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Jeffrey Bellin

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# ELIMINATING RULE 609 TO PROVIDE A FAIR OPPORTUNITY TO DEFEND AGAINST CRIMINAL CHARGES: A PROPOSAL TO THE ADVISORY COMMITTEE ON THE FEDERAL RULES OF EVIDENCE

*Jeffrey Bellin\**

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\* The author is the Mills E. Godwin, Jr., Professor at William & Mary Law School, and a former federal prosecutor. In Fall 2023, the Federal Advisory Committee on Evidence Rules “invited five of the best Evidence scholars in the country to speak on the following topic: ‘What are the one or two amendments to the Evidence Rules that are at the top of your wish list?’” ADVISORY COMMITTEE ON EVIDENCE RULES, AGENDA FOR COMMITTEE MEETING OCTOBER 27, 2023, at 1 (2023), [https://www.uscourts.gov/sites/default/files/2023-10\\_evidence\\_rules\\_agenda\\_book\\_final\\_10-5.pdf](https://www.uscourts.gov/sites/default/files/2023-10_evidence_rules_agenda_book_final_10-5.pdf) [<https://perma.cc/5PRD-X86A>]. The following is the written submission that accompanied the author’s presentation to the committee on October 26, 2023, in Minneapolis, Minnesota. Supplemental citations and other minor changes introduced in the law review editing process are indicated in brackets. The citations in the original submission are modified to conform to the *Fordham Law Review*’s citation practices without indication. This Essay was prepared as a companion to the Philip D. Reed Lecture held on October 27, 2023, at the University of St. Thomas School of Law, under the sponsorship of the Judicial Conference Advisory Committee on Evidence Rules.

## INTRODUCTION

Federal Rule of Evidence 609 authorizes the admission of prior convictions to impeach criminal defendants who testify. And in this important and uniquely damaging application, the [r]ule's logic fails, distorting American trials and depriving defendants of a fair opportunity to defend against the charges. The Advisory Committee [on Evidence Rules (the "Advisory Committee")] should propose the elimination of Rule 609 and prohibit cross-examination with specific instances of a criminal defendant's past conduct when those instances are unrelated to the defendant's testimony and unconnected to the case.

This short essay begins by setting out the proposed rule change alongside a proposed Advisory Committee [n]ote. The balance of the essay elaborates on the [n]ote's discussion. The discussion highlights the proposal's consistency with recent White House and [U.S.] Department of Justice [(DOJ)] policy initiatives and the unique opportunity that the elimination of Rule 609 presents to the Advisory Committee to improve the fairness and legitimacy of American trials.

## I. PROPOSED RULE CHANGE AND ADVISORY COMMITTEE NOTE

**Rule 608. A Witness's Character for Truthfulness or Untruthfulness<sup>1</sup>**

... (b) Specific Instances of Conduct. ~~Except for a criminal conviction under Rule 609,~~ Extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

- (1) the witness (*if the witness is not a defendant in a criminal case*); or
- (2) another witness whose character the witness being cross-examined has testified about . . . .

~~Rule 609. Impeachment by Evidence of a Criminal Conviction~~

*Deleted* [see Appendix for current text of Rule 609]

**Advisory Committee Note**

Rule 609 is deleted, leaving the impeachment of a witness's character for truthfulness to Rule 608.

Rule 609 failed to give concrete direction to the courts, instead condensing an unresolved policy debate into an amorphous balancing test. That balancing test has proven unworkable.<sup>2</sup> Rule 609 case[ ]law is marred by

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1. All proposed additions to the rule are indicated with italicized text, and omissions are crossed out.

2. See generally Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L. REV. 289 (2008); Ric Simmons, *An Empirical Study of Rule 609 and Suggestions for Practical Reform*, 59 B.C. L. REV. 993 (2018).

inconsistent and erroneous rulings.<sup>3</sup> And because defendants can sidestep Rule 609 impeachment by declining to testify, a primary impact of the rule is that defendants remain silent at trial, depriving jurors of the opportunity to hear from a witness whose account may be critical to accurate factfinding.

While the removal of Rule 609 will result in more defendant testimony, it will not upset the balance of trials. Prosecutors have little need to impeach the credibility of criminal defendants through indirect means such as prior convictions. Jurors already view the defendant's testimony with skepticism. As the [U.S. Court of Appeals for the] Second Circuit explains: "Nothing could be more obvious, and less in need of mention to a jury, than the defendant's profound interest in the verdict."<sup>4</sup> There is little added to the credibility assessment when jurors are told that testifying defendants—already powerfully incentivized to shade their testimony to preserve life and liberty—have a criminal record. And there is a substantial danger that the jury will consider prior conviction impeachment for an improper purpose, such as to reduce the government's burden of proof, or assume that the defendant is the kind of person who would commit the charged offense.

Even without Rule 609, prosecutors will still be able to introduce evidence of a defendant's prior crimes through other avenues provided by the rules, such as Rule 404(b)(2) (other crimes admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident), Rule 404(a)(2)(A) (rebutting defense character evidence), Rule 413 (past sexual offenses), and Rule 414 (past child molestation). With the elimination of Rule 609, however, the admission of prior crimes will no longer be tied to the defendant's decision to testify, removing a substantial burden on the constitutional right to testify in one's own defense.<sup>5</sup>

Rule 608 is amended to prevent the migration to that rule of the same impeachment of defendants that previously occurred under Rule 609. Character impeachment of other witnesses will continue to be permitted, however. For example, under Rule 608(b)(1), parties can cross-examine witnesses (other than the criminal defendant) with specific instances relevant to that witness's character for truthfulness, including instances that resulted in a criminal conviction. And any party can always introduce noncharacter impeachment, such as evidence of a witness's bias, under the normal relevance rules.<sup>6</sup> For similar rules forbidding impeachment of defendants with criminal convictions, see HAW[.] R. EV[ID]. 609; KAN[.] STAT. ANN. § 60-421 [(2024)]; [and] MONT[.] R. EVID. 609.

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3. *See supra* note 2.

4. *United States v. Gaines*, 457 F.3d 238, 248 (2d Cir. 2006).

5. *Rock v. Arkansas*, 483 U.S. 44, 49 (1987) ("[A] defendant in a criminal case has the right to . . . testify in his or her own defense.").

6. *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

## II. RULE 609 IN THE COURTS

Rule 609 permits the admission of criminal convictions to impeach a witness's character for truthfulness.<sup>7</sup> Because Rule 608(b)(1) already permits cross-examination with specific instances of a witness's conduct, Rule 609's primary significance is that it creates a specific mechanism for the admission of a testifying defendant's prior convictions.<sup>8</sup> As a technical matter, Rule 609(a)(1)(B) only permits this evidence if its probative value with respect to the character for truthfulness of the defendant-witness outweighs its prejudicial effect.<sup>9</sup> And this balance should generally foreclose impeachment.<sup>10</sup> But many judges reflexively admit prior convictions under Rule 609 as the price the defendant must pay to take the witness stand.<sup>11</sup>

For example, the [U.S. Court of Appeals for the] Ninth Circuit in *United States v. Perkins*<sup>12</sup> approved the admission of a defendant's prior bank robbery conviction in a bank robbery trial with this reasoning:

In this case, defendant's credibility and testimony were central to the case, as Perkins took the stand and testified that he did not commit the robbery. We therefore conclude that the district court did not abuse its discretion in denying Perkins's motion to preclude the government from asking him about his recent prior conviction for bank robbery. . . .<sup>13</sup>

The language is notable not for what it says but for what it omits. The court's reasoning does not distinguish the case from any other, relying solely on the fact that the defendant (Perkins) denied committing the bank robbery to support the introduction of his prior bank robbery conviction.

A recent [U.S. Court of Appeals for the] Eighth Circuit opinion, *United States v. Cooper*,<sup>14</sup> reveals the same flaw, explaining why a defendant's six-year-old aggravated assault conviction was admissible to impeach his character for truthfulness:

Under Rule 609(a)(1)(B), a crime punishable by more than one year in prison "must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant." Fed. R. Evid. 609(a)(1)(B). Here, [defendant-]Cooper's credibility was at issue: the jury heard testimony

7. [FED. R. EVID. 609.]

8. [*Id.* 608(b)(1), 609.]

9. That is the rule for felonies. For dishonesty crimes, Rule 609(a)(2) permits impeachment without balancing. *See id.* 609(a)(2).

10. *See* Bellin, *supra* note 2, at 338 (explaining why, for criminal defendants, "Rule 609 dictates exclusion" in the "vast run of cases").

11. *See* Simmons, *supra* note 2, at 1034; *cf.* *United States v. German*, No. 22-11811, 2023 WL 1466609, at \*1 (11th Cir. Feb. 2, 2023) ("A criminal defendant who chooses to testify places his credibility in issue as does any witness; therefore, he is subject to impeachment through evidence of prior convictions."); *United States v. Reza*, No. 21-CR-1042, 2023 WL 1070474, at \*5 (D.N.M. Jan. 27, 2023) (responding to defendant's motion to exclude prior convictions by noting that "[prior conviction evidence under Rule 609] is the norm and admissible under current law" (alteration in original)).

12. [937 F.2d 1397 (9th Cir. 1991).]

13. *Id.* at 1406.

14. 990 F.3d 576 (8th Cir. 2021).

from Hoff, H.K., and another witness implicating Cooper in drug distribution, while Cooper denied his involvement.

We agree with the district court that the prior felony conviction was probative as to Cooper's credibility as a witness. The district court conducted the appropriate balancing and concluded that the probative value outweighed its prejudicial effect. We find no error in the district court's analysis.<sup>15</sup>

Again, there is nothing in this reasoning that is unique to this case. In every criminal trial where the defendant testifies, a government witness "implicat[es]" the defendant, and the defendant "denie[s]" his involvement."<sup>16</sup>

These binding federal appellate opinions establish that the defendant's denial of guilt triggers impeachment with prior convictions, even if the prior conviction is for the same crime (as in *Perkins*) or has minimal relevance to credibility (as in *Cooper*). Illustrating how far this logic extends, in 2023 a federal district court ruled that "the government may impeach [the defendant] Mr. Crittenden with the thirteen prior convictions included in the government's response to Mr. Crittenden's motion *in limine*."<sup>17</sup> If Rule 609 permits the introduction of [thirteen] prior convictions, it is hard to imagine any impeachment that would be sufficiently prejudicial to be excluded.

Importantly, these examples do not prove that federal courts always allow prior conviction impeachment. A 2018 survey of federal district court cases and judges found that district courts admit about two[-]thirds of testifying defendants' prior convictions.<sup>18</sup> The survey also identified "some troubling trends."<sup>19</sup>

Judges admit crimes of violence at an oddly high rate: over half of the prior convictions for assault-type crimes were admitted . . . . Judges also admitted three quarters of the prior convictions for drug possession . . . . Perhaps most troubling of all is that in approximately 18% of the cases, the prior conviction was admitted—including the name of the crime—even though it was identical or nearly identical to the crime for which the defendant was currently on trial. This implies that a substantial minority of the judges admit prior convictions in which the unfair prejudice almost certainly outweighs the probative value. This is not surprising: [a separate] survey [of judges] indicated a number of outlying judges who would admit nearly every prior conviction; thus, we can assume that some judges will be very liberal in their courtroom rulings. Nevertheless, evidence that such a significant percentage of rulings are so out of step with the mainstream

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15. *Id.* at 585 (emphasis added) (quoting FED. R. EVID. 609(a)(1)(B)).

16. *Id.*

17. *United States v. Crittenden*, No. 23-CR-18, 2023 WL 2967891, at \*4 (N.D. Okla. Apr. 17, 2023); *see also* *United States v. Taylor*, 44 F.4th 779, 794 (8th Cir. 2022) (sex trafficking defendant impeached with "26- and 28-year-old convictions" for armed burglary and forgery); *United States v. German*, No. 22-11811, 2023 WL 1466609, at \*2 (11th Cir. Feb. 2, 2023) ("Because his credibility was a key issue at his trial, the conviction's probative value outweighed any prejudicial effect despite it being over ten years old.").

18. *See* Simmons, *supra* note 2, at 1033.

19. *Id.* at 1034.

consensus provides support for the argument that the rule may need to be amended to avoid these types of rulings.<sup>20</sup>

This inconsistency is not surprising because, as explained below, Rule 609 is inherently contradictory.<sup>21</sup> But inconsistency is also to be expected due to the infrequency of appellate review. There will not be any review when a district court excludes prior convictions since defendants will not want to, and prosecutors cannot, appeal such rulings.<sup>22</sup> In addition, the [U.S.] Supreme Court has held that a defendant can only appeal the admission of prior convictions under Rule 609 if the defendant testifies and allows the prosecutor to introduce the impeachment.<sup>23</sup> If, as is more frequent, the defendant declines to testify once the judge rules that prior conviction impeachment is permitted, the in limine ruling authorizing that impeachment becomes unreviewable.<sup>24</sup> Thus, most Rule 609 decisions avoid review, exacerbating the evidentiary free-for-all described above.

In sum, the present situation in the courts is that the admission of a testifying defendant's prior convictions depends on the policy preferences of the assigned trial judge. That undermines the trial system's legitimacy and fairness. And it is anathema to a system of evidence rules and to the Advisory Committee tasked with overseeing those rules.

### III. THE OUTDATED ARGUMENTS IN FAVOR OF RULE 609

There are two arguments typically offered to support Rule 609, one logical and one rhetorical. The argument based in logic is that a prior conviction reveals the witness's flawed character and that this flaw suggests that the witness may be lying. Here is Justice [Oliver Wendell] Holmes[, Jr.]'s] classic explanation of the concept in 1884:

[W]hen it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact. The evidence

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20. *Id.*

21. In addition, some courts will admit prior convictions but exclude reference to the type of conviction—something that is in tension with the rule, *see* *United States v. Estrada*, 430 F.3d 606, 616 (2d Cir. 2005), and that recent research suggests particularly disadvantages Black defendants. *See* James A. Macleod, *Evidence Law's Blind Spots*, 109 IOWA L. REV. 189, 189 (2023) (“[W]hen mock jurors lacked information about the nature of the defendant’s prior conviction, they rated the Black defendant more likely to be guilty than the white defendant.”).

22. *See, e.g.,* *United States v. Ember*, 726 F.2d 522, 524 (9th Cir. 1984) (“Even if the rulings excluding the evidence were erroneous, double jeopardy bars this appeal if the district court’s action is properly characterized as a judgment of acquittal.”).

23. *Ohler v. United States*, 529 U.S. 753, 757 (2000); *Luce v. United States*, 469 U.S. 38, 43 (1984). Review is also foreclosed if a district court refuses to rule on whether impeachment will be allowed should the defendant testify. *See United States v. Howell*, 17 F.4th 673, 682 (6th Cir. 2021).

24. *See, e.g.,* *United States v. Janqdhari*, 755 F. App’x 127, 130 (3d Cir. 2018) (declining to review ruling that prior robbery conviction was admissible under Rule 609 in prosecution for robbery if defendant testified).

has no tendency to prove that he was mistaken, but only that he has perjured himself, and it reaches that conclusion solely through the general proposition that he is of bad character and unworthy of credit.<sup>25</sup>

The rhetorical argument comes through in a more recent judicial defense of the rule:

[C]onvicted felons are *not* generally permitted to stand pristine before a jury with the same credibility as that of a Mother Superior. Fairness is not a one-way street and in the search for truth it is a legitimate concern that one who testifies should not be allowed to appear as credible when his criminal record of major crimes suggests that he is not.<sup>26</sup>

Both arguments appeared when Congress first debated Rule 609 in 1974.<sup>27</sup> The chief proponents of prior conviction impeachment, Representative Lawrence Hogan (Maryland) and Senator John McLellan (Arkansas) waged extensive floor battles to preserve the practice. In the House, Hogan argued that there were two kinds of people: those with criminal records (“antisocial”) and those without (“law-abiding citizens”).<sup>28</sup> He asked: “Should a witness with an antisocial background be allowed to stand on the same basis of believability before juries as law-abiding citizens with unblemished records? I think not.”<sup>29</sup> Later he expanded on this worldview, contending on the House floor: “You simply cannot get away from the fact that, if a thief or perjurer is unworthy of belief, one might be even less inclined to believe a murderer, or assassin, or drug trafficker, or white slaver, or saboteur, or what have you.”<sup>30</sup>

After Hogan lost his floor battle, Senator McClellan took up the mantle on the Senate floor. McLellan argued (without evidence) that the House’s effort to eliminate prior conviction impeachment would increase crime: “The further we go in loosening up the laws, the more and more crime increases . . . Everything today is being done to find some way to protect the criminal, while society is forgotten.”<sup>31</sup> Senator Roman Hruska (Nebraska) rose to support McClellan during the Senate debate, emphasizing the importance of being able to impeach “thugs with prior criminal records.”<sup>32</sup> These arguments, which had failed in the House, succeeded in the Senate, ultimately sending the debate to a [c]onference [c]ommittee and preserving the prior conviction impeachment rule we have today.<sup>33</sup>

Proponents of Rule 609 focus on the value of impeachment generally, overlooking that impeachment that is permitted under Rule 609 would generally be permitted in similar fashion (even without Rule 609) under Rule

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25. *Gertz v. Fitchburg R. Co.*, 137 Mass. 77, 78 (1884).

26. *United States v. Lipscomb*, 702 F.2d 1049, 1077 (D.C. Cir. 1983) (MacKinnon, J., concurring).

27. *See* 120 CONG. REC. 2348, 2376 (1974).

28. *Id.*

29. *Id.*

30. *Id.* at 2380.

31. *Id.* at 37081.

32. *Id.* at 37077.

33. [*See id.* at 2381.]



608.<sup>34</sup> The primary significance of Rule 609 is its pathway to impeach criminal *defendants* who testify. And there, the arguments in favor of Rule 609 fail. As explained in the next sections, the rule provides no useful information to juries, while regularly depriving them of testimony from the person who knows the most about what occurred.<sup>35</sup>

As for the arguments summarized above, there is, of course, no evidence that Rule 609 impacts crime. And criminal justice policymakers no longer view the world through the simplistic “criminal” versus “law-abiding citizen” framework underlying the [r]ule. In fact, President [Joseph R.] Biden issued Executive Order 14,074 in May 2022 recognizing “the legacy of systemic racism in our criminal justice system” and the need to “work together to eliminate the racial disparities that endure to this day.”<sup>36</sup> Nowhere are these disparities more apparent within the evidence rules than in Rule 609, which disproportionately impacts Black defendants. While [8] percent of adults [in the United States] have felony convictions, the percentage is 23 percent for Black adults.<sup>37</sup>

President Biden’s executive order directs the government to “facilitat[e] reentry into society of people with criminal records, including by providing support to promote success after incarceration; sealing or expunging criminal records, as appropriate.”<sup>38</sup> In April 2023, the [DOJ] expressed a commitment to implement the order, stating: (1) “DOJ will advance efforts to expand access to record sealing and expungement for eligible individuals”; and (2) “DOJ will work to build understanding among policymakers and service providers of the barriers and obstacles that individuals must navigate upon returning to the community from incarceration and help problem solve solutions to those barriers.”<sup>39</sup> Eliminating Rule 609 fits squarely within the DOJ’s commitment.<sup>40</sup> The rule is premised on an outdated notion that then-

34. [See *supra* notes 25–29 and accompanying text.]

35. [See *infra* Parts IV–VI.]

36. Exec. Order No. 14,074, 87 Fed. Reg. 32945, 32945 (May 31, 2022).

37. See Sarah K.S. Shannon, Christopher Uggen, Jason Schnittker, Melissa Thompson, Sara Wakefield & Michael Massoglia, *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795, 1814 (2017) (reporting felony convictions as of 2010); Montré D. Carodine, “*The Mis-characterization of the Negro*”: A Race Critique of the Prior Conviction Impeachment Rule, 84 IND. L.J. 521, 544 (2009) (critiquing Rule 609’s disproportionate racial impact).

38. Exec. Order No. 14,074, 87 Fed. Reg. at 32958.

39. U.S. DEP’T OF JUST., REHABILITATION, REENTRY, AND REAFFIRMING TRUST, THE DEPARTMENT OF JUSTICE STRATEGIC PLAN PURSUANT TO SECTION 15(F) OF EXECUTIVE ORDER 14074, at 50, 53 (2023), [https://www.justice.gov/d9/2023-04/the\\_department\\_of\\_justice\\_strategic\\_plan\\_pursuant\\_to\\_section\\_15f\\_of\\_executive\\_order\\_14074.pdf](https://www.justice.gov/d9/2023-04/the_department_of_justice_strategic_plan_pursuant_to_section_15f_of_executive_order_14074.pdf) [https://perma.cc/6UEP-76H3].

40. See *id.* at 46, 55 (committing to “reduc[e] stigma upon release” and “facilitate reentry into society of people with criminal records”); cf. *Fact Sheet: President Biden’s Safer America Plan*, WHITE HOUSE (Aug. 1, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/01/fact-sheet-president-bidens-safer-america-plan-2/> [https://perma.cc/W4AK-B7QR] (including as one of bullet points for plan: “Help formerly incarcerated individuals successfully reenter society”); *Returning Citizens Empowered to Start and Grow Businesses Under Proposed Rule*, SBA (Sept. 14, 2023), <https://www.sba.gov/article/2023/09/14/returning-citizens-empowered-start-grow->

Senator Biden critiqued in 1974 as: “if you are a former convicted felon . . . your credibility should always be questioned the rest of your life.”<sup>41</sup>

#### IV. THE ABSENCE OF PROBATIVE VALUE

Rule 609 applies to all witnesses, but its primary significance is its application to criminal defendants who testify.<sup>42</sup> And whatever one wants to say about the general assumptions underlying Rule 609, the rule’s logic loses force in this critical context. That is because any generic value of prior convictions as credibility impeachment is overwhelmed by a criminal defendant’s inherent—and transparent—self-interest in avoiding conviction.

Every person faces a strong incentive to lie when accused of a crime. There are undoubtedly those, like Immanuel Kant, who will tell the unvarnished truth even if that means decades in prison.<sup>43</sup> But most people undoubtedly shade the truth to preserve their freedom. This pressure to lie was once viewed as so compelling that it justified a ban on interested-witness testimony altogether.<sup>44</sup>

The powerful self-interest in avoiding criminal punishment is common sense. With respect to critical facts and at strategic moments, typical defendants[—]like typical politicians, celebrities, and people generally[—]may omit facts and shade their testimony to place themselves in the best light.<sup>45</sup> As a consequence, jurors are skeptical of defendant testimony; and while jurors want to hear from defendants, they carefully scrutinize defendant testimony in light of the other evidence in the case.<sup>46</sup> Thus, in one experiment, jurors rated the defendants’ credibility as approximately [three] out of [ten] regardless of whether prior convictions were introduced, less than

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businesses-under-proposed-rule [<https://perma.cc/THG7-X55B>] (“Updated regulations would remove barriers to capital for entrepreneurs with certain types of justice involvement.”).

41. 120 CONG. REC. 37039, 37082 (1974). See *infra* notes 87–88 and accompanying text for then-Senator Biden’s argument against Rule 609 during the 1974 debate on the Senate floor.

42. [See *infra* Part VIII.]

43. Kant argued that people must always tell the truth regardless of the consequences. [See generally IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary Gregor trans., Lara Denis ed., Cambridge Univ. Press 2017) (1797).]

44. See *Ferguson v. Georgia*, 365 U.S. 570, 574 (1961) (“Disqualification for interest was thus extensive in the common law when this Nation was formed.”).

45. [Cf. *Williamson v. United States*, 512 U.S. 594, 608–09 (1994) (Ginsburg, J., concurring) (“A person arrested in incriminating circumstances has a strong incentive to shift blame or downplay his own role in comparison with that of others, in hopes of receiving a shorter sentence and leniency in exchange for cooperation.”).]

46. See Bellin, *supra* note 2, at 299 (“Jurors, who generally have little sympathy for a person charged with a crime, are well aware that even otherwise honest defendants have a strong incentive to shade their trial testimony in favor of acquittal.”); Richard D. Friedman, *Character Impeachment Evidence: Psycho-Bayesian (!?) Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 664 (1991) (critiquing the reasoning underlying Rule 609 as follows: “At first I thought it was very unlikely that, if Defoe committed robbery, he would be willing to lie about it. But now that I know he committed forgery a year before, that possibility seems substantially more likely.”).

half of the average credibility rating ([seven]) assigned to nonparty witnesses.<sup>47</sup>

Indeed, courts sometimes instruct juries to view defendant testimony with skepticism due to the defendant's "deep personal interest" in the verdict.<sup>48</sup> The modern trend, however, is to go without such instructions because, as the Second Circuit explains: "Nothing could be more obvious, and less in need of mention to a jury, than the defendant's profound interest in the verdict."<sup>49</sup>

Since everyone knows that criminal defendants face great pressure to lie when testifying, Rule 609 adds nothing legitimate to the process. Rule 609 admits prior convictions to suggest that the witness might lie under oath. But for criminal defendants, the pressure to lie created by the prospect of incarceration already establishes that point beyond doubt.<sup>50</sup> And the defendant's self-interest in liberty is many orders of magnitude greater than any hypothetical dishonesty-inducing character flaw revealed by a prior conviction.<sup>51</sup> If a defendant's self-interest in avoiding criminal punishment is analogized to a lake of credibility impeachment, the fact of a prior conviction is a drop of rain. Perhaps the raindrop adds something,<sup>52</sup> [b]ut its impact is too small to matter.

#### V. THE DANGER OF UNFAIR PREJUDICE

While prior convictions do not add anything significant to the jury's assessment of the criminal defendant's credibility as a witness, the introduction of the defendant's prior crimes has powerful side effects. The most obvious is that the jury will use the prior convictions for purposes that are not permitted by the evidence rules: namely, to convict the defendant based on past conduct, rather than present guilt.<sup>53</sup>

Exclusion of the defendant's prior crimes is a longstanding foundation of American criminal procedure. As the Supreme Court explained in 1948:

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47. Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37, 41 (1985).

48. *Reagan v. United States*, 157 U.S. 301, 304 (1895); see *United States v. Gaines*, 457 F.3d 238, 246 (2d Cir. 2006) ("We recognize that our precedents in this area include cases that find no error in similar jury instructions so long as the 'motive to lie' charge is 'balanced' by a further instruction that the motive does not preclude the defendant from telling the truth."); see also *United States v. King*, 485 F. App'x 588, 590 (3d Cir. 2012) (discussing this trend).

49. *Gaines*, 457 F.3d at 248.

50. Based on this argument, English courts have effectively abolished the practice. See *R v. Campbell* [2007] EWCA (Crim) 1472 [30]–[31] (appeal taken from Reading Crown Court) (UK).

51. See *Gaines*, 457 F.3d at 246–49.

52. In fact, there is some question whether it adds anything at all. There is little empirical evidence connecting prior convictions and lying and many reasons to suspect that the noise outweighs the signal. See Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563, 566 (2014) (critiquing convictions as an unreliable proxy for underlying conduct).

53. See *Michelson v. United States*, 335 U.S. 469, 475–76 (1948).

The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.<sup>54</sup>

Rule 609 creates an exception to this prohibition purportedly to open a window into "the witness's character for truthfulness."<sup>55</sup> But juries use prior convictions for other purposes even when instructed not to.<sup>56</sup> As the Advisory Committee's note to the 1990 [a]mendment to Rule 609 states, "in virtually every case in which prior convictions are used to impeach the testifying defendant, the defendant faces a unique risk of prejudice."<sup>57</sup> The [n]ote highlights the danger that "convictions that would be excluded under Fed. R. Evid. 404 will be misused by a jury as propensity evidence despite their introduction solely for impeachment purposes."<sup>58</sup> As the Supreme Court recognizes, that is not all. In addition, the jury may simply deem a defendant with a serious criminal record to be less deserving of their protection, reducing the burden of proof and undermining the presumption of innocence.<sup>59</sup> And in fact, this was the finding of a comprehensive study of criminal trials, where the authors found a correlation "in cases with weak evidence" between the jury's learning of a criminal record and conviction."<sup>60</sup>

## VI. DISTORTING THE TRIAL PROCESS

Defense attorneys recognize the tremendous damage wrought by the introduction of prior convictions. Consequently, a common response to an in limine ruling that a defendant's prior convictions will be admitted under Rule 609 is for the defendant to decline to testify.<sup>61</sup> This tactical retreat can be viewed as a kind of prejudice to the defendant, but it is more than that.

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54. *Id.*; see also *People v. Zackowitz*, 172 N.E. 466, 468 (N.Y. 1930) ("[A] defendant starts his life afresh when he stands before a jury, a prisoner at the bar.").

55. FED. R. EVID. 609.

56. See Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 426 (2018) (collecting empirical evidence of the phenomenon).

57. [FED. R. EVID. 609 advisory committee's note to 1990 amendment.]

58. [*Id.*]

59. See *Michelson*, 335 U.S. at 475–76; see also *Old Chief v. United States*, 519 U.S. 172, 180–81 (1997) (requiring redaction of name of prior conviction in felon in possession prosecutions due to the danger that juries will improperly use prior convictions to "generaliz[e] a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily)").

60. Theodore Eisenberg & Valerie P. Hans, *Taking A Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1357 (2009) ("Juries appear to rely on criminal records to convict when other evidence in the case normally would not support conviction.").

61. [See, e.g., Bellin, *supra* note 2, at 324 (discussing *United States v. Doyle*, 771 F.2d 250 (7th Cir. 1985)).]

When the evidence rules cause defendants to withhold their testimony, it is a perversion of the system itself.

The adversary process works best when both sides present relevant information to the jury. If the rules of evidence prevent that, the process suffers. That is why early Rule 609 case law highlighted “the importance of the defendant’s testimony” as a basis for excluding prior convictions offered as impeachment.<sup>62</sup> The courts reasoned that if the defendant’s testimony was important, *juries* suffered if the defendant declined to testify to avoid impeachment[—]sadly, this reasoning has faded from the case[ ]law as courts increasingly embrace prior conviction impeachment.<sup>63</sup>

Live testimony from the witnesses to disputed events is the American courts’ primary factfinding tool and a key contributor to the legitimacy of verdicts. Thus, when striking down obstacles to defendant testimony in 1987, the Supreme Court stated:

The conviction of our time is that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury.<sup>64</sup>

Yet testimony from the most knowledgeable witness is frequently missing from American trials, in large part because of Rule 609.<sup>65</sup> In every other context where someone is accused of wrongdoing, we instinctively seek out an explanation from the accused. Yet jurors frequently go without input from the accused in the most serious disputes of all—criminal trials.<sup>66</sup> It can be a mercy to permit a defendant to decline to testify when the defendant chooses silence.<sup>67</sup> It is not a mercy, however, when defendants remain silent because the evidence rules threaten to parade their criminal record before the jury if, and only if, they testify.

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62. *Id.* at 325 (discussing history of “the importance of the defendant’s testimony” factor).

63. *See id.* at 325 & n.137 (highlighting the “bizarre and as yet unexplained reversal,” where “the courts began to emphasize the necessity for prior conviction impeachment *precisely because* the defendant’s direct examination testimony was ‘important,’ ‘crucial,’ ‘central,’ ‘critical’ or, most poignantly, ‘of utmost importance’”).

64. *Rock v. Arkansas*, 483 U.S. 44, 54 (1987) (quoting *Washington v. Texas*, 388 U.S. 14, 22 (1920)); *see also* *Ferguson v. Georgia*, 365 U.S. 570, 582 (1961) (“[D]ecades ago the considered consensus of the English-speaking world came to be that there was no rational justification for prohibiting the sworn testimony of the accused, who above all others may be in a position to meet the prosecution’s case.”); *United States v. Nixon*, 418 U.S. 683, 709 (1974) (explaining that “[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive,” and “[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts”).

65. John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 491 (2008) (“In almost all instances in which a defendant with a prior record did not testify, counsel for the wrongfully convicted defendant indicated that avoiding impeachment was the principal reason the defendant did not take the stand.”). Defendants decline to testify in about 50 percent of trials. *See* Eisenberg & Hans, *supra* note 60, at 1373 tbl.2.

66. [See Bellin, *supra* note 56, at 417.]

67. U.S. CONST. amend. V.

The twisted incentives generated by Rule 609 require the large group of defendants who stand trial with prior convictions<sup>68</sup> to choose either to remain silent at trial or be impeached with their prior convictions. Studies show that defendants suffer regardless of which path they choose. If they remain silent, juries assume it is because they are guilty.<sup>69</sup> If they testify, juries hear about their prior record, undermining the presumption of innocence.<sup>70</sup>

This confluence of tactics and history creates one of the most indefensible scenarios in the American trial process—documented cases of *innocent* defendants who decline to testify in their own defense to avoid the introduction of prior convictions[] and are then convicted. In a study of defendants who were later cleared by post-conviction DNA testing, [Professor] John Blume found that 39 percent of these innocent defendants did not testify at their trials, 91 percent of those who did not testify had prior convictions, and that “[i]n every single case in which a [later exonerated] defendant with a prior record testified, the trial court permitted the prosecution to impeach the defendant with his or her prior convictions.”<sup>71</sup> Blume adds: “In almost all instances in which a defendant with a prior record did not testify, counsel for the wrongfully convicted defendant indicated that avoiding impeachment was the principal reason the defendant did not take the stand.”<sup>72</sup>

#### VII. RULE 609’S TUMULTUOUS ORIGIN STORY

Rule 609 has the most convoluted origin story of any of the rules of evidence. And it involves one of the Advisory Committee’s worst moments.

Rather than craft the rule it thought best, the Advisory Committee “backed off” under pressure from Representative Hogan and Senator McClellan.<sup>73</sup> Based on Hogan and McClellan’s representations of Congress’s position, the Advisory Committee proposed a version of Rule 609 that allowed automatic impeachment with felony convictions and with *crimen falsi*—regardless of degree.<sup>74</sup> Hogan and McLellan then touted the Advisory Committee’s support for broad impeachment in subsequent [c]ongressional debates.<sup>75</sup>

The Advisory Committee was misled. The House rejected the Committee’s proposed rule and adopted a rule that prohibited impeachment

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68. BRIAN A. REAVES, BUREAU OF JUST. STAT., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 - STATISTICAL TABLES 8 (2013), <https://bjs.ojp.gov/content/pub/pdf/fdluc09.pdf> [<https://perma.cc/NSV9-C9AB>] (reporting that, in 2009, 75 percent of suspects charged with a felony had a prior arrest, 60 percent had a prior felony arrest, 60 percent “had at least one prior conviction,” and 43 percent “had at least one prior felony conviction”).

69. Bellin, *supra* note 56, at 426 (surveying empirical evidence on “[t]he surprising power of the silence penalty” that harms defendants who do not testify at trial).

70. *See id.*; *see also* Eisenberg & Hans, *supra* note 60, at 1357.

71. *See* Blume, *supra* note 65, at 489–90.

72. *Id.* at 491.

73. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 516 (1989) (recounting that, in response to interference by Senator McClellan, “[t]he Advisory Committee backed off”); *see supra* Part III.

74. [*See Green*, 490 U.S. at 516–17, 516 n.19.]

75. [*See* 120 CONG. REC. 37039, 37080 (1974); *id.* at 2376.]

with prior convictions except if the crime “involved dishonesty or false statement.”<sup>76</sup> The Senate Judiciary Committee “agreed with the House limitation that only offenses involving false statement or dishonesty may be used.”<sup>77</sup> The [c]ommittee listed the few convictions that would be permitted, those falling in the narrow *crimen falsi* category: “perjury or subordination of perjury, false statement, criminal fraud, embezzlement or false pretense.”<sup>78</sup> At that moment, the practice of impeaching criminal defendants with prior convictions neared extinction. Both houses of Congress agreed that impeachment of criminal defendants should be limited to a tiny set of crimes; the [c]onference [c]ommittee would have been obligated to track that agreement.<sup>79</sup>

John McClellan, however, would not let it go. In his [thirty-fir]st year in the Senate, he moved, on November 22, 1974, to amend the [Senate] Judiciary Committee’s version of Rule 609. McClellan’s amendment reverted to the Advisory Committee (really McClellan’s own) proposal, broadly permitting impeachment of criminal defendants with convictions.<sup>80</sup> After debate, the motion was called, votes entered, and “[t]he result was announced—yeas 35, nays 35.”<sup>81</sup> A tie. “Mr. McClellan’s amendment was rejected.”<sup>82</sup> McClellan was frustrated, but “in view of the closeness of the vote” announced his intention to move to reconsider.<sup>83</sup> Since McClellan had been on the losing side, he could not so move, leaving the fate of Rule 609 to someone from the prevailing side.<sup>84</sup> In a moment of collegiality, Senator James Abourezek[,] who would vote three times against McLellan that day, moved to reconsider on his behalf.<sup>85</sup> Debate renewed, with Senator Joe Biden speaking at length against McLellan’s amendment.<sup>86</sup>

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76. RICHARD D. FRIEDMAN & JOSHUA DEAHL, *FEDERAL RULES OF EVIDENCE: TEXT AND HISTORY* 230 (2015) (reprinting legislative history).

77. *Id.* at 232 (reprinting the Senate Judiciary Committee Report).

78. *Id.*

79. *See* ELIZABETH RYBICKI, CONG. RSCH. SERV., 98-696, *RESOLVING LEGISLATIVE DIFFERENCES IN CONGRESS: CONFERENCE COMMITTEES AND AMENDMENTS BETWEEN THE HOUSES* 15 (2019) (“The House’s managers may agree on the House position, the Senate position, or some middle ground. But they may not include a provision in a conference report that does not fall within the range of options defined by the House position at one extreme and the Senate position at the other.”).

80. [120 CONG. REC. 37039, 37076 (noting that the amendment “would permit the credibility of any witness to be challenged by the proof of convictions of any felony—or any misdemeanor that involved dishonesty or false statement”).]

81. [*Id.* at 37080.]

82. [*Id.*]

83. [*Id.*]

84. [*See id.* (Senator James Abourezk noted that he would “move for reconsideration, since [he] was on the prevailing side”).]

85. *See id.* at 37080–81, 37083.

86. [*See id.* at 37082–83.]

Drawing on his own experience in the criminal courts, Biden summarized the numerous objections to prior conviction impeachment,<sup>87</sup> but his primary contention was that the rule itself was based on a false premise:

I do not see why it should even be advanced as going to the credibility of the witness, because if we do that, we assume, under our justice system, that if you have once committed a crime . . . you have lost your credibility forever, you have lost the reliance on the ability to go into court and be adjudged to be credible until proved not credible on the basis of the testimony introduced by the witnesses . . . . I would plead with my colleagues [to reject the argument that] if you are a former convicted felon, you are not capable of coming around and being a credible citizen, and your credibility should always be questioned the rest of your life.<sup>88</sup>

Despite Biden's opposition, the motion for reconsideration carried [thirty-eight] to [thirty-four] and a subsequent motion to adopt McClellan's amendment carried [thirty-nine] to [thirty-three].<sup>89</sup> This meant that the House and the Senate now disagreed on Rule 609 and the rule went to a [c]onference [c]ommittee.

The [c]onference [c]ommittee tried to reconcile the House and Senate positions with a judicial balancing test. Judges would admit the convictions of testifying defendants "if the probative value of the evidence outweighs its prejudicial effect."<sup>90</sup> This was, of course, the same "if" question that divided Congress. And by offering the balancing test without additional guidance, the [c]onference [c]ommittee left the courts in an impossible position.

Judges understandably struggle with the Rule 609(a)(1)(B) balancing test because the rule seems to assume that prior convictions should be admitted even when criminal defendants testify.<sup>91</sup> But the balancing test, if rigorously applied, almost always rules them out.<sup>92</sup> This is the inevitable result of a rule based on diametrically opposed views. There was no way to bridge a gap between legislators who on one side argued for impeachment to strike a blow against rising crime, "antisocial" deviants,<sup>93</sup> "white slaver[s],"<sup>94</sup> and "thugs with prior criminal records"[.]<sup>95</sup> [a]nd on the other side rejected any "us versus them" dichotomy, recognized the practice's "devastating prejudice to a defendant," and sought to prevent impeachment to "encourage more defendants to take the stand."<sup>96</sup> The [c]onference [c]ommittee punted the

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87. For example, that the jury would use prior convictions as substantive evidence: "[T]he jury would not view the introduction of the evidence of a prior crime as going to credibility, but would view it as to going to the substance of the case in question." *Id.* at 37082.

88. *Id.*

89. "So Mr. McClellan's amendment was agreed to." *Id.* at 37083.

90. FED. R. EVID. 609(a)(1)(B).

91. *Cf.* *United States v. Burston*, 159 F.3d 1328, 1335 (11th Cir. 1998) ("The implicit assumption of Rule 609 is that prior felony convictions have probative value.").

92. *See* Bellin, *supra* note 2, at 338.

93. [120 CONG. REC. 2348, 2376 (1974).]

94. [*Id.* at 2380.]

95. *Id.* at 37077.

96. *Id.* at 37078.



policy question—one of the most important in modern evidence law—to the courts, where it continues to fester.

#### VIII. MODIFYING RULE 608 TO EFFECTUATE THE ELIMINATION OF RULE 609

The [F]ederal [R]ules of [E]vidence rely on two rules to govern character impeachment of witnesses: Rules 608 and 609. Rule 608 governs the topic generally, while Rule 609 is a special application when the impeachment concerns a prior conviction. If Rule 609 did not exist, prosecutors could invoke Rule 608 to cross-examine testifying defendants about the underlying conduct that formed the basis of a conviction so long as that conduct was “probative of character for truthfulness.”<sup>97</sup> Consequently, proposed revisions of Rule 609 require attention to the implications for Rule 608.

A small caveat can be added to Rule 608(b) to prevent the most problematic form of prior conviction impeachment from migrating to that rule. Here is the text of Rule 608(b) with the [italicized] caveat:

[T]he court may, on cross-examination, allow [specific instances] to be inquired into if they are probative of the character for truthfulness or untruthfulness of: (1) the witness (*if the witness is not a defendant in a criminal case*); or (2) another witness whose character the witness being cross-examined has testified about.<sup>98</sup>

Rule 608 would still permit (1) cross-examination of non-criminal-defendant witnesses with specific instances that were probative of character for truthfulness, including conduct that resulted in a conviction;<sup>99</sup> and (2) cross-examination of witnesses who testify as to the truthful character of any witness with specific instances relevant to that witness’s character (even if that witness is a criminal defendant). In addition, prior convictions can always be used to contradict specific representations made by a testifying witness, including a defendant.<sup>100</sup> Further, prosecutors will continue to be able to offer the defendant’s criminal record (where warranted) as substantive evidence under Rules 404(b), 413, and 414. And if a defendant sought to introduce positive character evidence, prior convictions could become admissible under Rule 404(a)(2)(A).<sup>101</sup>

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97. FED. R. EVID. 608(b).

98. Cf. Friedman, *supra* note 46, at 690 (proposing a similar change of eliminating Rule 609 and amending Rule 608 to read: “if other than an accused”).

99. If a criminal defendant sought to impeach a government witness with prior convictions, the trial court could consider the inadmissibility of the defendant’s own convictions (if applicable) in assessing the admissibility of the government witness’s convictions under the Rule 403 balancing test.

100. See *United States v. Mustafa*, 753 F. App’x 22, 38 (2d Cir. 2018) (holding prior convictions admissible to contradict defendant’s testimony because “where a defendant testifies on direct examination about specific facts, the prosecution may use cross-examination to prove that the defendant lied as to those facts”).

101. [See, e.g., *United States v. Jaensch*, 552 F. App’x 206, 212 (4th Cir. 2013) (noting that evidence of a prior conviction may be admitted where the defendant “elicited testimony concerning his trait of honesty, it was admitted, and the Government offered evidence to rebut that testimony”).]

In sum, the proposed change is narrow. The deletion of Rule 609 and amendment to Rule 608 prohibit one thing: cross-examination with specific instances of a criminal defendant's past conduct when that conduct is unrelated to the defendant's testimony and unconnected to the case. Again, nothing legitimate is lost with this change since jurors are always deeply skeptical of a testifying defendant's claims of innocence.<sup>102</sup> Instead of assuming that the defendant is lying (or guilty) because [they are] "a criminal," however, the jury would assess the testimony in light of the defendant's self-interest and the other evidence in the case.

#### CONCLUSION

Rule 609 permits the introduction of evidence with almost no probative value despite a grave danger of unfair prejudice. And the rule artificially ties the admission of the defendant's criminal record to the decision to testify. This distorts the trial process, causing both innocent and guilty defendants to forego testifying.

The best argument in favor of Rule 609 is that its drafters tried to mitigate these problems with a balancing test. But that effort has been a failure. The case law is filled with nonsensical analysis and inconsistent rulings.<sup>103</sup> And the reality is likely worse than it appears since the most problematic rulings avoid appellate review.<sup>104</sup> Rule 609 is worse than nothing; it is the illusion of a problem solved while the problem rages out of control.

Eliminating Rule 609 and preventing the character impeachment of testifying defendants through Rule 608 solves all the difficulties referenced above with no negative collateral effects. These changes would:

- work an enormous simplification of evidence law, eliminating a lengthy rule with multiple distinct balancing tests;
- permit more defendants to exercise their constitutional right to testify;
- eliminate the prospect of jurors assigning guilt based on impermissible character reasoning (or worse); and
- allow juries to hear more frequently from the defendants whose fates they decide.

And these changes can be accomplished without collateral damage. Most defendants plead guilty, and those who don't are almost always convicted at trial. In 2022, prosecutors won over [82] percent of criminal trials in U.S. [d]istrict [c]ourt[s].<sup>105</sup> This is not likely to change when more defendants testify since jurors are skeptical of defendant testimony and prosecutors are skilled at impeaching witnesses with a broad range of noncharacter evidence,

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102. [See *supra* Part IV.]

103. [See *supra* Part III.]

104. [See *supra* Part II; *supra* notes 22–24 and accompanying text.]

105. See TABLE D-4. U.S. DISTRICT COURTS—CRIMINAL DEFENDANTS DISPOSED OF, BY TYPE OF DISPOSITION AND OFFENSE, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2022 (2022), [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_d4\\_0930.2022.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2022.pdf) [<https://perma.cc/BYX3-CHFR>] (considering cases decided by either bench or jury trial).

like prior inconsistent statements and bias. Eliminating Rule 609 will have a narrow and predictable impact. It will eliminate the widely recognized unfair prejudice created by the introduction of prior crimes as impeachment[] and enhance the legitimacy and richness of trial proceedings by allowing more juries to hear from the people whose fate they must determine.

#### APPENDIX

##### **Rule 609. Impeachment by Evidence of a Criminal Conviction**

(a) **IN GENERAL.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

(b) **LIMIT ON USING THE EVIDENCE AFTER 10 YEARS.** This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

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

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

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

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

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

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

(1) it is offered in a criminal case;

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

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

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

(e) **PENDENCY OF AN APPEAL.** A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.