

As immigration attorney Asli Bali points out, “periods of national crisis have revealed the vulnerability of immigrants’ rights to hysteria and repression.”¹⁷² In many ways, the current “war on terrorism” has manifested itself in the domestic front as a “war on immigration.” The CLEAR Act is one example of the anti-immigration and anti-terrorism forces colliding, because the Act is justified on the grounds of protecting America from both the “criminal” aliens and the potential terrorists coming across our borders. The Act, however, seems to rely on the false presumption that undocumented immigrants are inherently dangerous. Moreover, by coercing local and state police to act as immigration agents, the CLEAR Act has the potential to prevent effective community policing while increasing the potential for abuse of ethnic minorities at the hands of police. Hopefully, the language of national security will not cloud these very real concerns from the view of the lawmakers currently considering the Act. Lawmakers should recognize that, more than anything, the CLEAR Act is unnecessary anti-immigration legislation, and as such, it should be opposed.

¹⁷² Asli U. Bali, *Changes in Immigration Law and Practice After September 11: A Practitioner’s Perspective*, 2 CARDOZO PUB. L. POL’Y & ETHICS J. 161 (2003).

**STATE V. PIERCE: REFINING THE STANDARD FOR THE
ADMISSION OF POLYGRAPH EVIDENCE**

Anton L. Jackson

I. Introduction

Although the inadmissibility of polygraph evidence in the course of a criminal trial has been well-established law in Tennessee for almost fifty years, the quandary presented itself two years ago in *State v. Pierce*.¹ This case forced the Tennessee Supreme Court to balance the need to protect state citizens against sexual predators with the well-established rules of evidence which hold that “polygraph evidence is inherently unreliable, and therefore irrelevant and inadmissible.”² In *Pierce*, the issue before the court was whether polygraph test results, which were performed as part of a sex offender risk assessment and encouraged by leading psychosexual analysts and researchers, were admissible in the non-capital sentencing hearing of a convicted sex offender.³

By refusing to admit polygraph evidence in sentencing hearings, the Tennessee Supreme Court has drawn the proverbial line in the sand and refuses to breach well-established rules of evidence in favor of additional proposed safeguards against sexual predators. As our society attempts to combat the seemingly growing occurrence of sex crimes, especially those committed against children, we must not let our fear of this devious behavior circumvent the fair application of our laws. We must recognize that manipulation and perversion of legal

¹ 138 S.W.3d 820 (Tenn. 2004).

² *State v. Pierce*, 138 S.W.3d 820, 826 (Tenn. 2004); *State v. Torres*, 82 S.W.3d 236, 252 (Tenn. 2002); *State v. Irick*, 762 S.W.2d 121, 127 (Tenn. 1988).

³ *Pierce*, 138 S.W.3d at 823.

principles—in this case, the attempt to introduce polygraph evidence in violation of the rules of evidence—lends itself only to the invalidation of these rules, and ultimately, the legal institution itself.

This note provides support for the Tennessee Supreme Court's holding in *Pierce*. First, it evaluates the reliability of polygraph examinations and the rationale for their widespread inadmissibility as evidence. Secondly, it examines the use of polygraphs on sexual offenders and weighs the positive and negative contributions they lend to preventing recidivism. This note concludes by re-enforcing the notion that it is the responsibility of the judiciary to establish and affirm well-established principles, here, the rules of evidence and the inadmissibility of polygraph evidence, even if the goal in violating these principles is to provide assistance in preventing vile and despicable behavior.

II. The Process by Which *Pierce* was Sentenced

Gregory Pierce was indicted for the rape of a twelve year-old girl after it was discovered that he had impregnated her.⁴ He pled guilty to the lesser charge of attempted rape of a child and received an eight-year sentence.⁵ It remained in the discretion of the trial court to determine the manner in which he would serve the sentence upon the completion of a risk assessment analysis to be performed by the Counseling and Clinical Services (hereinafter "CSS").⁶ The purpose of such an analysis is to evaluate the offender's risk of re-offending, and provide a sentencing recommendation to the court based on the results of the risk assessment.⁷

The subsequent report compiled by Dr. Michael

⁴ *Id.*

⁵ *Id.* at 821.

⁶ *Id.* at 822.

⁷ *Id.*

Adler, clinical director of CCS, detailed Pierce's personal history, including his work history, an assessment of his social and emotional skills, and statements by Pierce detailing his crime and history of sexual offense.⁸ Pierce stated that he had not committed any sexual offenses prior to the offense for which he was being sentenced.⁹ The report also included the results of a Penile Plethysmograph (hereinafter "PPG"), a test administered to measure sexual responsiveness to a variety of stimuli across variables such as gender, age, and sexual activity.¹⁰ Pierce's PPG showed arousal responses to females from infants to age seventeen, male infants, males from age two to five, and males from age twelve to seventeen.¹¹ Dr. Adler's report stated that Pierce's statements and his PPG were inconsistent and suggested that the court administer a polygraph examination to verify Pierce's stated criminal history.¹²

Thereafter, the court ordered Pierce to complete the polygraph before it rendered a sentencing decision.¹³ The results of the exam indicated that Pierce's claims that he had not committed any prior sexual offenses were untruthful. As a consequence, the trial court decided to consider the examination in sentencing Pierce stating, "[T]he Court can only conclude I've got a . . . person that sexually is going to act out with children."¹⁴ Based in part on the results of the polygraph examination, the trial court denied Pierce's request for probation or another alternative form of sentencing.¹⁵

Pierce appealed, and the Tennessee Court of Criminal Appeals ruled that because he had failed to object

⁸ *Id.*

⁹ *Id.*

¹⁰ *In re Care and Treatment of Tucker*, 578 S.E.2d 719, 721 (S.C. 2003).

¹¹ *Pierce*, 138 S.W.3d at 822.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 823.

¹⁵ *Id.*

to consideration of the polygraph results during his sentencing hearing, he had waived his right to appeal that issue.¹⁶ However, the court nonetheless noted Pierce's argument and stated that they could not address this issue because it was not within the scope of their review.¹⁷ Pierce appealed the finding of the Court of Criminal Appeals to the Tennessee Supreme Court, which granted his application for permission to appeal.¹⁸ In considering whether this evidence should have been excluded, the Tennessee Supreme Court held that "the trial court erred by considering the results of Pierce's polygraph examination" in sentencing him.¹⁹

Reaffirming prior decisions which held that polygraph examinations were unreliable, the Tennessee Supreme Court ruled that "polygraph examination results, testimony on such results, [and] testimony on a defendant's willingness or refusal to submit to a polygraph examination" were inadmissible in all sentencing hearings.²⁰

III. The Development of the Admissibility of Polygraph Evidence

In Tennessee, as in most states, long-standing precedent holds that the results of a polygraph are "inherently unreliable" and, as consequence, irrelevant and inadmissible.²¹ The Tennessee Supreme Court's 1958

¹⁶ *Id.* at 823-24.

¹⁷ *Id.* at 824.

¹⁸ *Id.*

¹⁹ *Id.* at 826.

²⁰ *Id.* However, the court did conclude under de novo review that "Pierce was not a suitable candidate for probation," even after excluding the polygraph evidence. *Id.* at 827.

²¹ See *Torres*, 82 S.W.3d at 252 n.20; *State v. Campbell*, 904 S.W.2d 608, 614-15 (Tenn. 2001); *State v. Hartman*, 42 S.W.3d 44, 60 (Tenn. 2001); *Irick*, 762 S.W.2d at 127; *Grant v. State*, 374 S.W.2d 391, 392 (Tenn. 1964); *Marable v. State*, 313 S.W.2d 451, 458 (Tenn. 1958).

decision in *Marable v. State* laid the framework for the inadmissibility of polygraph examinations and lie detector tests in this state.²² In *Marable*, the court held that “[t]he unquestioned and unanimous weight of authority and general rule is that the results of a lie detector test are inadmissible in evidence.”²³ The issue in *Marable* was whether it was reversible error for a witness to testify that a defendant, upon request to take a polygraph examination, asked to speak to a lawyer. After discussion with that lawyer, the defendant refused to take the polygraph.²⁴ The court reiterated the inadmissibility of the polygraph examination, but declined to find reversible error, noting that the objectionable testimony was subject to cross-examination by defendant’s counsel.²⁵ Six years later, the Court expanded the scope of *Marable* in *Grant v. State*.²⁶

Grant involved a contempt of court conviction against an attorney for “suborning perjury.”²⁷ Four men were indicted for illegally possessing, transporting, and selling whiskey.²⁸ The men testified on their own behalf, and the court found they perjured themselves under the instruction of their attorney, Leo Grant.²⁹ In Grant’s trial, defendant Grant attempted to introduce evidence of a polygraph examination he had been given. The trial court held that the results of the polygraph were inadmissible, but did allow evidence of the “circumstances” surrounding the polygraph examination—specifically questions and answers surrounding the examination.³⁰ In finding that the lower court had erred, the Tennessee Supreme Court upheld the established precedent that polygraph

²² 313 S.W.2d 451.

²³ *Id.* at 458.

²⁴ *Id.*

²⁵ *Id.* at 455-56, 458-59.

²⁶ 374 S.W.2d at 392.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

examinations are inadmissible.³¹ Moreover, by excluding the circumstances surrounding the examination and the willingness of the defendant to take or refuse the test, the court further broadened the scope of *Marable*.³²

While most cases involving the introduction of polygraph evidence involve the examination of a defense witness, the Tennessee Supreme Court has also ruled on the admissibility of polygraph evidence as it relates to witnesses who testify for the state.³³ In *State v. Irick*, the court found no distinction between the polygraph evidence of a state's witness and polygraph evidence of a defendant's witness, holding both inadmissible.³⁴

In *Irick*, Billy Ray Irick was indicted for common law murder, felony murder, aggravated rape by vaginal penetration, and aggravated rape by anal penetration of a seven-year-old child.³⁵ The jury found Irick guilty of first degree murder during the perpetration of a felony and two counts of aggravated rape.³⁶ The relevant issue in *Irick* was whether a defendant can introduce polygraph examination evidence of a state's witness.³⁷

Prior to *Irick*, most cases involving polygraph evidence dealt with the state attempting to introduce evidence gathered during a polygraph examination of the defendant himself or of a defense witness. In *Irick*, however, the defense wished to introduce the polygraph examination of the victim's step-father, whose polygraph revealed "deception to a relevant question" regarding his answer to whether he had anything to do with the death of

³¹ *Id.*

³² *Id.*

³³ See *Irick*, 762 S.W.2d at 127 (preventing capital defendant from impeaching the state's witness with a polygraph examination which stated that the witness exhibited signs of deception during the exam).

³⁴ *Id.* at 127.

³⁵ *Id.* at 124.

³⁶ *Id.*

³⁷ *Id.* at 127.

his step-daughter.³⁸ The court found no distinction between the admissibility of a polygraph examination for a state's witness compared to that of a defense witness and further stated that no existing precedent distinguished the two.³⁹

The new sphere of litigation in the area of the admissibility polygraph evidence is the issue of whether to allow the introduction of polygraph evidence during sentencing proceedings. The Tennessee Supreme Court first addressed this issue in *State v. Hartman*.⁴⁰ In *Hartman*, the court upheld the lower court's refusal to allow the introduction of the defendant's polygraph examination results as mitigating evidence in his capital sentencing hearing.⁴¹ The defendant argued that the rules of evidence should not be strictly applied "as to infringe a defendant's constitutional right to present mitigating evidence at a capital sentencing procedure."⁴² While the court agreed with the defendant's assertion that the rules of evidence should not be strictly applied in capital sentencing hearings as to preclude relevant, mitigating evidence, the court stated that the inherent unreliability of the polygraph rendered the examination irrelevant.⁴³ As a result, the court ruled that polygraph examinations are inadmissible in capital sentencing hearings.⁴⁴

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 42 S.W.3d 44 (Tenn. 2001).

⁴¹ *Id.* at 60.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

IV. *State v. Pierce* Refines the Standard for the Admissibility of Polygraph Evidence

A. Applying the Rules of Evidence to Non-Capital Sentencing Hearings

The issue now presented in *Pierce* is whether the rules of evidence should be strictly applied in a non-capital sentencing hearing, or more specifically, whether polygraph examinations are admissible in such hearings.⁴⁵ This issue has become increasingly important as our society wrestles with combating the seemingly endless stream of sexual offenses and re-offenses. It has become virtually impossible to identify first-time sexual offenders prior to their initial acts. Therefore, the focus has shifted to identifying those convicted offenders who demonstrate a high probability of recidivism.⁴⁶

Tennessee has adopted legislation intended to identify sexual offenders who may have a high risk of re-offending.⁴⁷ Under this legislation, a convicted sex offender who is seeking probation or an alternative sentence must submit to an assessment to determine the offender's risk of recidivism.⁴⁸ Polygraph examinations are encouraged as useful tools in identifying and evaluating those offenders who have a high risk of re-offending.⁴⁹

⁴⁵ *Pierce*, 138 S.W.3d at 826.

⁴⁶ *Risk Assessment*, ¶ 4 (2005), Association for the Treatment of Sexual Abuse, available at <http://www.atsa.com/ppAssessment.html> (last visited July 8, 2006).

⁴⁷ See TENN. CODE ANN. § 39-13-705 (2003).

⁴⁸ See TENN. CODE ANN. § 39-13-704(d)(2) (2003) (establishing standardized procedures for evaluating sexual offenders as developed and prescribed by the Sex Offender Treatment Board).

⁴⁹ *Pierce*, 138 S.W.2d at 825 (noting the Sex Offender Treatment Board's use of the publication, PRE-SENTENCE PSYCHOSEXUAL EVALUATION: ADULT SEXUAL OFFENDERS during its annual training). The manual encourages the use of "polygraph and physiological measures within [the] report." *Id.* at 825 n.9 (citing PSYCHOSEXUAL EVALUATION MANUAL, PRE-SENTENCE PSYCHOSEXUAL EVALUATION: ADULT SEXUAL OFFENDERS 6).

The psychology community has wholly accepted polygraph examinations as a reliable resource in its assessment of sexual offenders.⁵⁰ The *Pierce* court decided, however, that these examinations were not sufficiently reliable to be introduced in the court proceedings.⁵¹

The Tennessee Supreme Court ruled that the trial court erred by considering the *Pierce*'s polygraph examination in determining his sentence.⁵² In so ruling, the court followed Tennessee's well-established precedent and relied on the *Marable*, *Grant*, and *Irick* decisions.⁵³ Citing *Hartman*, the court reasoned that since the introduction of polygraph evidence to mitigate a sentence in favor of the defense was impermissible, the introduction of polygraph evidence to enhance a sentence in favor of the state was also impermissible.⁵⁴

As previously mentioned, the Tennessee Court of Criminal Appeals ruled *Pierce* had failed to object to the consideration of the polygraph results in his sentencing, and therefore, had waived his right to appeal the issue.⁵⁵ The intermediate court found that there was still sufficient evidence in the risk assessment report without the polygraph examination to deny *Pierce*'s request for probation.⁵⁶ The Supreme Court, while holding that the trial court was clearly in error in admitting the polygraph evidence, agreed with the Court of Appeals and upheld the denial of probation because of the other information contained in the risk assessment report.⁵⁷

⁵⁰ *Id.*

⁵¹ *Id.* at 828.

⁵² *Id.* at 826.

⁵³ *Id.*

⁵⁴ *Id.* at 826.

⁵⁵ *Id.* at 823-24.

⁵⁶ *Id.*

⁵⁷ *Id.*

B. The Relevance Standard as Applied to Polygraph Evidence

Tennessee Rule of Evidence 402 provides evidence that is not relevant is not admissible.⁵⁸ Relevant evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”⁵⁹ The unreliable nature of the polygraph is due to the “extreme polarization” within the scientific community about polygraph techniques.⁶⁰ Therefore, the potential unreliability of polygraph evidence is often cited as the reason for its exclusion.

A number of factors have been presented as possibly having an affect on polygraph results, including fatigue, amnesia, pathological lying, and the lack of fear of being caught in a lie.⁶¹ Herein lies the inherent problem of polygraph examinations; they are simply scientifically imperfect. The “lack of any indicia of reliability [of polygraph evidence] means it is not probative.”⁶² It is the probative factor that renders polygraph evidence inadmissible as a matter of law.⁶³ “Probative” is defined as “serving to establish or prove the truth.”⁶⁴ The very essence of state and federal rules of evidence is to establish this truth. Because polygraph evidence can neither establish nor prove truth, there is no justification in using

⁵⁸ TENN. R. EVID. 402.

⁵⁹ TENN. R. EVID. 401.

⁶⁰ *United States v. Scheffer*, 523 U.S. 303, 309 (1998).

⁶¹ *People v. Anderson*, 637 P.2d 354, 359 (Colo. 1981) (noting other factors such as emotional upset of the subject, drunkenness, subjection to drugs, bad physical or emotional condition, high blood pressure, hardening of the arteries, obesity, feeble-mindedness, psychotic condition, high blood pressure, use of antiperspirant, etc.).

⁶² *Hartman*, 42 S.W.3d at 60.

⁶³ TENN. R. EVID. 402.

⁶⁴ GILBERT'S LAW SUMMARIES: POCKET SIZE LAW DICTIONARY 258 (West Group 1997).

such technology to determine the fate of an individual, regardless of the gravity of the crime.

C. Tennessee Supreme Court Acknowledges Societal Concerns in Reaching Its Decision

Our society has become increasingly concerned with addressing sexual offenders, particularly those who prey upon children. Legislatures have established Sex Offender Registries, and courts have upheld their constitutionality.⁶⁵ Society has enacted stronger legislation for the punishment of sex crimes. In our haste to combat this terror, however, we must be certain that we do not abridge the protections that the judicial system seeks to afford all citizens.

The Tennessee Supreme Court upheld the established protections of the judicial system despite pressures from a fearful society. The easy remedy would have been to allow polygraph examinations in sentencing hearings for sex offenders and to dispense sentences based on the results of such tests. Then, if a polygraph examination indicated that a convicted sex offender was lying, a court would institute a harsher sentence, thus ensuring that the system works. Utilizing such a system would allow the masses to express a collective sigh of relief knowing that the world is a safer place.

However, consider a second alternative to this scenario in which a convicted sex offender is to be sentenced for his transgression. He claims that he no longer has deviant tendencies, after which he is administered a polygraph examination. The test determines that he is telling the truth. The court then gives the convicted sex offender a reduced sentence, and he is

⁶⁵ See, e.g., *Young v. State*, 806 A.2d 233 (Md. 2002); *Jane Doe I v. Phillips*, 194 S.W.3d 833 (Mo. 2006); *Commonwealth v. Howe*, 842 A.2d 436 (Pa. 2004).

reintroduced to society after serving less time in prison. Unfortunately, the offender deceived the lie detector and quickly re-offends. Had the court relied upon human evaluation and reliable evidence, then the offender would have been subjected to more intense scrutiny.

Finally, consider a third alternative. In this scenario, an offender is falsely assessed by the polygraph, and his freedom is stripped due to his nervousness or a change in his body temperature. He serves a longer sentence despite a lower actual risk of recidivism than the offender in the second scenario.

In all three scenarios, the polygraph, which assesses the offender's alleged credibility, fails due to the offender's psychological or physical makeup.⁶⁶ The rules of evidence are established to prevent such discrepancies and exclude evidence which is not completely reliable. By excluding evidence that is known to be unreliable, such as polygraph evidence, we can more confidently ensure the release of those who are least likely to re-offend while separating those with a greater chance of recidivism from their potential victims. In *Pierce*, the Tennessee Supreme Court refused to submit to the pressure of societal fears and adhered to well-established evidentiary principles.

V. Conclusion

Polygraph examinations carry no evidentiary weight in Tennessee. They are inherently unreliable and, therefore, inadmissible.⁶⁷ The court is charged with protecting the integrity of its decisions. Therefore, only relevant and reliable evidence can be introduced to support or impeach the credibility of a witness. The Tennessee Supreme Court took a stand in *Pierce v. State* to ensure that

⁶⁶ David C. Raskin & Charles R. Hones, *The Comparison Question Test*, in HANDBOOK OF POLYGRAPH TESTING 1 (Murray Kleiner ed., Academic Press 2002).

⁶⁷ *Pierce*, 138 S.W.2d at 826.

only the most reliable evidence would be considered in all sentencing hearings, whether for capital or non-capital offenses, and to ensure that courts would render fair and equal decisions based on that evidence.

