# AN EMPIRICAL STUDY OF RULE 609 AND SUGGESTIONS FOR PRACTICAL REFORM

RIC SIMMONS

# AN EMPIRICAL STUDY OF RULE 609 AND SUGGESTIONS FOR PRACTICAL REFORM

RIC SIMMONS*

**Abstract:** Rule 609 of the Federal Rules of Evidence allows a party to impeach a witness with his or her prior criminal convictions. It is fair to say that this rule is the most criticized of all the Rules of Evidence; scholars have been calling for its reform or outright abolition for decades. These critics argue that the rule relies on propensity evidence, which has very little probative value in evaluating a witness's truthfulness on the stand, and that—especially when used to impeach a criminal defendant—the evidence carries a high risk of unfair prejudice and often prevents defendants from testifying at trial. What has been missing from the debate so far is what is actually happening when judges apply Rule 609 in the courtroom. This Article conducts an empirical study of Rule 609 to determine how the rule operates in practice. First, the Article presents a historical background of Rule 609 and evaluates some of the common criticisms of the rule. Next, the Article presents the results of a survey of law students and federal district court judges to determine how much probative value and unfair prejudice each group perceives for different types of prior convictions. The survey finds some differences between the groups, but overall notes a surprising consensus that crimes of theft have a high probative value for proving lack of credibility, whereas other types of convictions do not. The Article then examines how federal district court judges actually apply Rule 609 in the courtroom. Contrary to conventional wisdom, it shows that federal judges do not routinely admit prior convictions to impeach criminal defendants, and that (consistent with the survey) judges tend to admit theft crimes more often than almost any other type of conviction. The review of district court decisions does indicate some extreme outliers and an unexplained and troubling tendency to admit crimes of drug possession. The Article then proposes a modest reform to Rule 609, which encourages the admission of theft crimes to impeach witnesses, but precludes the use of other types of criminal convictions as impeachment evidence.



* Chief Justice Thomas J. Moyer Professor for the Administration of Justice and Rule of Law, Michael E. Moritz College of Law, The Ohio State University. I would like thank Angela Lloyd, Anna Roberts, Daniel McConkle, and the participants of the 2017 CrimFest conference for their helpful suggestions and feedback. I would also like to thank Tresha Patel, Kelsey Kornblut, and Melissa Lenz for their excellent research assistance on this Article.

## INTRODUCTION

Rule 609 is perhaps the most maligned of any Federal Rule of Evidence. For decades, scholars have consistently argued for its reform or outright abolition.[1] Specifically, the critics have targeted the application of Rule 609 to criminal defendants; that is, the practice of impeaching a criminal defendant with a prior conviction.[2] The critics argue that prior convictions have very little probative value to prove dishonesty on the stand; they may not be reliable indicators of actual criminal activity; the threat of their admission deters defendants from exercising their constitutional right to testify; and they carry a significant danger of unfair prejudice, because a

[1] The scholarly critiques of Rule 609 are too numerous to list in full here. Some of them even pre-date the rule itself. *See, e.g.*, Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637 (1991) (proposing abolition of Rule 609 and reform of Rule 608 to never allow any character evidence to impeach criminal defendants); Leslie Alan Glick, *Impeachment by Prior Convictions: A Critique of Rule 6-09 of the Proposed Rules of Evidence for U.S. District Courts*, 6 CRIM. L. BULL. 330 (1970) (discussing the legal questions and implications of Rule 609, whether it is consistent with case law, and the fundamental policy questions involved with Rule 609 prior to its adoption); Alan D. Hornstein, *Between* Rock *and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 VILL. L. REV. 1 (1997) (arguing that prior convictions should never be allowed to impeach criminal defendants); Gene R. Nichol, Jr., *Prior Crime Impeachment of Criminal Defendants: A Constitutional Analysis of Rule 609*, 82 W. VA. L. REV. 391 (1980); Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977 (2016) [hereinafter Roberts, *Conviction*] (reviewing multiple reasons why Rule 609 is flawed and should be abolished); Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563 (2014) [hereinafter Roberts, *Unreliable Conviction*] (discussing the extent to which convictions are reliable indicators of relative culpability); Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835 (2016) [hereinafter Roberts, *Implicit Stereotyping*] (arguing that Rule 609 keeps defendants off the witness stand, thus removing an opportunity to lessen the effects of jurors' implicit bias against minority defendants); Robert G. Spector, *Impeaching the Defendant by His Prior Convictions and the Proposed Federal Rules of Evidence: A Half Step Forward and Three Steps Backward*, 1 LOY. U. CHI. L.J. 247 (1970) (arguing for the abolition of Rule 609 because impeachment by prior conviction has little relevancy, produces a "chilling effect" on criminal defendants, and creates an "associational effect" with witnesses testifying on the defendant's behalf) [hereinafter Spector, *Impeaching the Defendant*]; Robert G. Spector, Commentary, *Rule 609: A Last Plea for Its Withdrawal*, 32 OKLA. L. REV. 334 (1979) [hereinafter Spector, *Rule 609*]. *But see generally* Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295 (1994) (arguing that the primary problem with Rule 609 is that judges do not properly apply its balancing test and too often admit prior convictions against defendants).

[2] Most instances of impeaching a criminal defendant with a prior conviction are covered by Rule 609(a)(1)(B), but criminal defendants can also be impeached under Rule 609(a)(2) if the prior conviction was a crime of falsity. Because many of the reform proposals argue for abolishing the practice of impeaching a criminal defendant with *any* prior conviction, I will use the term "applying Rule 609 to a criminal defendant" rather than simply referring to Rule 609(a)(1)(B).

jury will tend to ignore the limiting instruction and use the prior convictions as evidence that the defendant has a propensity to commit a crime.[3]

And yet the rule endures, at least on the federal level.[4] Indeed, on the state level there is a trend toward liberalizing the rules on impeaching with prior convictions.[5] Critics of the rule have offered a number of reasons, some of them somewhat sinister, for why the rule persists.[6] Others argue that the politicians and policymakers who maintain the rule are acting in good faith, but that they have a wildly inaccurate understanding of the probative value and unfair prejudice of this type of evidence.[7]

But there is another possible explanation for the continued perseverance of Rule 609: the critics may have it wrong, and the policymakers who drafted the rule may have been right all along. After all, in most cases Rule

---

[3] *See* Friedman, *supra* note 1, at 678–80 (concluding that character impeachment evidence has no probative value for credibility and is highly prejudicial); Hornstein, *supra* note 1, at 9–20, 40–55 (arguing that prior convictions have little probative value and impeachment by prior conviction burdens the defendant's constitutional right to testify); Roberts, *Conviction*, *supra* note 1, at 1992–2001 (addressing the flawed assumptions of Rule 609); Roberts, *Unreliable Conviction*, *supra* note 1, at 579–92 (discussing the unreliability of prior convictions as indicators of relative culpability).

[4] For an excellent discussion of successful efforts to abolish the application of Rule 609 to criminal defendants on the state level, see Roberts, *Conviction*, *supra* note 1, at 2018–36. There have been two substantive amendments to Rule 609 on the federal level, but neither one changed the balancing test for admitting prior convictions against criminal defendants. *See* FED. R. EVID. 609 advisory committee's notes.

[5] *See* Roberts, *Conviction*, *supra* note 1, at 1990 (citing Dannye R. Holley, *Judicial Anarchy: The Admission of Convictions to Impeach: State Supreme Courts' Interpretive Standards, 1990–2004*, 2007 MICH. ST. L. REV. 307, 315.

[6] Some proposed reasons why Rule 609 has escaped reform efforts: actors in the criminal justice system secretly want jurors making decisions based on criminal propensity evidence; they are further concerned that any reform of the rule would open up deeper, darker questions about the legitimacy of the convictions themselves; and they are more than happy to deter defendants from testifying, because this will improve conviction rates and reduce the ability of a juror to empathize with the defendant. *See id.* at 2015–17.

[7] The legislative history surrounding Rule 609 implies that the members of Congress who supported the rule honestly believed that a defendant's prior convictions were relevant to a jury in determining the party's credibility. *See, e.g.*, 120 CONG. REC. 37,076 (1974) (statement of Senator McClellan in arguing that Rule 609 should automatically admit all prior felony convictions to impeach criminal defendants):

> Can it really be argued that the fact that a person has committed a serious crime—a felony—has no bearing on whether he would be willing to lie to a jury? Should a jury be denied that right [to hear the evidence]? Should society be denied the opportunity, in trying to protect itself, in its effort to discover the truth, to show that the witness before it is a man who has committed such a crime and, therefore, might be willing to now lie to a jury?

*Id.*

609 does not *require* a judge to admit these prior convictions;[8] it merely allows the judge to admit the evidence if she determines that the probative value of the evidence to impeach the defendant outweighs all unfair prejudice. And after applying this balancing test, judges often admit these prior convictions, though not nearly as often as critics imply.[9] This means that judges frequently believe that these prior convictions are useful to a jury in evaluating a defendant's credibility—so useful, in fact, that their usefulness outweighs their rather substantial unfair prejudice.[10]

It could be true, of course, that these judges are misguided—that they are miscalculating the probative value or the unfair prejudice of this evidence, either for illegitimate reasons or simply because of an honest misunderstanding of how useful the evidence is and/or how much it may unfairly impact the jury.[11] To help determine what is really going on when judges make their Rule 609 determinations, this Article presents the results of a survey that was given to federal trial judges to see how they measured the probative value and unfair prejudice of various prior convictions. The same survey was given to a number of second-year law students, to see what differences there might be between the opinions of those who had been applying the rule for decades and those who had just been exposed to the rule.[12] Perhaps unsurprisingly, the judges are far more likely to admit prior convictions under this rule, but even the students (who show great skepticism about the rule in general) are willing admit to prior convictions for certain types of crimes.[13] Thus, among the experts and the novices alike, there is a consensus that an outright ban on this evidence is inappropriate; that in at least some circumstances, admitting a prior conviction to impeach a crimi-

---

[8] Rule 609(a)(2) requires admission of prior convictions that are crimes of falsity, if the conviction is less than ten years old. FED. R. EVID. 609(a)(2). As explained below, this Article focuses on Rule 609(a)(1)(B), which covers the admissibility of convictions that are not crimes of falsity when offered to impeach a criminal defendant. *Id.* R. 609(a)(1)(B).

[9] As noted in Part III, federal judges admit prior convictions only about two-thirds of the time, and they allow the jury to hear the name of the crime only about half of the time. *See infra* notes 152–164 and accompanying text (analyzing the admission of prior conviction evidence for impeachment of criminal defendants in 120 federal district court cases).

[10] Unsurprisingly, courts that allow prior convictions to be admitted to impeach criminal defendants routinely mention the probative value of this evidence to prove lack of credibility. *See, e.g.*, Walden v. Georgia-Pac. Corp., 126 F.3d 506, 523 (3d Cir. 1997) (quoting Cummings v. Malone, 995 F.2d 817, 826 (8th Cir. 1993) ("[O]ne who has transgressed society's norms by committing a felony is less likely than most to be deterred from lying under oath.")).

[11] *See supra* note 6 (discussing possible reasons the criminal justice system resists reform efforts to Rule 609).

[12] *See infra* notes 130–135 and accompanying text (describing the process for conducting the survey).

[13] *See infra* notes 136–138 and accompanying text (analyzing the results of the conducted survey).

nal defendant does more good than harm.[14] Of course, all of the judges and the law students could simply be wrong—perhaps they all miscalculate the probative value and/or the unfair prejudice of this type of evidence. But the breadth and the strength of this consensus should at least give the Rule 609 reformers pause before they call for the outright abolition of this rule.[15] Instead, a more modest reform of Rule 609 may be in order, perhaps one that enhances the balancing test, or that specifies which types of crimes may be used to impeach.[16]

In addition to the survey results, the Article examines what federal judges do in the courtroom when faced with applying Rule 609 to criminal defendants. The Article analyzes over 120 federal district court cases in which the prosecutor sought to admit a prior conviction to impeach the defendant.[17] The results of this analysis are broadly consistent with our survey: judges almost routinely admitted evidence of certain types of crimes, whereas evidence of other types of crimes was not usually admitted (or at least the jury was not told the name of the crime for which a conviction occurred).[18]

Studying the application of Rule 609 also has broader implications for evidence law. Balancing tests—particularly those that balance probative value and unfair prejudice—are extremely common in deciding whether to admit evidence,[19] and judges are given vast amounts of discretion in applying those balancing tests.[20] But in most circumstances, their decisions are very fact-specific; the unfair prejudice and probative value of a graphic photograph or of a prior bad act offered to prove knowledge will vary depending on the facts of the case and the details of the proffered evidence. Thus, it is very difficult to conduct any systematic study about how judges apply a Rule 403-type balancing test in most cases. In contrast, we can study Rule 609's balancing test in a much more objective way: assuming the prior conviction is for a type of crime that is completely dissimilar from

---

[14] *See infra* Part II.B and accompanying text.

[15] *See generally, e.g.*, Spector, *Rule 609*, *supra* note 1 (arguing for the abolition of Rule 609).

[16] Another possibility would be to codify all or part of the five-factor test that is used in various forms by the circuit courts when applying Rule 609's balancing test to criminal defendants. *See, e.g.*, United States v. Hernandez, 106 F.3d 737, 739–40 (7th Cir. 1997) (restating the five-factor test first enumerated in *United States v. Mahone*, 537 F.2d 922 (7th Cir. 1976)).

[17] *See infra* notes 152–164 and accompanying text (discussing the results from an analysis of federal district court cases applying Rule 609).

[18] *See infra* notes 152–164 and accompanying text.

[19] Indeed, Rule 403, which bars evidence if the unfair prejudice substantially outweighs its probative value, applies to nearly every evidentiary ruling made by a trial judge. *See* FED. R. EVID. 403.

[20] *See, e.g.*, Gold, *supra* note 1, at 2321–27 (arguing that, with respect to Rule 609, the problem rests with the discretion granted to judges in applying the rule).

the crime for which the defendant is now on trial,[21] the probative value for impeachment purposes and unfair prejudice of the evidence should remain relatively constant for any trial.[22] Thus, it is possible to ask judges, lawyers, or even lay people to determine the degree of probative value and unfair prejudice for every type of criminal conviction, and make objective decisions as to which prior convictions should be admitted and which should not. This microcosm can give us insight into how judges apply—or should apply—balancing tests in many other contexts, by seeing how judges measure probative value and unfair prejudice. Furthermore, we may see differences between the decontextualized survey results and the actual results at trial, where a judge's decision may be improperly influenced by implicit bias, the strength of the prosecutor's case, or any other legally irrelevant factors.

Part I of the Article reviews the history of Rule 609, and then critically examines the four main critiques of applying the rule to criminal defendants.[23] Part II describes the survey and then presents and analyzes the results.[24] Part III compares the results of the survey with how trial judges are actually deciding Rule 609 motions.[25] Part IV of this Article proposes some modest changes to Rule 609 in response to this research.[26]

## I. RULE 609

### *A. History of the Rule*

Historically, under the common law, a prior criminal conviction could preclude a witness from testifying altogether.[27] By the time the Federal

---

[21] If the prior conviction is for a crime that is similar to the crime for which the defendant is now on trial, the likelihood of unfair prejudice increases substantially, as there is a greater danger that the jury will use the prior crime for an illegitimate propensity purpose. *See, e.g.*, *Hernandez*, 106 F.3d at 740 ("The court was well aware that there was a similarity between the two crimes, a factor that requires caution on the part of the district court to avoid the possibility of the jury's inferring guilt on a ground not permissible under Rule 404(b).").

[22] Of course, the probative value and unfair prejudice of a given prior conviction cannot be held completely constant in real-life cases; for example, juries in certain parts of the country may see gun possession crimes as more or less prejudicial, depending on the local cultural attitudes towards guns. And the trial judge is also supposed to consider the "importance of the defendant's testimony" in the case, which may vary depending on the crime for which he is being charged and his theory of defense. *See id.*

[23] *See infra* notes 27–129 and accompanying text.

[24] *See infra* notes 130–151 and accompanying text.

[25] *See infra* notes 152–164 and accompanying text.

[26] *See infra* notes 165–180 and accompanying text.

[27] *See* 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, 296 (2008); Christian A. Bourgeacq, Note, *Impeachment with Prior Convictions Under Federal Rule of Evi-*

Rules of Evidence were codified, almost all American jurisdictions had abolished this absolute bar,[28] but all still allowed prior convictions to impeach a witness, under the theory that "[t]here is little dissent from the general proposition that at least some crimes are relevant to credibility."[29] The Advisory Committee's original version of Rule 609 automatically admitted all felony convictions as well as all crimes of falsity, with no discretion given to the trial judge.[30] When a subcommittee of the House Judiciary Committee considered the Rules of Evidence, many of the witnesses argued that the trial judge should have discretion to preclude prior convictions if the unfair prejudice of the evidence substantially outweighed its probative value.[31] The subcommittee added this balancing test—essentially stating that Rule 403 should apply to prior conviction impeachment evidence—for felony convictions that were not crimes of falsity.[32] The full Judiciary Committee went even further and precluded all convictions that were not crimes of falsity, and, after an extensive floor debate, this version passed in the House.[33] The Senate passed a version of Rule 609 that was similar to the Advisory Committee's initial version, automatically admitting all felonies and prior crimes of falsity.[34] The Conference Committee thus created a compromise between the two bills: automatically admitting all crimes of falsity but applying a revised Rule 403 balancing test to other felonies, which would only be admitted if the probative value of the evidence outweighed its unfair prejudice.[35]

---

*dence 609(a)(1): A Plea for Balance*, 63 WASH. U. L.Q. 469, 470 (1985) (citing C. MCCORMICK, MCCORMICK ON EVIDENCE 93 (3d ed. 1984)). This prohibition was erased gradually over the end of the 19th Century and the beginning of the 20th Century as statutes were passed that permitted people with felony convictions to testify. *See* Montgomery v. United States, 403 F.2d 605, 611 (8th Cir. 1968) (discussing the common law prohibition on individuals testifying if they had a criminal record and its abolition in the United States during the nineteenth century).

[28] FED. R. EVID. 601 advisory committee's note. The blanket ban on felons testifying as witnesses was removed from all state laws by 1953. 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 601 app. at 01 (Mark S. Brodin & Joseph M. McLaughlin eds., 2d ed. 2016).

[29] FED. R. EVID. 609 advisory committee's note.

[30] *See* Gold, *supra* note 1, at 2298–301 (discussing the history of Rule 609(a)). The Advisory Committee briefly changed its mind and added a Rule 403 balancing test to the rule, but subsequently changed it back before submitting the Rules of Evidence to Congress in 1972. *Id.*

[31] *Id.* at 2301.

[32] *Id.* at 2301–02.

[33] *Id.* at 2303 & nn.45–46. Professor Gold notes that the debate on Rule 609 "far exceeded that relating to any other provision in all the proposed Federal Rules of Evidence." *Id.* at 2303.

[34] *Id.* at 2305–07 & nn.57–60.

[35] *Id.* at 2307–08.

The Advisory Committee substantively amended Rule 609 in 1990 and 2006.[36] The 1990 amendment relaxed the balancing test for criminal convictions used to impeach any witness *other than* a criminal defendant; such a conviction would now be admissible unless the opposing party could demonstrate that its unfair prejudice substantially outweighed its probative value.[37] Admitting a prior conviction to impeach a defendant, however, still faced the same strict balancing test: a judge is only permitted to admit such a conviction if the prosecutor could demonstrate that the probative value to impeach outweighs its unfair prejudice.[38] The Advisory Committee left this balancing test in place because:

> [T]he rule recognizes that, in virtually every case in which prior convictions are used to impeach the testifying defendant, the defendant faces a unique risk of prejudice—*i.e.*, the danger that convictions that would be excluded under Federal Rule of Evidence 404 will be misused by a jury as propensity evidence despite their introduction solely for impeachment purposes.[39]

The 2006 amendment limited the number of crimes that would be automatically admissible as "crimes of falsity."[40]

The history of Rule 609 suggests a compromise between those who believe that prior convictions should *never* be admitted to impeach criminal defendants and those who argue that prior convictions should *automatically* be admitted to impeach.[41] It also shows that the drafters of the rule were aware of the unique danger that criminal defendants faced if their prior convictions were admitted against them by creating an unusually high barrier to admissibility in such circumstances.[42] The unfair prejudice of prior convic-

---

[36] Like nearly every other Federal Rule of Evidence, Rule 609 was also amended in 2011 as part of the Restyling project, but no substantive changes were made. *See* FED. R. EVID. 609 advisory committee's notes.

[37] *Id.*

[38] *See* FED. R. EVID. 609(b)(1).

[39] *Id.* R. 609 advisory committee's note to 1990 amendment. The 1990 amendment also allowed a party to "remove the sting" by eliciting evidence of the witness's prior conviction on direct examination, rather than waiting for the opposing party to confront the witness on cross-examination. *Id.*

[40] *See id.* advisory committee's note to 2006 amendment. After 2006, only convictions that included a false statement or false action as an element of the crime would be classified as a crime of falsity. *Id.*

[41] *See* Gold, *supra* note 1, at 2298–309 (recounting the history of Rule 609 and its adoption); Hornstein, *supra* note 1, at 6–8 (discussing the debate surrounding the adoption of Rule 609).

[42] *See* FED. R. EVID. 609 advisory committee's note; Gold, *supra* note 1, at 2298–309; Hornstein, *supra* note 1, at 6–8. The standard balancing test for admissibility, found in Rule 403, strongly favors admissibility: the party opposing the evidence must prove to the judge that the danger of unfair prejudice substantially outweighs its probative value. There are only three provi-

tion evidence is already much higher for criminal defendants;[43] thus, even if the standard Rule 403 balancing test applied in this context (as it does for impeaching any other witness with a prior conviction), very few of these prior convictions would be admitted. The fact that the burden shifts to the prosecutor to prove a greater probative value than unfair prejudice means that only the most probative of these prior convictions should be admitted.[44] As we will see from the survey below, most judges follow this principle in the decontextualized setting of the survey, though they seem willing to admit a somewhat wider variety of crimes in the courtroom setting.[45] And as will always be true with a rule involving judicial discretion, there are judges who are outliers on either side.

### *B. Critiques of the Rule*

As noted above, there is no shortage of articles advocating reform or repeal of Rule 609.[46] Most of these critiques (and the focus of this Article) have to do with a very specific provision of Rule 609: impeaching a criminal defendant with a prior conviction.[47] But any evaluation of this aspect of the rule must also consider the entire infrastructure of impeachment with prior dishonest actions, including both how Rule 609 should apply to witnesses who are not criminal defendants as well as how Rule 608 regulates the admissibility of actions that are not criminal convictions.[48] Thus, any proposed reforms to how Rule 609 applies to criminal defendants—as well as any arguments for those reforms—must take into account how those re-

---

sions in the Rules that apply a different (and stricter) balancing test: Rule 609(a)(1)(B), when a prosecutor attempts to admit a prior conviction to impeach a criminal defendant; Rule 703, when an expert is asked to reveal her (otherwise inadmissible) underlying data; and Rule 609(b), when a party seeks to impeach with a prior conviction that is over ten years old.

[43] *See infra* notes 99–129 and accompanying text (arguing that the danger of jurors improperly using prior conviction evidence as propensity evidence is heightened for criminal defendants).

[44] *See* FED. R. EVID. 609 advisory committee's note to 1990 amendment ("Although the rule does not forbid all use of convictions to impeach a defendant, it requires that the government show that the probative value of convictions as impeachment evidence outweighs their prejudicial effect.").

[45] *Compare infra* notes 136–138 (discussing the results of the survey), *with infra* notes 141–151 (discussing the results of the analysis of the federal district court cases).

[46] *See supra* note 1 (presenting a list of critics of Rule 609).

[47] *See, e.g.*, Hornstein, *supra* note 1, at 55–61 (arguing that Rule 609 may unconstitutionally burden a criminal defendant's right to testify); Spector, *Impeaching the Defendant*, *supra* note 1, at 247–51 (arguing that impeaching a criminal defendant with felonies has little relevancy, produces a "chilling effect," and produces an "associational effect"). This mostly includes Rule 609(a)(1)(B), which covers impeaching a criminal defendant with felonies that are not crimes of falsity, but would also include Rule 609(a)(2), which covers impeaching *any* witness (including a criminal defendant) with a crime of falsity. *See* FED. R. EVID. 609.

[48] *See* FED. R. EVID. 608–609.

forms and arguments would affect the rest of the impeachment provisions in Rules 608 and 609.

The arguments against the use of prior convictions to impeach can be roughly broken down into four categories. Some of these arguments are specific to the practice of admitting prior convictions evidence against criminal defendants; others are broader attacks on admitting prior convictions against *any* witness; some are so broad that they argue against admitting any prior dishonest action to impeach any witness.[49] The four categories are as follows:

> (1) Prior convictions have little or no probative value regarding credibility;
> (2) Admitting prior convictions infringes on the defendant's right to testify;
> (3) Some of these convictions are unreliable (i.e., the defendant may not have actually been guilty of the crime); and
> (4) Jurors will use the prior convictions for an improper purpose.[50]

This Article will consider each of these criticisms in turn.

### 1. Probative Value of Prior Convictions for Determining Credibility

This critique appears in many different forms. The "strong" version of this argument claims that there is no probative value whatsoever in admitting any prior convictions.[51] Most lay people—and certainly almost all

---

[49] *See* Roberts, *Conviction*, *supra* note 1, at 1992–2004 (discussing the underlying, flawed assumptions of Rule 609); Roberts, *Unreliable Conviction*, *supra* note 1, at 574–79 (discussing common criticisms of Rule 609).

[50] Professor Anna Roberts has proposed another category of critiques regarding Rule 609: that when it is used against criminal defendants, it contributes to a "broader dysfunction" in the criminal justice system. She gives a number of examples: it discourages criminal defendants from taking the witness stand; it may contribute to wrongful convictions; it is a "hidden" collateral consequence of a criminal conviction; it exacerbates the racial disparities in the criminal justice system; it gives even more power to prosecutors; and it influences more defendants to plea bargain their cases. Roberts, *Conviction*, *supra* note 1, at 2004–14. I address the first of these critiques *infra* notes 76–84 and accompanying text. Some of the other critiques include normative assumptions—for example, a presumption that it is detrimental to give prosecutors more power, or that it is detrimental to the system to have more plea bargains—that are beyond the scope of this paper.

[51] Critics of Rule 609 point out that the rule relies on a long chain of assumptions and inferences: (1) there is such a thing as "character for truthfulness"; (2) knowing a witness's character for truthfulness is useful to jurors in evaluating the witness' credibility; (3) a witness's character for truthfulness can be determined by learning about the witness's prior dishonest actions; (4) a witness's character for truthfulness can be determined by learning about the witness's prior convictions; and (5) jurors are able (with the help of a limiting instruction) to use this evidence appropriately to evaluate a witness's credibility. *See* Robert D. Dodson, *What Went Wrong with Federal*

judges—would reject this absolutist argument. Surely some criminal convictions—such as crimes of falsity—are relevant in determining whether a witness is currently telling the truth. As an extreme example, if the jury hears from two witnesses, and one has never been convicted of any crime, whereas the other has been convicted of perjury three times in the past five years, it would be reasonable for a juror to find the former more credible than the latter.

But most critics of Rule 609 do not make such an extreme argument. Instead, they argue that the probative value of prior convictions is very low, such that it will almost always be outweighed by the unfairly prejudicial effect that they will have on the jury (as described by the fourth objection in Section 4 below).[52] Professor Anna Roberts, who has written extensively on this issue, argues that the justifications given by the defenders of Rule 609 "rest not on data but on what one might call 'junk science at its worst.'"[53] She notes that the probative value of a prior conviction rests on a number of questionable presumptions:

> (1) The defendant committed the crime in question;
> (2) Those without such a conviction did *not* commit the crime in question;
> (3) The conviction can be related to a particular character trait;
> (4) The defendant still possesses that trait just as he had it then;
> (5) The trait helps predict the likelihood that the defendant will lie while on the stand; and
> (6) The jury will be able to use this evidence to help them assess this likelihood.[54]

---

*Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1, 31–32 (1999); Roberts, *Conviction*, *supra* note 1, at 1992–93. As one commentator noted (though with a slightly different chain of inferences):

> The probativity of the evidence of the prior conviction can be no stronger than the weakest link in that inferential chain. Indeed, the probative value of the evidence of prior conviction is the product of the probabilities of each inference necessary to support the conclusion, and that product is perforce lower than the lowest probability of each of the several inferences to be drawn.

Hornstein, *supra* note 1, at 14 (citing Richard O. Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021 (1977)).

[52] *See* Hornstein, *supra* note 1, at 15–19 (discussing the marginal probative argument against prior conviction impeachment evidence); Spector, *Impeaching the Defendant*, *supra* note 1, at 249.

[53] Roberts, *Conviction*, *supra* note 1, at 1992 (quoting Dannye W. Holley, *Federalism Gone Far Astray from Policy and Constitutional Concerns: The Admission of Convictions to Impeach by State's Rules—1990–2004*, 2 TENN. J.L. & POL'Y 239, 304–05 (2005)).

[54] Roberts, *Conviction*, *supra* note 1, at 1992–93.

Professor Roberts attacks all of these presumptions and points out that the conclusion from a chain of inferences is suspect or invalid if only one of those inferences is faulty.[55] But most of these presumptions are in fact quite reasonable. The correlation between conviction of a crime and actual guilt for that crime is very high—at least 96%.[56] The second presumption is true for *any* impeachment evidence given to a jury. For example, in a given trial, both witness A and witness B may have made multiple prior inconsistent statements, but the opposing counsel is only aware of those made by Witness A. Should the judge bar the attorney from impeaching Witness A with the prior inconsistent statements, simply because there is a chance that Witness B also has made undiscovered prior inconsistent statements? The fourth presumption—whether there are fixed traits (such as "propensity to lie") that can be assigned to witnesses—challenges not just Rule 609 but a large subset of evidentiary rules, such as Rule 608 and Rule 404(a).[57] And to the extent that fixed traits may diminish with time, Rule 609's balancing test already takes this into account;[58] the older the conviction, the less likely a judge will admit it, and if the conviction is over ten years old, it faces a very strong presumption against admissibility.[59]

The third, fifth, and sixth presumptions all focus on the probative value of the prior conviction to prove lack of credibility, which almost certainly varies depending on the crime. Some scholars believe that *any* prior conviction, regardless of the type of crime, indicates little or nothing about a defendant's likelihood to lie on the stand.[60] These critics point out that the entire logic of the rule rests on a propensity inference (that a person who committed a certain act in the past has a tendency to commit that act, and is therefore more likely to commit the act in the future) and propensity evidence is heavily disfavored in the law of evidence.[61] But although propensi-

---

[55] *Id.* at 1992–97 (critiquing the assumptions underlying the probative value of prior conviction impeachment evidence).

[56] *See infra* notes 99–129 and accompanying text (discussing studies that conclude that there is a high correlation between prior conviction and guilt).

[57] *See* FED. R. EVID. 404(a), 608.

[58] *See Hernandez*, 106 F.3d at 739–40 (setting out five factors for determining whether a prior conviction is admissible against a criminal defendant under Rule 609(a)(1)(B), including the timing of the prior conviction).

[59] *See* FED. R. EVID. 609(b)(1) (admitting convictions over ten years old only if the probative value for impeachment "substantially outweighs" the unfair prejudice).

[60] *See* Glick, *supra* note 1, at 331–34 (arguing that there is no positive relationship between the defendant's past conviction and his present willingness to tell the truth); Spector, *Impeaching the Defendant*, *supra* note 1, at 249–50 (concluding that there is no logical connection between a defendant's past conviction and his willingness to tell the truth when testifying).

[61] *See, e.g.*, FED. R. EVID. 404(a) (barring almost any use of propensity evidence if offered to prove actions in accordance with that propensity).

ty evidence is *disfavored*, it is not *banned*; we allow defendants to admit propensity evidence if they wish (and we allow prosecutors to respond); we also allow both parties to admit evidence of prior dishonest conduct to show that a witness has a propensity to lie.[62] Thus, the drafters of the Rules of Evidence acknowledge that propensity evidence has some probative value.[63] As we will see below,[64] a majority of law students and federal judges agree that at least some categories of criminal convictions (such as theft crimes) have a probative value to prove propensity to lie, and are thus useful to prove lack of credibility on the stand.

A more sophisticated version of the argument attacking the probative value of prior convictions emphasizes the *marginal* probative value of a criminal defendant's prior conviction.[65] This tactical shift from absolute probative value to marginal probative value is far more powerful if the witness is a party to the case, and even more powerful if the witness is a criminal defendant.[66] In those scenarios, the jurors will already be aware that the witness has a strong motivation to lie, so that their learning about a prior criminal conviction will do very little to affect their judgment about the witness's credibility. Professor Richard Friedman imagines a juror having the following absurd internal dialogue: "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."[67]

The strength of this critique rests at least in part on the type—and the number—of prior criminal convictions that are available for impeachment purposes. Here, it is important to consider Rule 609 not just in isolation, but as part of the entire impeachment-by-character regime that is created by the Rules of Evidence. We allow all witnesses to be impeached by character

---

[62] *Id.*

[63] *See id.* R. 404 advisory committee's note (discussing the rationale for admission of character evidence).

[64] *See infra* notes 136–151 and accompanying text (analyzing the data gained from a survey of federal district court cases).

[65] *See, e.g.*, Hornstein, *supra* note 1, at 18 ("The question we must ask about the probative value of prior convictions, then, is how much such evidence adds to our assessment of credibility in light of the defendant/witness's strong interest in the outcome."); Roberts, *Conviction*, *supra* note 1, at 1997 ("[T]he jury already has every reason to suspect that a defendant faced with the loss of liberty and perhaps life might shape his or her testimony in order to maximize the possibility of acquittal.").

[66] *See* Hornstein, *supra* note 1, at 15–19 (discussing the marginal probative value argument).

[67] Friedman, *supra* note 1, at 664. Professor Friedman uses a Bayesian analysis to argue that the marginal probative value of prior convictions to impeach criminal defendants is extremely small. *See id.* at 655–70 (applying a Bayesian analysis to character impeachment of criminal defendants).

witnesses who testify that the witness has a propensity to be untruthful.[68] And we allow all witnesses to be cross-examined with prior dishonest actions, as long as the probative value for impeachment is not substantially outweighed by the unfair prejudice.[69] If we accept the premise behind Rule 608, it would be odd to reject Rule 609 for *all* criminal convictions, because in some cases, the underlying conduct that supported the criminal conviction would be admissible under Rule 608. Certainly this is true for "crimes of falsity," which are automatically admissible under Rule 609[70] and would almost surely pass a Rule 403 balancing test if offered under Rule 608.[71] But it is also true for many crimes that do not meet Rule 609's narrow definition of crime of falsity, such as theft crimes.[72] For example, if a cross-examining attorney has a good faith belief that the witness had stolen money from his employer, Rule 608(b) allows the attorney to ask the witness about the prior theft to prove to the jury that the witness had committed a severely dishonest act in the past.[73] If the defendant had in fact been *convicted* of stealing money from his employer, the probative value increases, because we are more certain that the dishonest action occurred (instead of a "good faith basis," we have a guilty plea or proof beyond a reasonable doubt).[74] It is true that the unfair prejudice also increases, because every criminal conviction carries a stigma; we will consider this in subsection (B)(4) below.[75]

---

[68] *See* FED. R. EVID. 608(a).

[69] *See id.* R. 608(b).

[70] *See id.* R. 609(a)(2).

[71] Though even crimes of falsity would not be admissible under Rule 608 if the prior conviction were identical to the crime for which the defendant is now being charged. I discuss this problem in Part IV. *See infra* notes 165–180 and accompanying text.

[72] *See* H.R. REP. NO. 93-1597, at 9 (1974) (Conf. Rep.) ("By the phrase 'dishonesty and false statement' the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.").

[73] *See* FED. R. EVID. 608(b).

[74] *But see infra* notes 85–98 and accompanying text (describing how some critics dispute the reliability of prior convictions).

[75] *See infra* notes 99–129 and accompanying text (discussing the improper use of prior conviction evidence by jurors as character evidence).

2. Admitting Prior Convictions Infringes on the Defendant's Right to Testify

The Supreme Court has held that every criminal defendant has a right to testify in his or her own defense.[76] Furthermore, a defendant's ability to testify can have serious practical implications for the outcome of the case. Studies have shown that many jurors disregard the standard instruction to draw no inference from the defendant's failure to testify, instead associating the defendant's silence with guilt.[77] Meanwhile, the threat of impeachment by prior conviction has been proven to dissuade some criminal defendants from testifying,[78] and empirical evidence suggests that a jury is more likely to convict a defendant if the defendant does not testify.[79] Impeachment by prior conviction may also have played a significant role in the trials of those who have been wrongfully convicted.[80]

Furthermore, as Professor Roberts has noted, if a defendant is a member of a minority group, many jurors will carry an implicit bias against the defendant.[81] If the defendant chooses to testify, he can alleviate the power of that implicit bias, but if the possibility of impeachment by prior conviction discourages him from testifying, the jury is more likely to evaluate the

---

[76] *See* Rock v. Arkansas, 483 U.S. 44, 49 (1987) ("At this point in the development of our adversary system, it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense.").

[77] *See* LEWIS MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? 21 (1959) (survey shows that 71% of respondents inferred guilt from a defendant's refusal to testify); John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 478 & n.1 (2008) (citing a survey finding that approximately half of Americans believe that refusal to testify is an indicator of guilt); *see also* Friedman, *supra* note 1, at 667 (jurors tend to ignore the judicial instruction not to infer guilt from silence because the instruction is "virtually incoherent").

[78] According to one study, 62% of defendants without criminal records testified, but only 45% of defendants with criminal records testified. Blume, *supra* note 77, at 490 n.49.

[79] *See* Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 413 (2018) (surveying four hundred mock jurors and finding that based on the same fact pattern, a defendant who testifies—and is not impeached with any prior convictions—is convicted 62% of the time, whereas a defendant who does not testify is convicted 76% of the time); Robert D. Okun, *Character and Credibility: A Proposal to Realign Federal Rules of Evidence 608 and 609*, 37 VILL. L. REV. 533, 554–55 (1992) (discussing scientific studies that conclude a jury is more likely to convict a defendant who does not testify).

[80] Blume, *supra* note 77, at 479 ("Virtually all of the [wrongfully convicted] defendants who did not testify had a prior record that likely would have been disclosed to the jury had they taken the stand."). Professor Blume conducted an empirical study of 172 individuals who had been exonerated by the Innocence Project through the end of 2006. *Id.* at 488. He found that of the wrongfully convicted defendants, 91% of those who had criminal records waived their right to testify. *Id.* at 491.

[81] *See* Roberts, *Implicit Stereotyping*, *supra* note 1, at 860–69 (discussing the implicit racial stereotypes that arise when minority defendants do not testify).

defendant as a member of a (disfavored) group rather than as an individual.[82] Thus, if a black or a Latino defendant is discouraged from testifying because of this rule, his decision could exacerbate pre-existing racial biases in our jury system.

These critiques are powerful—but they rest entirely on the presumption that using prior convictions to impeach is improper in the first place. After all, there are many legitimate ways of impeaching a criminal defendant: showing that he is biased; confronting him with prior inconsistent statements; using negative character witnesses to prove that he is not credible; or even using cross-examination to expose his story as not credible and full of inconsistencies.[83] The threat of any of these impeachment techniques could conceivably convince a defendant that he is better off not taking the stand, and in this way "infringe" on his right to testify.[84] Nobody would argue, however, that allowing *any* form of impeachment violates the defendant's right to testify; surely the prosecutor has the right to conduct an effective cross-examination. Thus, this critique of Rule 609 is only persuasive if you have already established that admitting prior convictions to impeach is unfair to the defendant. In other words, if you have already established that Rule 609 evidence is of low probative value and/or allows substantial unfair prejudice, the argument that the rule discourages the defendant from testifying demonstrates that the damage done by the rule can be extensive. But the argument does not, on its own, prove that the rule should not exist.

3. Some of the Prior Convictions May Be Unreliable

A number of critics of Rule 609 have attacked the rule based on the theory that the prior conviction itself may have been inaccurate—that is, the defendant may have been wrongfully convicted of the prior crime, and thus providing the jury with this evidence may mislead the jury.[85] The critics also argue that the disparity of resources between the prosecutor and the

---

[82] *See id.* at 860–82 (discussing implicit stereotypes and proposing that courts focus on the *Mahone* factor of "importance of the defendant's testimony" in order to preclude evidence of prior convictions and allow minority defendants to testify).

[83] *See* Friedman, *supra* note 1, at 669 & n.80 (discussing other factors arising from impeachment evidence that may dissuade a defendant from testifying).

[84] *See id.*; Nichol, *supra* note 1, at 400–05 (discussing the burden prior conviction impeachment evidence places on a defendant's constitutional right to testify).

[85] *See* Hornstein, *supra* note 1, at 9–12 (arguing that the prevalence of plea bargains and the coercive nature of many plea bargains means that often a conviction is not a reliable indicator that the defendant committed the crime); Roberts, *Unreliable Conviction*, *supra* note 1, 579–80 (arguing that courts should undertake investigations into the reliability of prior convictions prior to admitting them under Rule 609).

defense attorney means that a criminal trial is frequently not a "fair fight."[86] Furthermore, they point out that most criminal convictions are the result of plea bargaining, in which the prosecutor wields an extraordinary amount of power and the defendant may be coerced into pleading guilty.[87]

There are three responses to this argument. First, it is again important to compare Rule 609 to Rule 608, which allows any witness to be impeached with any instance of prior dishonest conduct, as long as the attorney has a "good faith basis" that the witness committed the dishonest conduct.[88] This is obviously a much lower standard of proof than what is required to obtain a criminal conviction, however flawed one may believe our criminal justice system to be. In the case of a prior conviction, we know that the witness either admitted to the action under oath during a plea allocution or he was found guilty beyond a reasonable doubt by a jury of his peers. Indeed, one of the reasons why criminal convictions are given their own rule separate and apart from Rule 608 is because—unlike a mildly substantiated allegation of dishonest conduct—we can be relatively certain that the witness committed the underlying criminal action.[89]

A second response is that the unreliable conviction argument is based on a very radical proposition that involves a sweeping and widespread indictment of our criminal justice system. Individuals are imprisoned, fined,

---

[86] *See* Roberts, *Unreliable Conviction*, *supra* note 1, at 582.

[87] *Id.* at 580–84 (concluding that it would be a "miracle" if the result of the plea-bargaining process was reliable).

[88] *See* FED. R. EVID. 608(b). Professor Roberts further argues that some of these felony convictions are *malum prohibitum* rather than *malum in se*; thus, the individuals who are convicted of these crimes are not committing a moral wrong and the prior convictions have even less probative value to prove lack of credibility. *See* Roberts, *Unreliable Conviction*, *supra* note 1, at 587–90. This is a good point, but it merely means that not *all* felonies should be admitted under Rule 609; in other words, judges should take the type of crime under consideration when using Rule 609's balancing test.

[89] One possible counterargument to this response is that Rule 609 evidence carries with it a special (and perhaps inaccurate) veneer of reliability. In other words, when jurors hear about prior dishonest conduct under Rule 608(b), they will automatically (and correctly) discount the strength of the evidence because they know there is a chance that the prior dishonest conduct did not occur. In contrast, when jurors hear about a prior conviction under Rule 609, they incorrectly assume that it is certain that the defendant committed the crime, and therefore fail to discount the evidence to account for the possibility that the defendant may not, in fact, have committed the crime. The strength of this critique rests on two factors. First, how reliable in fact are prior convictions—if the false conviction rate is really only around one or two percent, the difference between the jurors' belief in the defendant's guilt and the likelihood that he is actually guilty is negligible. *See infra* notes 95–98 and accompanying text (discussing how empirical evidence points to a high correlation between conviction and guilt). Second, how much do jurors in fact believe that a prior conviction means actual guilt? The high-profile cases involving exonerations have given many potential jurors a strong level of skepticism about the reliability of our criminal justice system; many potential jurors may incorrectly believe that the false conviction rate is in fact much higher than it is.

and suffer the stigma of a criminal record based on a criminal conviction. If we do not believe criminal convictions are reliable, there are hundreds of other rules in the criminal justice system that need to be reformed to reflect that fact—from sentencing rules for recidivists to civil forfeiture laws to the imposition of dozens of different collateral consequences. And most importantly of all, we need to be fundamentally reforming the criminal justice system itself to lower the number of wrongful convictions.[90] In other words, if criminal convictions are as unreliable as these critics contend, the application of Rule 609 to criminal defendants is the least of our concerns.

The third response springs naturally from the previous response. Given the widespread acceptance—both within the criminal justice system and among the public at large—that a person convicted of a crime is almost certainly guilty of that crime, the burden of persuasion naturally rests on those who would argue against this proposition.[91] To put it simply, the critics have failed to make their case. The critics present two primary arguments. First, they argue that the adversary system is unfair; the prosecutor has so many more resources and so much more power than the defendant that the defendant is at a disadvantage both at trial and during the plea bargaining stage.[92] This argument fails to consider the significant procedural protections given to defendants, including the prosecutor's need to prove guilt beyond a reasonable doubt; the defendant's right—unique among all parties in the adversary system—to remain silent both before and during the trial; and discovery rules, which nearly always favor the defendant. At any rate, imbalances in resources on the one side or favorable procedural rules on the other side are only indirectly relevant to the actual question: how often is a defendant convicted of a felony that he in fact did not commit?

Once again, the burden of proof should rest on those challenging the conventional wisdom on this question. The critics do indeed provide some empirical data, such as the increasing number of exonerations of those who had been found guilty, including those who have pled guilty.[93] This is presented as evidence that "it cannot be taken as a given that a conviction cor-

---

[90] *See, e.g.*, Roberts, *Unreliable Conviction*, *supra* note 1, at 579–90 (discussing systemic issues with the criminal justice system that raise questions as to the reliability of convictions).

[91] *See infra* notes 95–98 and accompanying text (discussing empirical evidence pointing to a high correlation between conviction and guilt).

[92] *See* Roberts, *Unreliable Conviction*, *supra* note 1, at 579–80 (discussing disparities in the judicial process and the lack of a fair fight between prosecutors and defense attorneys).

[93] For example, Professor Roberts points out that as of 2014 the National Registry of Exonerations contained 1,339 exonerees, approximately 10% of whom pled guilty. Roberts, *Unreliable Conviction*, *supra* note 1, at 584 (citing *Exonerations*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx [http://perma.cc/LHD2-ATRP]).

relates to commission of the crime."[94] But nobody is claiming that a prior conviction is *always* indicative of actual guilt; that would be an absurd assertion. After all, every piece of evidence that the jury hears is open to doubt: eyewitnesses lie and make mistakes; forensic experts commit errors in their calculations; even photos and documents can be forged or misinterpreted by jurors. Instead, defenders of Rule 609 merely maintain that there is a *very high correlation* between a prior conviction and guilt. This correlation is in fact extraordinarily high, especially when compared to other forms of evidence a jury hears. Most estimates of false conviction rates are lower than 1%[95]—which means that there is a 99% correlation between the evidence of a conviction and actual guilt of the crime.[96] As a point of compari-

[94] Roberts, *Conviction*, *supra* note 1, at 1993.

[95] *See* C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 55, 81 (1996) (estimating the national wrongful conviction rate at 0.5%); Morris B. Hoffman*, The Myth of Factual Innocence*, 82 CHI.-KENT L. REV. 663, 673 (2007) (using Innocence Project Data to estimate the wrongful conviction rate to be between .0016% and 1.95%); Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 ALB. L. REV. 1465, 1473 (2010) (estimating a wrongful conviction rate of felonies between 0.5% and 1% each year). Some estimates are higher, ranging from 4% all the way up to 10%. *See, e.g.*, Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y. L. SCH. L. REV. 911, 918 (2011) (estimating a false conviction rate of at least 0.5% and as high as 5% or more); Samuel R. Gross & Barbara O' Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 929–30 (2008) (discussing the frequency of false convictions and estimating a false conviction rate of up to ten percent); Virginia Hughes, *How Many People Are Wrongly Convicted? Researchers Do the Math*, NAT'L GEOGRAPHIC: ONLY HUMAN (Apr. 28, 2014), http://phenomena.nationalgeographic.com/2014/04/28/how-many-people-are-wrongly-convicted-researchers-do-the-math/ [https://perma.cc/3CYR-KDV9] (estimating a 4.1% rate of false convictions). Even if these outlying estimates are correct, the reliability of prior conviction evidence is still higher than other types of evidence that are routinely admitted. The number of false convictions may be higher if one is concerned with legal innocence rather than factual innocence. For example, in some cases the lack of adequate counsel may result in a conviction when a competent or less overworked defense attorney could have successfully made a suppression motion, or convinced the jury that reasonable doubt existed. *See* Roberts, *Unreliable Conviction*, *supra* note 1, at 580–85 (discussing the disparity of resources between defense counsels and prosecutors and the heavy case-load burden on defense attorneys). These types of false convictions, however, would not affect the actual correlation between the fact of the conviction and the fact of the defendant's guilt.

[96] The high number of exonerations—just over two thousand in twenty-seven years—is dramatic and troublesome, but not statistically significant when trying to determine the correlation between conviction and actual guilt, given the fact that there are over one million felony convictions each year. *See Exonerations by Year and Type of Crime*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year-Crime-Type.aspx [https://perma.cc/WT89-DGVL] (last visited Feb. 8, 2018).

son, handwriting analysis is accurate only 85% of the time,[97] and voice identification is accurate between 66% and 89% of the time.[98]

4. Jurors Will Use the Prior Convictions for an Improper Purpose

Of all the critiques of applying Rule 609 to criminal defendants, the improper purpose critique is by far the strongest. The danger of unfair prejudice in this context is undeniable, both in terms of the jury using the prior conviction as evidence that the defendant has a propensity to commit crimes (a use that is forbidden by Rule 404(a))[99] or in terms of the jury believing that they should punish the defendant for past crimes rather than the current crime being charged.[100] In addition, this concern is uniquely heightened for a criminal defendant as opposed to other witnesses, because the inference of criminal propensity is much more damaging with regard to a criminal defendant than it is for any other witness.[101]

Critics of Rule 609(a)(1)(B) note that the evidence carries a high risk of unfair prejudice because of jurors' potential to inappropriately use the evidence.[102] Various empirical studies have shown that some mock jurors do in fact misuse prior convictions, using them as evidence of criminal propen-

---

[97] Moshe Kam et al., *Signature Authentication by Forensic Document Examiners*, 46 J. FORENSIC SCI. 884, 885 (2001).

[98] Lawrence M. Solan & Peter M. Tiersma, *Hearing Voices: Speaker Identification in Court*, 54 HASTINGS L.J. 373, 396–97 (2002) (discussing the results of a study conducted in A. Daniel Yarmey et al., *Commonsense Beliefs and the Identification of Familiar Voices*, 15 APPLIED COGNITIVE PSYCHOL. 283, 291–92 (2001)) (noting a 66% accuracy rate for identifying a voice the subject knows casually, and an 89% accuracy rate for identifying a voice of someone the subject knows well). Even the most commonly admitted forms of evidence have a lower accuracy rate. The accuracy of line-up identifications (which are routinely admitted) is only 56% (though it was found to be as high as 60% with model instructions). *See* Nancy Mehrkens Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 L. & HUM. BEHAV. 283, 283, 285, 288–89 (1997); *see also* John C. Brigham et al., *Accuracy of Eyewitness Identification in a Field Setting*, 42 J. PERSONALITY & SOC. PSYCHOL. 673, 677 (1982) (estimating a 50% accuracy rate for eyewitness identification). Fingerprint analysis has a false negative rate of 7.5%. *See* Bradford T. Ulery et al., *Accuracy and Reliability of Forensic Latent Fingerprint Decisions*, 18 PROC. NAT'L ACAD. SCI. 7733, 7733 (2011).

[99] *See* FED. R. EVID. 404(a).

[100] *See* Roberts, *Conviction*, *supra* note 1, at 1997–99 (discussing the unfair prejudice towards criminal defendants arising from the use of prior conviction impeachment evidence as improper propensity evidence).

[101] *See id.*; Gold, *supra* note 1, at 2313 ("In such a case, the jury may ignore the issues and convict because evidence of prior conviction suggests the accused is a bad person who, if not guilty of the crime charged, may be deserving of punishment for something else.").

[102] *See* Roberts, *Unreliable Conviction*, *supra* note 1, at 577 (discussing the flawed psychological inferences of "trait theory"); Spector, *Impeaching the Defendant*, *supra* note 1, at 262–63 (discussing the lack of probative value and high prejudicial effect of character evidence of criminal defendants).

sity rather than as evidence of lack of credibility.[103] It is true that this danger of unfair prejudice means that propensity evidence is *disfavored* in our courtroom, but this type of evidence is not banned altogether. As already noted, Rule 608(b) allows for any witness to be impeached by prior dishonest actions, and Rule 608(a) allows a character witness to testify about the witness's tendency to be dishonest.[104] Both of these provisions are based on the premise that a witness's credibility can be judged at least in part by her character for credibility, and that the unfair prejudice of such evidence is at least occasionally not so high that it substantially outweighs the probative value.[105] Likewise, Rule 404(a) tightly restricts propensity evidence, but it explicitly allows such evidence in criminal cases, both for the defendant and the prosecution, again under the theory that such evidence could have enough probative value that it is not overwhelmed by the unfair prejudice.[106]

Jurors do, of course, receive a limiting instruction specifically telling them not to use the prior conviction for any purpose other than to evaluate the defendant's credibility on the stand, but these instructions have a limited effect.[107] Empirical evidence has shown that most jurors cannot follow lim-

---

[103] *See, e.g.*, Bellin, *supra* note 79. In Bellin's survey, mock jurors were given identical fact patterns; one group was then told that the defendant had a prior conviction for robbery (which was similar to the crime being charged) whereas another was told the defendant had a prior conviction for fraud (which was dissimilar to the crime being charged but more probative to prove lack of credibility). The jurors who heard about the prior robbery convicted the defendant at a rate of 82%, whereas the jurors who heard about the prior fraud convicted the defendant at a rate of 73%. *Id.* Bellin concludes that because the similar crime led to a higher conviction rate than the crime that was directly relevant to credibility, at least some of the jurors were using the prior conviction as evidence of criminal propensity. *Id.* The respondents were told (as actual jurors would be told) to use the prior convictions only for the purposes of evaluating the defendant's credibility; apparently at least some of them ignored this instruction. *See infra* notes 109–115 (discussing an empirical study conducted on the use of jury instructions).

[104] *See* FED. R. EVID. 608.

[105] *See id.* advisory committee's note ("In accordance with the bulk of judicial authority, the inquiry is strictly limited to character for veracity, rather than allowing evidence as to character generally.").

[106] *See id.* R. 404 advisory committee's note (discussing the rationale for admission of propensity evidence in criminal cases).

[107] The United States Supreme Court has rejected the use of limiting instructions in a related context: when a co-defendant's confession is admitted even though it is inadmissible against the defendant. *See* Bruton v. United States, 391 U.S. 123, 135 (1968). Professor Roberts believes that prior convictions have a similarly powerful effect, arguing that "[t]here is no empirical support for the idea that jurors are more able to partition their brains in the case of convictions than in the case of confessions." Roberts, *Conviction*, *supra* note 1, at 1998. But the argument in *Bruton* was not that jurors are less able to "partition their brains" with regard to confessions; it was that hearing a co-defendant's confession implicating the defendant to the exact crime that the defendant is now being charged with is so powerful that any tendency to ignore the limiting instruction is unfairly fatal to the defendant's case. *See Bruton*, 391 U.S. at 135. The fact that some jurors may unfairly believe that the defendant has a propensity to commit crimes after hearing about a prior conviction does not rise to nearly the same level of danger to the defendant's case.

iting instructions perfectly and thus often use prior convictions as evidence of propensity to commit crimes.[108] A recent study conducted by Michael Cicchini and Lawrence White confirms this tendency, at least in the context of Rule 404(b).[109] The study gave participants a basic fact pattern about an alleged sexual assault.[110] The control group was given a stipulation that the defendant and the alleged victim were the only two people in the room; thus, if the sexual assault occurred, the defendant was the one who must have committed the crime.[111] The test group was given conflicting evidence on the question of who was in the room with the alleged victim, but was also told that the defendant committed a similar sexual assault a few years earlier.[112] The test group was told not to use the prior crime as evidence of propensity; only as further evidence that if the assault occurred, the defendant was the one who committed it.[113] Thus, if the test group followed the instruction properly, they should have been less sure of the identity of the perpetrator and (because that was the only difference between the two groups) less willing to convict the defendant. Instead, the test group convicted the defendant at a rate of 48%, whereas the control group only convicted the defendant at a rate of 33%.[114] The only way to explain this result is to assume that at least some members of the test group misused the prior act evidence and (at least subconsciously) believed that the defendant was more likely to commit the offense because he had a propensity to commit sexual offenses.[115]

Empirical studies such as the Cicchini/White study are critical in understanding the imperfections of limiting instructions, and should be used by judges in deciding how to apply balancing tests when determining admissibility. In the Cicchini/White hypothetical, for example, the defendant's prior sexual assault was not particularly distinctive or even very similar to

---

[108] *See* Dodson, *supra* note 51, at 31–32 ("Numerous studies conducted over the last forty years show [the assumptions behind Rule 609] are unfounded fictions and are simply wrong—jurors do use prior conviction evidence to infer criminal propensity and frequently ignore or fail to understand limiting instructions.").

[109] Michael D. Cicchini & Lawrence T. White, *Convictions Based on Character: An Empirical Test of Other-Acts Evidence*, 70 FL. L. REV. (forthcoming 2018), https://ssrn.com/abstract=2928998 [https://perma.cc/JQ4H-Z99V].

[110] *Id.* (manuscript at 9–13) (discussing the process for conducting the study and hypothesizing expected results).

[111] *Id.* (manuscript at 10–11).

[112] *Id.* (manuscript at 11).

[113] *Id.*

[114] *Id.* (manuscript at 13).

[115] *Id.* (manuscript at 13–14) (providing a statistical analysis of the results of the study).

the crime for which he was on trial;[116] thus, it provided very little legitimate evidence on the question of identity.[117] Meanwhile, the unfair prejudice of the jury hearing that the defendant committed the same crime on a prior occasion is extremely high, especially with sex crimes. Thus, a real-life judge almost certainly should not admit the evidence of the defendant's prior sexual assault; applying Rule 403, the probative value to prove identity was substantially outweighed by the unfair prejudice of the propensity evidence, even with the limiting instruction.[118] In other words, the Cicchine/White study does not really prove that limiting instructions are useless, or that the unfair prejudice from prior crimes will *always* overwhelm the probative value that those crimes may provide for the jury. Rather, it shows that judges have to strictly apply the balancing test to ensure that juries are not unfairly prejudiced by certain evidence.

As already discussed, Rule 609 recognizes the great danger of unfair prejudice that exists when jurors hear about a criminal defendant's prior convictions and thus creates a special balancing test for criminal defendants.[119] The balancing test creates a presumption *against* admitting evidence of these prior crimes; that is, the prosecutor must show that the probative value of the prior crime to prove the defendant's lack of credibility is greater than the unfair prejudice the defendant will suffer based on the illegitimate propensity inference.[120] This is in contrast to the balancing test in Rule 403, which carries a heavy presumption of admissibility for most evidence, and which is the balancing test used in 609(a)(1)(A) for admitting prior convictions to impeach any witness other than a criminal defendant, as well as the test used in Rule 608(b), for admitting any prior dishonest act (other

---

[116] In the prior event, the potential defendant was on a date with a woman, went back to her apartment and gave her a backrub, and then touched her chest and buttocks during the backrub even after he was told to stop. In the crime for which he was on trial, the defendant allegedly accosted a stranger at a party by touching her buttocks while she was asleep. *Id.* (manuscript at 11–12). Neither type of sexual assault is distinctive enough to have much probative value, and aside from the fact that the defendant allegedly touched the victim's buttocks in each case, the two incidents are not at all similar.

[117] To admit a prior act to prove identity under Rule 404(b), the prior act and the current act must share extensive or peculiar similarities. *See, e.g.*, United States v. Mack, 258 F.3d 548, 553–54 (6th Cir. 2001) (reviewing a number of similarities between two robberies in admitting evidence under Rule 404(b) to show identity); United States v. Gilbert, 229 F.3d 15, 21–25 (1st Cir. 2000) ("[O]ther acts evidence is admissible to prove identity under Rule 404(b) when 'the shared characteristics of the other act and the charged offense are sufficiently idiosyncratic that a reasonable jury could it more likely than not that the same person performed them both' . . . ." (quoting United States v. Trenkler, 61 F.3d 45, 53 (1st Cir. 1995)).

[118] *See* FED. R. EVID. 403.

[119] *See supra* notes 27–45 and accompanying text (discussing the history behind the adoption of Rule 609 and the rationale for its provisions).

[120] *See* FED. R. EVID. 609.

than a prior conviction) to impeach any witness *including* a criminal defendant.[121] In other words, Rule 609(a)(1)(B) has already acknowledged that there is a much greater danger of unfair prejudice for criminal defendants, and has instructed judges to alter their balancing test accordingly.[122] What critics and reformers of Rule 609(a)(1)(B) are proposing is a blanket ban on using convictions to impeach criminal defendants, no matter how numerous the prior convictions may be, and no matter how indicative the prior crime may be of a propensity to lie.[123]

If—as critics of Rule 609 imply—the probative value of the prior conviction *never* outweighs the unfair prejudice, because the marginal probative value is so low and the unfair prejudice is so high, then under a properly applied balancing test these prior convictions would never be admitted.[124] Thus, the Rule 609 reformers are effectively arguing that judges frequently—if not routinely—misapply the balancing test whenever they admit prior convictions against defendants for impeachment purposes. In other words, the Rule 609 critics are second-guessing trial judges, and arguing that the judges should not be trusted to conduct this balancing test because they either overestimate the evidence's probative value or underestimate its unfair prejudice, or both.

This is a legitimate argument—after all, many of the evidence rules remove discretion from judges and create outright bans on admissibility.[125] Almost all such rules that ban certain evidence outright, however, are based at least in part on policy considerations (encouraging settlements[126] and plea bargains,[127] or protecting the privacy rights of rape survivors[128]), or reliabil-

---

[121] *See id.* R. 608(b), 609(a)(1)(A).

[122] As we will see in Part III, judges apply the balancing test and often preclude the prior conviction because of the danger of unfair prejudice. *See infra* notes 152–164 and accompanying text (analyzing the results from a survey sent to judges and a review of 120 federal district court cases that applied Rule 609).

[123] *See, e.g.*, Roberts, *Conviction*, *supra* note 1, at 1981–82 (arguing that the flawed assumptions of Rule 609 "support a powerful argument for abolition").

[124] *See generally, e.g.*, Friedman, *supra* note 1 (arguing for the abolition of Rule 609 and a complete bar on using prior conviction evidence to impeach criminal defendants who are testifying); Hornstein, *supra* note 1 (same); Spector, *Impeaching the Defendant*, *supra* note 1 (same).

[125] *See, e.g.*, FED. R. EVID. 407 (barring all evidence of subsequent remedial measures if offered to prove liability); *id.* R. 409 (barring all evidence of offering to pay medical expenses if offered to prove liability).

[126] *See id.* R. 408 advisory committee's note ("[A] more consistently impressive ground [for exclusion of compromise offers and negotiations] is promotion of public policy favoring the compromise and settlement of disputes.").

[127] *See id.* R. 410 advisory committee's note ("Exclusion of offers to plead guilty or nolo has as its purpose the promotion of disposition of criminal cases by compromise.").

[128] *See id.* R. 412 advisory committee's note to 1994 amendment ("The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyp-

ity concerns (such as the rules against admitting hearsay or unreliable scientific evidence[129]). And judges are given so much discretion in making almost every other evidentiary ruling that anyone proposing to remove that discretion in a specific context must explain why this type of ruling is so extraordinary that judges—who would generally be thought of as experts in measuring probative value and unfair prejudice—cannot be trusted to make it. Thus, it would be useful to understand how judges apply the balancing test in this context. In the next section, we look at how judges measure probative value and unfair prejudice in making Rule 609 determinations, and compare their analyses to how non-experts (second-year law students) make the same judgments.

## II. SURVEYING STUDENTS AND JUDGES

### *A. The Survey*

The survey set out to measure how students and judges would apply a very specific provision of Rule 609 in a very specific fact pattern.[130] The survey asked respondents to apply Rule 609(a)(1)(B), which states that a witness's prior felony conviction should be admitted to attack a witness's character for truthfulness if its probative value outweighs its unfair prejudice.[131] The survey reminded respondents that in this context, "probative value" refers to the degree of relevance to prove the witness's character for untruthfulness (thus, it did *not* refer to the degree of relevance to prove the defendant's propensity to commit crimes).[132] The survey instructions also specified that the crime for which the defendant is now on trial is completely unrelated to the crime of the prior conviction, to ensure that there was no question of added unfair prejudice from the similarity of the crimes.

---

ing that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process.").

[129] *See id.* R. 702, 802. *See generally* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) (setting forth a non-exclusive checklist for assessing the reliability of scientific expert testimony).

[130] The survey instrument is reproduced in Appendix A, *infra*.

[131] FED. R. EVID. 609(a)(1)(B).

[132] In spite of these instructions, at least one judge indicated in his/her comments that the probative value would be much higher if the defendant were on trial for a similar crime—precisely the opposite conclusion than what a judge *should* reach if the crimes were similar. *See id.* R. 609 advisory committee's note to 1990 amendment ("Thus, the rule recognizes that, in virtually every case in which prior convictions are used to impeach the testifying defendant, the defendant faces a unique risk of prejudice—*i.e.*, 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.").

The survey consisted of a list of twenty-three different crimes, ranging in severity from underage drinking and shoplifting to murder. None of the crimes were crimes of falsity as defined by the Federal Rules of Evidence.[133] The list was presented to the respondents in alphabetical order. After each crime, there were two columns: one labeled "probative value for impeachment" and another labeled "unfair prejudice." The respondents were given the following instructions:

*Assume that a criminal defendant is on trial and will take the stand, and the defendant has a single prior conviction, which took place five years ago. The prosecutor wants to offer this prior conviction for impeachment purposes pursuant to Rule 609. The crime for which the defendant is now on trial is completely dissimilar from the prior conviction. There are no specific facts in the current case which would increase or decrease the probative value of the prior conviction to prove dishonesty or the level of unfair prejudice to this particular defendant.*

*If the prior conviction is admitted, the jury will be given the standard limiting instruction telling them to use the prior conviction only for the purposes of evaluating the witness's truthfulness, and not to use it for any other purpose.*

*For each of the following crimes, the survey will ask you to rank on a scale of 0–100 how PROBATIVE you think the prior conviction would be to prove that the defendant has a tendency to lie and therefore is more likely to be lying on the stand. In other words, how much probative value would you assign to the prior conviction in conducting your Rule 609 balancing test?*

*Then the survey will ask you to rank on a scale of 0–100 how UNFAIRLY PREJUDICIAL you think the prior conviction would be. In other words, what level of unfair prejudice would you assign to the prior conviction in conducting your Rule 609 balancing test?*

The survey was administered in Evidence class to 352 law students between 2011 and 2013. These students responded to the survey after reading about Rule 609 and then discussing Rule 609 in class.

The survey was also sent out to a total of 864 federal district court judges in the spring of 2016. The survey was sent through e-mail if an e-mail address for the chambers was publically available; otherwise it was sent by traditional mail.[134] Forty-nine judges submitted complete responses.[135]

---

[133] *Id.* R. 609(a)(2) defines a crime of falsity as one in which "establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement." These prior convictions are automatically admissible.

[134] One hundred and eighty seven judges were contacted by e-mail and the other 677 were contacted by traditional mail.

### *B. The Results*

We compiled and aggregated the responses in a number of different ways. First, for each individual crime, we noted whether the respondent set the probative value as higher than the unfair prejudice. Under the appropriate balancing test, the prior conviction should be admitted if the probative value for impeachment outweighed (i.e., was greater than) the unfair prejudice.[136] By aggregating these results, we could determine for each crime whether a majority of the respondents believed the probative value for impeachment was greater than the unfair prejudice (i.e., whether a majority of respondents would admit the prior conviction).

Using this method, we see a clear distinction between the percentage of students who would admit each crime and the percentage of federal trial judges who would admit each crime:

Table 1[137]

| Crime | Percentage Who Would Admit Crime | |
|---|---|---|
| | **Students** | **Judges** |
| Aggravated Assault | 10.2% | 20.4% |
| Assault | 8.2% | 18.4% |
| Assault—Hate Crime | 11.4% | 16.3% |
| Domestic Violence | 6.3% | 22.4% |
| Burglary | 25.6% | **61.2%** |
| Carjacking | 23.9% | **53.1%** |
| Child Molestation | 11.1% | 22.4 % |
| Cocaine Possession | 7.7% | 12.2% |
| Cocaine Sale | 11.4% | 24.5% |

[135] A number of judges submitted only partial responses, which were not aggregated into the results. Other judges responded with written explanations that described how they would go about deciding whether to admit, or explaining why they could not complete the survey as requested. None of these responses were aggregated into the results. A compilation of all of the textual responses is contained in Appendix B, *infra*.

[136] *See* FED. R. EVID. 609(a)(1)(B).

[137] This Table is permanently available at http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-3/simmons-graphics.pdf [https://perma.cc/XP7V-N3RH].

| | | |
|---|---|---|
| Underage Drinking | 11.9% | 20.4% |
| Embezzlement | **72.4%** | **91.8%** |
| Grand Theft Auto | 30.4% | **57.1%** |
| Illegal Immigration | 27.3% | 18.4% |
| Marijuana Possession | 6.8% | 12.2% |
| Murder | 13.4% | 26.5% |
| Murder of Policeman | 10.8% | 30.6% |
| Prostitution | 7.7% | 14.3% |
| Rape | 13.4% | 34.7% |
| Robbery | 25.0% | 49.0% |
| Selling Marijuana | 12.8% | 24.5% |
| Shoplifting | 34.1% | 49.0% |
| Statutory Rape | 6.3% | 14.3% |
| Insider Trading | **71.3%** | **85.7%** |
| Results are in **bold** when over 50% of group would admit. | | |

For every crime except one, the admissibility rate for judges is significantly higher than the admissibility rate for students—often twice as high. (The exception is illegal immigration, which over a quarter of the students would admit, but only 18.4% of the judges would admit. We will discuss that crime in more detail later.)[138] Only two of the twenty-three crimes would be admitted by a majority of students; no other crime came closer than 34%. In contrast, a majority of judges would admit five of the twenty-three crimes, with two others (robbery and shoplifting) garnering 49% support.

This divergence is even more pronounced when we dig deeper into the numbers. The next table averages the probative value for each crime and the

[138] *See infra* note 146 and accompanying text (discussing the results of the survey showing that judges are more likely to admit highly stigmatizing crimes and students are more likely to admit immigration crimes).

unfair prejudice for each crime, and then subtracts unfair prejudice from probative value. Thus, a negative number means that in the aggregate the group would not admit the crime (because the unfair prejudice is, on average, higher than the probative value), whereas a positive number means that in the aggregate the group would admit the crime (because the probative value is, on average, higher than the unfair prejudice).

Table 2[139]

| **Crime** | **Difference in Mean Average Score (Probative – Unfair Prejudice)** | | **Difference Between Judges and Students*** |
|---|---|---|---|
| | **Student** | **Judge** | |
| Aggravated Assault | -39.2 | -37.0 | Judges +2.2 |
| Assault | -33.0 | -37.9 | Students +4.9 |
| Assault—Hate Crime | -39.7 | -44.8 | Students +5.1 |
| Domestic Violence | -42.9 | -37.1 | Judges +5.8 |
| Burglary | -13.8 | **9.0** | Judges +22.8 |
| Carjacking | -15.7 | **8.2** | Judges +23.9 |
| Child Molestation | -44.0 | -39.9 | Students +4.1 |
| Cocaine Possession | -33.6 | -38.9 | Judges + 5.3 |
| Cocaine Sale | -31.1 | -30.4 | Students +0.7 |
| Underage Drinking | -20.9 | -25.9 | Students +5 |
| Embezzlement | **25.8** | **52.9** | Judges +27.1 |
| Grand Theft Auto | -9.0 | **8.8** | Judges +17.8 |
| Illegal Immigration | -16.3 | -31.2 | Students +14.9 |
| Marijuana Possession | -27.3 | -34.9 | Students +7.6 |
| Murder | -37.6 | -25.3 | Judges +12.3 |

[139] This Table is permanently available at http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-3/simmons-graphics.pdf [https://perma.cc/XP7V-N3RH].

| | | | |
|---|---|---|---|
| Murder of Policeman | -39.7 | -18.5 | Judges +21.2 |
| Prostitution | -39.8 | -44.1 | Students +4.3 |
| Rape | -38.1 | -22.2 | Judges +15.9 |
| Robbery | -16.3 | **6.2** | Judges +22.5 |
| Selling Marijuana | -25.9 | -27.1 | Students +1.2 |
| Shoplifting | -7.0 | **7.0** | Judges +14 |
| Statutory Rape | -37.0 | -45.1 | Students +8.1 |
| Insider Trading | **23.7** | **39.4** | Judges +15.7 |
| * A positive number means the named group is more likely to admit this crime than the other group. | | | |

In the aggregate, the students would only admit two of the twenty-three crimes, whereas the judges would admit seven of them.

Finally, we see similar results when we use the median score for each crime as opposed to the mean average:

Table 3[140]

| **Crime** | **Difference in Median Score (Probative – Unfair Prejudice)** | | **Difference Between Judges and Students*** |
|---|---|---|---|
| | **Student** | **Judge** | |
| Aggravated Assault | -48.0 | -40.0 | Judges +8 |
| Assault | -40.0 | -54.0 | Students +14 |
| Assault—Hate Crime | -50.0 | -57.0 | Students +7 |
| Domestic Violence | -52.5 | -55.0 | Students +2.5 |
| Burglary | -15.0 | **20.0** | Judges +35 |
| Carjacking | -20.0 | **12.0** | Judges +32 |
| Child Molestation | -60.0 | -55.0 | Judges +5 |

[140] This Table is permanently available at http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-3/simmons-graphics.pdf [https://perma.cc/XP7V-N3RH].

| | | | |
|---|---|---|---|
| Cocaine Possession | -40.0 | -50.0 | Students +10 |
| Cocaine Sale | -30.0 | -40.0 | Students +10 |
| Underage Drinking | -15.0 | -25.0 | Students +10 |
| Embezzlement | **32.5** | **60.0** | Judges +28.5 |
| Grand Theft Auto | -16.0 | **20.0** | Judges +36 |
| Illegal Immigration | -20.0 | -48.0 | Students +28 |
| Marijuana Possession | -25.0 | -40.0 | Students +15 |
| Murder | -50.0 | -50.0 | Even |
| Murder of Policeman | -55.0 | -40.0 | Judges +15 |
| Prostitution | -45.0 | -55.0 | Students +10 |
| Rape | -55.0 | -35.0 | Judges +20 |
| Robbery | -17.5 | **3.0** | Judges +20.5 |
| Selling Marijuana | -25.0 | -30.0 | Students +5 |
| Shoplifting | -10.0 | **20.0** | Judges +30 |
| Statutory Rape | -40.0 | -59.0 | Students +19 |
| Insider Trading | **32.5** | **50.0** | Judges +17.5 |
| * A positive number means the named group is more likely to admit this crime than the other group. | | | |

Once again, in the aggregate, the students would only admit two of the twenty-three crimes, whereas the judges would admit seven of them.

### *C. Interpreting the Results*

Examining these results leads to three conclusions:

#### 1. Judges Are Much More Likely to Admit Prior Convictions Than Students

As noted above, judges are more amenable to admitting this evidence than students. There are a number of possible explanations for this phenomenon. First, judges have far more experience with trials, witnesses, and juries than students do, so perhaps they are more skilled at determining both

probative value for credibility and the unfair prejudice on the jury. Second, judges may be more likely to agree with the controversial premise behind Rule 609; as professionals who spend their careers applying the Rules of Evidence, they may have become adjusted to the underlying theory behind the rule. In contrast, when students first hear about the rule, they may find it counter-intuitive, and many may believe that if a crime is not a crime of falsity, it has little to no bearing on someone's propensity to tell the truth. Third, judges may be more hardened by their long experience with the criminal justice system; thus, because they have seen so many defendants with prior convictions, they may give a lower value for the unfair prejudice of that prior conviction. And fourth, as professionals who have been "captured" by the criminal justice system, judges may be more willing to admit these prior convictions for illegitimate reasons: they may actually expect and want the jurors to use the prior conviction for an improper propensity purpose, or they may want to deter the defendant from testifying to increase the chance of conviction.[141]

### 2. Both Groups Believe Crimes of Theft Are More Likely to Be Admitted Than Other Kinds of Crimes

As might be expected, both groups were more likely to admit theft crimes (burglary, carjacking, embezzlement, grand theft auto, robbery, shoplifting, and insider trading) than other crimes. This is probably because theft crimes seem more dishonest than, say, crimes of violence or drug crimes. In fact, theft crimes were the *only* crimes that were admitted by a majority of students and judges, and the only crimes in which the average probative value was higher than the average unfair prejudice. State court decisions supported this result as well: twenty-two states have determined that theft crimes are "crimes of falsity" and are thus automatically admissible under Rule 609(a)(2).[142]

But even though most students were willing to admit some of the theft crimes, by far the greatest discrepancy between the student responses and the judicial responses was found in this area: judges were much more likely to admit these crimes (and admit a wider variety of these crimes) than students. For some crimes (carjacking, grand theft auto, robbery, and shoplifting), judges believed that these crimes had a significantly higher probative value

---

[141] *See supra* note 6 and accompanying text (discussing possible reasons the criminal justice system resists reform with respect to Rule 609).

[142] *See infra* note 173 and accompanying text (discussing the twenty-two states that have determined theft crimes are "crimes of falsity").

than students did, and for other crimes judges believed that these crimes had a lower level of unfair prejudice (embezzlement and insider trading):

Table 4[143]

| Crime | Mean Average Probative Value | | Mean Average Unfair Prejudice | |
|---|---|---|---|---|
| | Student | Judge | Student | Judge |
| Burglary | 37.8 | 48.1 | 51.6 | 39.1 |
| Embezzlement | 68.5 | 76.1 | 42.7 | 23.2 |
| Carjacking | 36.9 | 53.6 | 52.6 | 45.4 |
| Grand Theft Auto | 37.8 | 49.5 | 46.8 | 40.7 |
| Robbery | 37.1 | 50.7 | 53.5 | 44.5 |
| Shoplifting | 31.6 | 46.7 | 38.7 | 39.7 |
| Insider Trading | 66.8 | 67.2 | 43.1 | 27.8 |

Note that the probative value of theft crimes is thought to be so high that for shoplifting (described in the survey as "shoplifting items with a value between $10 and $100"), the judges' average probative value was higher than the average unfair prejudice, even though under this definition shoplifting is a misdemeanor and thus not even admissible under Rule 609's provisions.[144]

### 3. Judges Are More Likely to Admit Highly Stigmatizing Crimes, Whereas Students Are More Likely to Admit Immigration Crimes

Judges appear to see less unfair prejudice in certain very serious crimes, such as murder and rape. Compare the following:

[143] This Table is permanently available at http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-3/simmons-graphics.pdf [https://perma.cc/XP7V-N3RH].

[144] FED. R. EVID. 609(a)(1) ("[F]or a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year . . . .").

Table 5[145]

| Crime | Mean Average Probative Value | | Mean Average Unfair Prejudice | |
|---|---|---|---|---|
| | Student | Judge | Student | Judge |
| Child Molestation | 36.8 | 32.0 | 80.8 | 71.9 |
| Murder | 42.0 | 40.4 | 79.5 | 65.7 |
| Murder of Policeman | 43.3 | 43.4 | 83.1 | 62.0 |
| Rape | 37.4 | 41.4 | 75.5 | 63.6 |

For each of these crimes, the perceived probative value to prove untruthful character is very similar between the two groups, but the unfair prejudice is significantly different, with judges believing the unfair effect on the jury is less than students believe. (Note that this is not true for all the crimes; the average unfair prejudice rating for all crimes for students was 56.2, whereas the average unfair prejudice rating for all crimes for judges was 53.5).[146] Thus, for these specific crimes only, judges appear to trust juries more with this kind of information.

On the other hand, compare the following:

Table 6[147]

| Crime | Mean Average Probative Value | | Mean Average Unfair Prejudice | |
|---|---|---|---|---|
| | Student | Judge | Student | Judge |
| Illegal Immigration | 36.0 | 26.4 | 52.3 | 57.6 |

This was by far the biggest difference in favor of the students about probative value; more students than judges seem to genuinely believe that a conviction involving illegal immigration is useful in evaluating a witness's

[145] This Table is permanently available at http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-3/simmons-graphics.pdf [https://perma.cc/XP7V-N3RH].

[146] *See supra* note 146 and accompanying text (analyzing the average unfair prejudice rating for all crimes in Table 6).

[147] This Table is permanently available at http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-3/simmons-graphics.pdf [https://perma.cc/XP7V-N3RH].

credibility. This was also the only crime that more students would admit than judges (although still only 28% of students would admit the crime). On average, students gave this crime a probative value rating approximately as strong as many of the theft crimes, such as carjacking, grand theft auto, robbery, and shoplifting.

### *D. Critiques of the Survey*

The survey results can be critiqued on a number of levels. Most fundamentally, they do not necessarily reflect the *actual* probative value and *actual* unfair prejudice of each of these pieces of evidence; rather, they represent the students' and judges' *estimates* of probative value and unfair prejudice. Nevertheless, the survey results may be the best estimates that we can make. It would be very hard, if not impossible, to measure the actual probative value or the actual unfair prejudice of each type of prior convictions.[148] The judges' estimates may be the more accurate of the two—after all, judges estimate probative value and unfair prejudice on a daily basis for all sorts of evidence; if we ignore their estimates in this context, we are calling into question thousands of Rule 403 rulings that judges make in courtrooms every day. The students' responses may be less reliable indicators in some ways, because students do not have the experience and expertise that the judges do. The students, however, may reflect a perspective that is less hardened by having presided over years of criminal trials and therefore more accurate.[149] They also may present a more politically diverse group of respondents, because judges tend to be more conservative and are often former prosecutors.[150]

One indicator of the accuracy of the results, however, is the consistency seen between the two diverse groups of respondents. Both groups would admit serious theft crimes such as embezzlement and insider trading, and

---

[148] Probative value in this context would measure how much a prior conviction in fact indicates that a witness is likely to lie on the stand; unfair prejudice would measure how likely a juror is to ignore the limiting instruction, and if so, to what extent the average juror will allow the belief in the defendant's propensity to commit a crime to influence her verdict.

[149] Law students are also probably better respondents than the general population because they are familiar with the terms "probative value" and "unfair prejudice."

[150] *See* Adam Liptak, *Why Judges Tilt to the Right*, N.Y. TIMES (Jan. 31, 2015), https://www.nytimes.com/2015/02/01/sunday-review/why-judges-tilt-to-the-right.html [https://perma.cc/6PWX-Y7YA] (discussing a study that shows judges tend to be more conservative than lawyers and possible reasons why this trend occurs). *See generally* Adam Bonica & Maya Sen, *The Politics of Selecting the Bench from the Bar: The Legal Profession and Partisan Incentives to Politicize the Judiciary* (Harvard Kennedy Sch. Faculty Research Working Paper Series RWP15-001, 2015), https://research.hks.harvard.edu/publications/workingpapers/citation.aspx?PubId=9544&type=FN&PersonId=280 [https://perma.cc/GNN8-N3SM] (conducting an empirical study of the politicization of the court system).

students came very close to agreeing with the judges in admitting some other theft crimes, such as shoplifting or grand theft auto. This leads to a presumption that the probative value for these crimes is generally higher than their unfair prejudice.

A more sophisticated critique of the survey is that it is decontextualized; that is, the judges are assigning levels of probative value and unfair prejudice in the abstract, without an actual defendant with actual charges in front of them. Judges may act somewhat differently in actual trial situations, for a number of reasons. First, they may be more thoughtful and engage in more critical thinking in making a real-life decision than when they are simply filling out a survey. Second, the survey results are anonymous, whereas the judges' actual rulings are public, and therefore may be influenced by how the judge believes she will be perceived by others (current litigants, future litigants, other judges, etc.). Third, the survey specified that the prior conviction was "completely dissimilar" to the charge the hypothetical defendant is currently facing, whereas in an actual trial situation the prior conviction may be similar to the current charge to varying degrees (for example, if the defendant is now on trial for firearm possession, a prior conviction for selling drugs could be seen as related because some jurors may associate selling drugs with possessing firearms), which should change how the judge would gauge the level of unfair prejudice. And finally, in the actual courtroom, judges may be influenced by a wide variety of implicit biases—based on the race of the defendant, the judge's own knowledge of the defendant's prior record or other aspects of the defendant's background, the type of crime the defendant is accused of, the strength of the evidence against the defendant, or any other factors.[151]

All of these critiques are legitimate reasons why the survey results may be inconsistent with how judges actually rule in cases, but most of them are not reasons to believe that the survey results are inaccurate in their estimates of probative value and unfair prejudice. Indeed, the second and fourth of these critiques (the fact that the survey is anonymous and responses are more likely to be free of implicit biases) are reasons to believe that the survey results *more* accurately reflect the actual probative value and unfair prejudice than the judges' actual rulings. The first critique—that judges may be more thoughtful and analytical in actual cases—cuts the other way, although it is possible that judges will in fact be more thoughtful when they are forced to explicitly rate the probative value and unfair prejudice of a prior conviction, as they are in the survey. The third critique does not really

[151] Thanks to Professor Anna Roberts for this critique. *See* Roberts, *Implicit Stereotyping*, *supra* note 1, at 861–68.

affect the accuracy of the survey results; it merely points out that real trials are more complex than the survey can model.

Having acknowledged the differences between how judges may respond in the survey and how they may rule in actual cases, we can now turn to an analysis of actual cases. In the next section, we will examine how judges rule on Rule 609 cases in the courtroom, and then compare those rulings to our survey results.

## III. RULE 609 IN THE COURTROOM

If the survey's averages were a completely accurate indicator of how judges applied the Rule 609(a)(1)(B) balancing test, then judges would routinely admit all theft crimes and exclude all other crimes (assuming, as the survey did, that the prior conviction and the crime for which the defendant is on trial are completely dissimilar). For many critics of Rule 609, even this state of affairs would be unacceptable: to them, even the admission of a prior theft conviction against a defendant accused of a completely unrelated crime is an injustice.[152] For these critics, the marginal probative value of prior convictions of theft to prove lack of credibility is too low, and the unfair prejudice of the jury hearing about the prior crime (even with a limiting instruction) is too high.[153]

This is, in the end, a judgment call: there is no empirical evidence of *how* indicative a prior felony theft conviction is to prove lack of credibility on the stand, and there is no real way of knowing the extent to which jurors will misuse the conviction as evidence of criminal propensity. It is worth noting, however, that surveys of the students (who had just learned about the rule a day or two before taking the survey) and of judges (who had years of experience applying the rule in their courtrooms) indicate extremely strong support for the proposition that, for theft crimes at least, the probative value of the prior conviction does outweigh its unfair prejudice.

Of course, that result only takes into consideration the *averages* of all the responses; some judges indicated they would admit almost any prior conviction, whereas others indicated that they would admit almost no prior conviction.[154] This is unavoidable for any rule that gives such a broad level

---

[152] *See* Friedman, *supra* note 1, at 638 (arguing for the abolition of character impeachment of a criminal defendant); Roberts, *Conviction*, *supra* note 1, at 2018–36 (discussing efforts to abolition or reform Rule 609).

[153] *See* Hornstein, *supra* note 1, at 15–19 (discussing marginal probative value compared to the high prejudicial effects of prior impeachment evidence); Roberts, *Conviction*, *supra* note 1, at 1997 (discussing marginal probative value).

[154] This diversity is reflected in the standard deviations for each response, as reported in Appendix A, *infra*.

of discretion to the decision maker, but it could be used as an argument for reforming the rule. Even if the results on average seem sensible (admitting all theft crimes and precluding all other crimes), if a substantial minority of judges admit convictions that cause a very high level of unfair prejudice, the rule may do more harm than good.

Furthermore, the survey itself asks judges how they would respond in a hypothetical case. It could be true that in practice, when deciding actual cases, judges behave differently. There are certainly isolated examples of trial judges making questionable decisions regarding Rule 609(a)(1)(B).[155] But to support an argument that this decision should be taken out of the hands of judges altogether, critics of the rule would need to have evidence that judges misapply the balancing test often enough that they routinely admit convictions whose unfair prejudice outweighs their probative value. So the last piece of the empirical data to consider is: how are trial judges actually applying this rule in practice?

For the most part it seems that federal trial judges do not make questionable Rule 609(a)(1)(B) decisions. An analysis of over one hundred and twenty federal district court cases[156] indicates that this type of abuse is not widespread. As would be expected from our survey results, trial court judges frequently admit convictions of theft crimes such as possession of stolen property, larceny, and robbery. On the end of the spectrum, trial courts are much less likely to admit prior convictions for drug sale, firearm offenses, and assault, presumably because they are much less probative of credibility. Below are the results for the ten most common crimes.[157] There are three columns for admissibility: the first column indicates whether the judge ad-

---

[155] For example, in a recent case in Tennessee in which the defendant was charged with possessing and selling cocaine, the trial judge, with very little analysis, ruled in favor of admitting a defendant's prior convictions for drug possession, drug sale, and aggravated assault to impeach the defendant if he testified. United States v. Sneed, No. 3:14 CR 00159, 2016 WL 4191683, at *2 (M.D. Tenn. Aug. 9, 2016) ("If Sneed chooses to testimony [sic], his credibility will be a central issue. We will allow impeachment using the three underlying felonies due to their anticipated probative value.").

[156] To conduct this analysis, we reviewed every federal district court case on Westlaw over the past twenty-two years that involved a Rule 609(a)(1)(B) motion, including the unpublished cases. This, of course, does not represent every possible Rule 609(a)(1)(B) decision, because many judges will make a Rule 609(a)(1)(B) ruling without reporting the decision to Westlaw. It is possible that this limitation of our empirical analysis may skew the results—unreported decisions may be less thoughtful or contain less legal analysis than reported decisions, leading to a different pattern of admissibility. A more comprehensive survey of every Rule 609(a)(1)(B) decision, including both reported and unreported decisions, however, would be extremely resource-intensive and may in fact not be possible.

[157] The overall sample included thirty-one different crimes, but most of them only arose once or twice, which was not enough times to indicate an accurate pattern of admission. These ten crimes were the only crimes that appeared four or more times in our sample.

mitted the fact of the felony conviction and allowed the prosecutor to reveal the name of the crime; the second column indicates how often the judge admitted the fact of the conviction but did not allow the prosecutor to reveal the name of the crime; and the third column indicates the total percentage of times that the judge admitted the prior conviction.

Table 7[158]

| Type of Prior Conviction | Total Number Considered | Percent Admitted With Name | Percent Admitted Without Revealing the Name | Total Percent Admitted (With or Without Names) |
|---|---|---|---|---|
| Possessing /Receiving Stolen Property | 10 | 80.0% | 0.0% | 80.0% |
| Grand Larceny/Theft | 14 | 71.4% | 7.4% | 78.6% |
| Drug Possession | 41 | 70.7% | 4.9% | 75.6% |
| Robbery | 28 | 64.3% | 3.6% | 67.9% |
| Burglary | 11 | 54.5% | 17.2% | 72.7% |
| Escape/Eluding Police | 6 | 50.0% | 0% | 50.0% |
| Drug Sale/Intent to Sell | 64 | 48.4% | 26.4% | 75.0% |
| Aggravated Assault | 16 | 43.8% | 18.7% | 62.5% |
| Firearm offense | 26 | 38.5% | 15.3% | 53.8% |
| Assault/Resisting a Police Officer | 4 | 25.0% | 50% | 75.0% |
| **Total (includes 31 different crimes)** | **231** | **53.2%** | **14.3%** | **67.5%** |

A number of aspects of these results stand out. First, contrary to the argument by some Rule 609 critics that judges routinely admit prior convictions to impeach criminal defendants, the data indicate that judges only ad-

[158] This Table is permanently available at http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-3/simmons-graphics.pdf [https://perma.cc/XP7V-N3RH].

mitted two-thirds of these prior convictions, and the jury is told the name of the prior conviction only about half the time. This indicates that judges are not automatically admitting prior convictions, but that they are taking the balancing test seriously. Furthermore, the results from the courtroom are broadly consistent with the results of the student survey and the judge survey: judges admitted theft crimes by name far more often than other crimes (other than crimes of drug possession, which will be discussed below) whereas crimes of violence are admitted far less often.[159]

Our analysis of the cases indicate that most judges were acutely aware of the danger that exists when a prior conviction was similar to the crime for which the defendant was currently on trial.[160] For example, of the nineteen drug sale convictions that were precluded, twelve of them were precluded at least in part because of the similarity between the prior conviction and the current charges. The same reasoning supported precluding five of the eight robbery charges that were precluded. In four other cases, the trial judge precluded a prior conviction involving a drug crime because the defendant was currently on trial for a firearms charge and juries might associate drug crimes with firearms.[161] In another case, the trial judge precluded a prior conviction for grand larceny because the defendant was currently on trial for a firearms offense and the judge was concerned that juries may not know the elements of grand larceny and incorrectly speculate that it involves the use of a firearm.[162] Finally, with regard to prior drug sales, judges frequently compromise by admitting the fact and the date of a prior conviction without allowing the prosecutor to elicit the specific name of the crime; often the judge explained that this was because of the similarity between the prior conviction and the crime for which the defendant was now being charged.

---

[159] *See supra* notes 141–146 and accompanying text (discussing the results of the survey).

[160] Most circuit courts require trial judges to apply a five-factor balancing test when determining admissibility under Rule 609(a)(2). Although the factors differ slightly from circuit to circuit, a common factor is the similarity between the charged crime and the prior conviction—the more similar the prior conviction, the more likely it will be that the jury will use the prior conviction improperly as evidence of propensity to commit the crime in question. *See, e.g.*, United States v. Hernandez, 106 F.3d 737, 739–40 (7th Cir. 1997).

[161] *See* United States v. Wilson, No. 15-cr-94, 2016 WL 2996900, at *2 (D.N.J. May 23, 2016) ("While the offenses are not identical, they are similar because, in this matter, an individual juror may associate Defendant's current charge of illegally possessing a firearm as a convicted felon with his prior conviction for distributing heroin."); United States v. Figueroa, No. 15-0098, 2016 WL 126369, at *2 (D.N.J. Jan. 11, 2016) (reasoning that an individual juror may associate drugs and guns); United States v. Vasquez, 840 F. Supp. 2d 564, 569 (E.D.N.Y. 2011) (concluding that drug possession is not sufficiently "veracity-related" to be more probative than prejudicial); United States v. White, No. 08-cr-0682, 2009 WL 4730234, at *4 (E.D.N.Y. Dec. 4, 2009).

[162] United States v. Alexander, No. CR-04-64-B-W, 2005 WL 2175169, at *2 (D. Me. Sept. 6, 2005). The trial occurred in Maine, and Maine did not have a crime for grand larceny, so the trial judge was concerned that the jurors would be too unfamiliar with the crime.

And yet the statistics from the courtroom do show some troubling trends. Judges admit crimes of violence at an oddly high rate: over half of the prior convictions for assault-type crimes were admitted, even though our survey results show that they have close to the lowest level of probative value for credibility and a relatively high level of unfair prejudice.[163] Judges also admitted three quarters of the prior convictions for drug possession, even though surveys indicated that the unfair prejudice of that crime is far higher than the probative value for credibility. 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.[164] 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: the survey 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 consensus provides support for the argument that the rule may need to be amended to avoid these types of rulings.

## IV. A NEW RULE 609

Any attempt to reform Rule 609 must consider its place in the overall context of impeachment evidence and propensity evidence. Many critics advocate barring the use of prior convictions when used to impeach criminal defendants—that is, abolishing Rule 609(a)(1)(B) entirely and amending Rule 609(a)(2) (which automatically admits all crimes of falsity) to ensure that it does not apply to criminal defendants.[165] But this change on its own would create inconsistencies in the law: prior convictions would still be allowed to impeach any other witness, whereas other types of dishonest conduct could still be used to impeach criminal defendants under Rule 608.

Furthermore, abolishing Rule 609(a)(1)(B) entirely would mean that prior convictions could never be used to impeach, no matter how numerous they were and no matter what type of crime the defendant had committed, primarily under the theory that the unfair prejudice of such evidence almost

---

[163] *See supra* note 136 and accompanying text (discussing the probative value for credibility and level of unfair prejudice of assault-type crimes in Tables 2 and 3).

[164] In one notable case, the defendant was on trial for possession of drugs with the intent to sell them, and the judge admitted four prior convictions for drug possession and one prior conviction for drug possession with intent to sell. United States v. Alexander, No. 11 CR 148-1, 2014 WL 64124, at *6–8 (N.D. Ill. Jan. 8, 2014).

[165] *See* Roberts, *Conviction*, *supra* note 1, at 2018–36 (discussing efforts to abolish Rule 609).

always outweighs its probative value.[166] As we can see from both the survey data and the analysis of courtroom decisions, this perspective is dramatically at odds with how judges view this evidence. It is certainly possible, as some critics contend, that the vast majority of judges (not to mention the majority of law students) are misguided, and that prior convictions should never be admitted against criminal defendants under any circumstances.[167] But it seems more likely that these convictions are at least occasionally more useful to a jury than they are harmful, which would lead us to seek out a more modest reform of Rule 609—one which, incidentally, is far more likely to be politically feasible than outright abolition.[168]

Rule 609(a)(1)(B) already contains a balancing test, which is ostensibly very favorable to the defendant: prior convictions are only supposed to be admitted if their probative value outweighs their unfair prejudice.[169] If judges properly applied this test in every case, it would be hard to make a case for changing the rule. The concern is that in practice, judges (or at least some judges) do not apply the balancing test properly: they either overestimate the probative value of the evidence, underestimate its unfair prejudice, do both, or perhaps ignore the balancing test altogether. The response to these problems should not be to abolish the rule entirely, but to provide judges with more guidance in the text of the rule so that they follow the balancing test more accurately and more consistently.

After examining the empirical data, we can reach two tentative conclusions. First, the surveys of students and judges reach a consensus that for some prior convictions—those that involve crimes of theft—the probative

---

[166] *See* FED. R. EVID. 609(a)(1)(B).

[167] *See generally, e.g.*, Friedman, *supra* note 1 (arguing for the abolition of Rule 609 on the grounds that the prejudicial effect of prior conviction evidence always outweighs the probative value of such evidence); Hornstein, *supra* note 1 (same); Spector, *Impeaching the Defendant*, *supra* note 1 (same).

[168] *But see* Roberts, *Conviction*, *supra* note 1, at 2016–36 (tracing the successful attempts to reform Rule 609 in three different state evidence codes).

[169] In contrast, if Rule 609(a)(2) did not exist, the admissibility of a defendant's prior convictions would be assessed under Rule 608, which would admit the prior conviction as long as the unfair prejudice did not substantially outweigh its probative value. This would result in a much larger number of prior convictions being admitted. Of course, those who advocate abolishing Rule 609(a)(2) are aware of this fact, and many of them propose replacing the rule with another rule that bans prior conviction evidence to impeach criminal defendants in any context, thus carving out an exception to Rule 608. *See, e.g.*, Roberts, *Conviction, supra* note 1, at 2036 (proposing the following change to the statutory language: "In a criminal case where the defendant takes the stand, the prosecution shall not ask the defendant or introduce evidence as to whether the defendant has been convicted of a crime for the purpose of attacking the defendant's credibility. If the defendant denies the existence of a conviction, that denial may be contradicted by evidence that the conviction exists.").

value for impeachment outweighs the unfair prejudice.[170] The surveys also reach a consensus that some prior convictions—crimes of violence, sex crimes, and drug crimes—have very little probative value for impeachment and a very high level of unfair prejudice.[171]

Second, our analysis of trial court judges applying Rule 609 in the courtroom shows rulings that are broadly consistent with the survey results: crimes of theft are very often admitted, whereas crimes of violence are not. And yet some glaring inconsistencies exist: specifically, crimes of drug possession are admitted to impeach even though the survey states that they have almost no impeachment value, and a substantial minority of judges admit prior convictions even though they are identical to the crime for which the defendant is now on trial.

These two conclusions point us in a similar direction: we need to amend Rule 609 to provide more guidance to those trial judges who are improperly admitting prior convictions that do not in fact pass the balancing test. We can provide that guidance by explicitly stating that theft crimes can be admitted for this purpose, but that no other crimes should be considered. This would be a relatively simple amendment to Rule 609(a),[172] which now reads:

> 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

---

[170] In the survey, crimes of theft included burglary, carjacking, embezzlement, grand theft auto, shoplifting, and insider trading.

[171] Of course, just because students and judges reach a consensus on these issues does not mean that they are correct. It could be, as the Rule 609 critics might contend, that the probative value of prior convictions is never sufficient to overcome the substantial unfair prejudicial effect that they have on the jury. But there is no apparent way to measure the true probative value or unfair prejudice of this kind of evidence; thus, the opinions of those who are first exposed to the rule and of those who apply the rule on a regular basis are at least useful data points in evaluating the rule.

[172] *See* FED. R. EVID. 609(a). The rest of Rule 609 deals with convictions that are over ten years old, convictions that have been pardoned or annulled, juvenile convictions, and convictions that are being appealed, all of which are issues outside the scope of this Article. *See id.* R. 609(b)–(e).

> **(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.

The proposed amendment would be to Rule 609(a)(1)(B), which would now read:

> **(B) may** be admitted in a criminal case in which the witness is a defendant, **only if the crime involves an element of theft, receiving stolen property, or similar criminal activity, and** if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

This would limit impeachment by prior conviction for criminal defendants to two types of crimes. First, under our amended Rule 609(a)(1), felonies that contain an element of theft would be admissible against a criminal defendant if the probative value outweighed the unfair prejudice, and admissible against any other witness if it passed the Rule 403 test. Second, under the existing Rule 609(a)(2), felonies that contain an element of falsity would be automatically admitted in all cases.[173]

This amendment would serve a number of important purposes. First, it would bar the admission of prior crimes that have (according to our survey

[173] This proposal parallels Michigan's Rule 609, which automatically admits crimes of falsity, and then admits theft crimes if they are felonies and (if the witness is a criminal defendant) the probative value of the evidence outweighs its prejudicial effect. *See* MICH. R. EVID. 609(a). It is worth noting that this amendment would bring the federal Rule 609 closer in content to many states' Rules of Evidence. In twenty-two states, theft crimes are considered "crimes of falsity" and are therefore automatically admissible under the state's version of Rule 609. *See* Huffman v. State, 706 So. 2d 808, 813 (Ala. Crim. App. 1997); Richardson v. State, 579 P.2d 1372, 1376–77 (Alaska 1978); Webster v. State, 680 S.W.2d 906, 908 (Ark. 1984); Webb v. State, 663 A.2d 452, 461 (Del. 1995); State v. Page, 449 So. 2d 813, 815–16 (Fla. 1984); People v. Spates, 395 N.E.2d 563, 568–69 (Ill. 1979); Newman v. State, 719 N.E.2d 832, 836 (Ind. Ct. App. 1999); State v. Harrington, 800 N.W.2d 46, 51 (Iowa 2011); State v. Mahkuk, 551 P.2d 869, 872–73 (Kan. 1976); State v. Grover, 518 A.2d 1039, 1041 (Me. 1986); State v. Brown, 621 N.E.2d 447, 454 (Ohio Ct. App. 1993); Cline v. State, 782 P.2d 399, 400 (Okla. Crim. App. 1989); State v. Gallant, 764 P.2d 920, 922–23 (Or. 1988); Commonwealth v. Kyle, 533 A.2d 120, 123 (Pa. Super. Ct. 1987); State v. Shaw, 492 S.E.2d 402, 403–04 (S.C. Ct. App. 1997); State v. Butler, 626 S.W.2d 6, 11 (Tenn. 1981); Bello v. State, No. 05–14–00284–CR, 2015 WL 2358173, at *2–3 (Tex. Ct. App. 2015); State v. Ray, 806 P.2d 1220, 1234 (Wash. 1991) (en banc); State v. McDaniel, 560 S.E.2d 484, 490 (W. Va. 2001). The proposed amendment would not automatically admit theft crimes as crimes of falsity, but it recognizes (as nearly half the state courts do) that these crimes are particularly probative for demonstrating propensity to lie on the stand.

results) very low probative value and very high unfair prejudice, such as crimes of violence, drug possession, or drug sale. As we saw in our analysis of actual cases, there are many judges who admit these prior convictions at significant rates (though generally not as high a rate as the theft crimes), even though the survey respondents indicated they should almost never be admitted.

This amendment ensures that Rule 609 stays consistent with Rule 608(b), which allows parties to impeach with prior dishonest actions.[174] According to the survey results, theft crimes have a high probative value for dishonesty; thus, many of them would be admissible under Rule 608(b) even in the absence of Rule 609. On the other hand, the survey indicates that other crimes, such as assault and drug crimes, have a very low level of probative value for dishonesty and a relatively high level of unfair prejudice; thus, the use of these prior convictions to impeach criminal defendants would almost certainly be barred by Rule 608(b) in the absence of Rule 609.[175]

Because our survey only compared the probative value and unfair prejudice for criminal defendants, it provides no support for amending Rule 609(a)(1)(A), which covers impeaching witnesses other than criminal defendants.[176] The probative value of prior convictions is the same regardless of the identity of the witness being impeached, but the unfair prejudice to the party who called the witness will be much lower if the witness is not the criminal defendant. Thus, it could be that even a crime of violence or a drug crime, which have a very low probative value, may have such a low level of unfair prejudice that the unfair prejudice does not substantially outweigh that low probative value.

Our analysis of the case law shows that this would be a significant change in the use of criminal convictions to impeach criminal defendants. Judges currently admit about 68% of prior convictions for crimes unrelated to theft[177]—even though the survey results indicate a strong consensus among judges that the unfair prejudice of these crimes outweighs their probative value. Our proposed rule would automatically bar all of these prior convictions. Furthermore, non-theft crimes are offered to impeach criminal

---

[174] *See* FED. R. EVID. 608(b).

[175] One other possible amendment would be to codify the common law rule that similarity between the prior conviction and the current charge should be a factor weighing against admissibility, because our analysis of case law shows some judges admitting prior crimes that are identical to the current charges. *See* United States v. Hernandez, 106 F.3d 737, 739–40 (7th Cir. 1997) (setting out that five factors that should be considered when deciding whether to admit prior crimes evidence).

[176] *See* FED. R. EVID. 609(a)(1)(A).

[177] This percentage includes instances in which the judge admits the prior conviction but does not give the jury the name of the prior crime.

defendants far more often than theft crimes are offered,[178] so a large proportion of prior convictions that are currently admitted to impeach would be automatically barred.[179]

Future reforms to Rule 609 may depend on further empirical analysis. For example, Rule 609(a)(2) automatically admits any crime of falsity[180]—even if the prior conviction is not a felony, even it if occurred eight or nine years before, and even if it is identical to the crime currently being charged. This probably leads to some crimes of falsity being admitted even though the unfair prejudice of the prior conviction substantially outweighs its probative value. And for witnesses who are not criminal defendants, more work needs to be done to measure the unfair prejudice to the party who called the witness that is caused by admitting the witness's prior convictions. Intuitively, it would seem that the unfair prejudice is less than if the criminal defendant himself is being impeached, but the degree to which that is true could still be measured.

## CONCLUSION

For decades, both critics and defenders of Rule 609 have been talking past each other, each making claims about the usefulness of prior convictions to the jury, and the unfair prejudice that their admission may cause. The legislators who originally passed Rule 609 were certain that this evidence was extremely probative for jurors to know about; the scholars who have uniformly criticized the rule ever since its passage are equally certain that the implementation of the rule almost always does more harm than good. This Article has attempted to bring some empirical evidence to bear on this decades-old dispute, and it uses that evidence to bring a more modest, targeted reform that will limit abuse of the rule but still ensure that the jury learns about the most useful types of criminal convictions.

---

[178] Of the 252 prior convictions that we examined in our analysis, 75% were crimes that did not involve theft. This would mean that in 75% of the cases in which prosecutors currently request that prior convictions be admitted the proposed Rule 609 would bar admissibility of those convictions altogether.

[179] Our data sample excluded cases in which the prosecutor offered a crime of falsity under Rule 609(a)(2), because those lay outside the scope of our survey. The proposed amendment would not affect the admissibility of these convictions—they would still be automatically admissible, as they are now. The proposed amendment would also not affect the admissibility of the 25% of prior convictions from our study that involve a crime of theft—they would still be subject to the same balancing test, and presumably would still be admitted approximately at a 72% rate, as they are now.

[180] For this rule to apply, the conviction must have occurred within ten years of the trial. *See* FED. R. EVID. 609(b).

# APPENDICES[181]

## APPENDIX A
## The Survey Instrument Rule 609 Poll

Assume that a defendant is on trial and will take the stand, and the jury will hear about one of his prior convictions for impeachment purposes. On a scale of 0-100, how probative do you think each of the following crimes would be to prove that the defendant has a tendency to lie and is therefore more likely to be lying on the stand? And on a scale of 0-100, how unfairly prejudicial do you find each of the following crimes? Assume that all convictions took place five years ago. Also assume that the crime for which the defendant is now on trial is completely dissimilar from the prior conviction.

| CRIME | PROBATIVE VALUE FOR IMPEACHMENT | UNFAIR PREJUDICE |
|---|---|---|
| Aggravated Assault (major injury—broken bone or permanent disfigurement) | | |
| Assault, causing minor injury (bruises or minor cuts) | | |
| Assault, causing minor injury of an individual based on his/her ethnicity or religion | | |
| Domestic Violence (causing minor injury of spouse or girlfriend/boyfriend) | | |
| Burglary (breaking into an empty house at night and stealing item(s) of any value) | | |
| Carjacking (using/threatening force to steal a car worth between $5,000-$20,000) | | |
| Child molestation (individual over 21 having sex with under 16 year old) | | |
| Cocaine possession | | |
| Cocaine sale | | |
| Underage drinking | | |
| Embezzlement (employee stealing from his/her company) of between $5,000 - $20,000 | | |
| Grand theft auto (stealing an unoccupied car worth between $5,000-$20,000) | | |
| Illegally entering the country as a non-citizen | | |
| Marijuana possession | | |

[181] These Tables are permanently available at http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-3/simmons-graphics.pdf [https://perma.cc/XP7V-N3RH].

| | | |
|---|---|---|
| Murder (Intentional killing of another human being) | | |
| Murder of police officer | | |
| Prostitution | | |
| Rape with force or threat of force | | |
| Robbery (using/threatening force against someone in order to steal item(s) of any value) | | |
| Selling Marijuana | | |
| Shoplifting items worth between $10-$100 | | |
| Statutory rape (individual over 21 having sex with 16-18 year old) | | |
| Trading stocks based on inside information, gain of between $5,000-$20,000 | | |

## APPENDIX B—RAW DATA

### Mean Average

| Crime | Mean Average Probative Value | | Mean Average Unfair Prejudice | |
|---|---|---|---|---|
| | Student | Judge | Student | Judge |
| Aggravated assault | 21.9 | 26.0 | 61.1 | 63.0 |
| Assault | 14.8 | 21.8 | 47.8 | 59.7 |
| Assault—Hate Crime | 26.0 | 20.3 | 65.7 | 65.0 |
| Domestic Violence | 26.1 | 22.2 | 69.0 | 59.3 |
| Burglary | 37.8 | 48.1 | 51.6 | 39.1 |
| Carjacking | 36.9 | 53.6 | 52.6 | 45.4 |
| Child Molestation | 36.8 | 32.0 | 80.8 | 71.9 |
| Cocaine Possession | 18.8 | 24.5 | 52.4 | 63.4 |
| Cocaine Sale | 25.4 | 29.0 | 56.5 | 59.4 |
| Underage Drinking | 9.8 | 18.7 | 30.8 | 44.7 |
| Embezzlement | 68.5 | 76.1 | 42.7 | 23.2 |
| Grand Theft Auto | 37.8 | 49.5 | 46.8 | 40.7 |
| Illegal Immigration | 36.0 | 26.4 | 52.3 | 57.6 |
| Marijuana Possession | 10.5 | 18.8 | 37.8 | 53.6 |
| Murder | 42.0 | 40.4 | 79.5 | 65.7 |
| Murder of Policeman | 43.3 | 43.4 | 83.1 | 62.0 |
| Prostitution | 22.8 | 16.9 | 62.6 | 61.0 |
| Rape | 37.4 | 41.4 | 75.5 | 63.6 |
| Robbery | 37.1 | 50.7 | 53.5 | 44.5 |
| Selling Marijuana | 20.3 | 22.9 | 46.2 | 50.0 |
| Shoplifting | 31.6 | 46.7 | 38.7 | 39.7 |
| Statutory Rape | 24.6 | 24.7 | 61.6 | 69.8 |
| Insider Trading | 66.8 | 67.2 | 43.1 | 27.8 |
| Overall Average (all crimes) | 31.9 | 35.7 | 56.2 | 53.5 |

## Median Average

| Crime | Median Average Probative Value | | Median Average Unfair Prejudice | |
|---|---|---|---|---|
| | Student | Judge | Student | Judge |
| Aggravated assault | 20.0 | 20.0 | 68.0 | 60.0 |
| Assault | 10.0 | 10.0 | 50.0 | 64.0 |
| Assault—Hate Crime | 20.0 | 13.0 | 70.0 | 70.0 |
| Domestic Violence | 20.0 | 15.0 | 72.5 | 70.0 |
| Burglary | 35.0 | 50.0 | 50.0 | 30.0 |
| Carjacking | 30.0 | 52.0 | 50.0 | 40.0 |
| Child Molestation | 30.0 | 25.0 | 90.0 | 80.0 |
| Cocaine Possession | 10.0 | 20.0 | 50.0 | 70.0 |
| Cocaine Sale | 20.0 | 20.0 | 50.0 | 60.0 |
| Underage Drinking | 5.0 | 5.0 | 20.0 | 30.0 |
| Embezzlement | 75.0 | 80.0 | 42.5 | 20.0 |
| Grand Theft Auto | 34.0 | 50.0 | 50.0 | 30.0 |
| Illegal Immigration | 30.0 | 10.0 | 50.0 | 58.0 |
| Marijuana Possession | 5.0 | 10.0 | 30.0 | 50.0 |
| Murder | 40.0 | 30.0 | 90.0 | 80.0 |
| Murder of Policeman | 40.0 | 40.0 | 95.0 | 80.0 |
| Prostitution | 20.0 | 10.0 | 65.0 | 65.0 |
| Rape | 30.0 | 40.0 | 85.0 | 75.0 |
| Robbery | 32.5 | 50.0 | 50.0 | 47.0 |
| Selling Marijuana | 15.0 | 20.0 | 40.0 | 50.0 |
| Shoplifting | 25.0 | 50.0 | 35.0 | 30.0 |
| Statutory Rape | 20.0 | 16.0 | 60.0 | 75.0 |
| Insider Trading | 75.0 | 75.0 | 42.5 | 25.0 |
| Overall Average (all crimes) | 25.8 | 30.9 | 57.4 | 54.7 |

**Standard Deviation**

| Crime | Standard Deviation Probative Value | | Standard Deviation Unfair Prejudice | |
|---|---|---|---|---|
| | Student | Judge | Student | Judge |
| Aggravated assault | 20.4 | 26.1 | 24.8 | 27.8 |
| Assault | 16.8 | 24.2 | 25.7 | 30.4 |
| Assault—Hate Crime | 23.6 | 21.3 | 25.6 | 28.4 |
| Domestic Violence | 22.2 | 25.0 | 21.5 | 32.7 |
| Burglary | 25.5 | 29.6 | 22.3 | 29.8 |
| Carjacking | 26.2 | 29.6 | 22.6 | 30.1 |
| Child Molestation | 28.2 | 28.6 | 23.5 | 27.8 |
| Cocaine Possession | 20.3 | 26.1 | 23.8 | 24.6 |
| Cocaine Sale | 22.9 | 25.2 | 21.8 | 28.4 |
| Underage Drinking | 15.3 | 30.2 | 29.7 | 40.2 |
| Embezzlement | 26.2 | 23.2 | 24.7 | 20.4 |
| Grand Theft Auto | 26.8 | 30.5 | 23.5 | 29.7 |
| Illegal Immigration | 28.9 | 28.4 | 27.3 | 31.3 |
| Marijuana Possession | 14.3 | 28.6 | 28.4 | 33.6 |
| Murder | 30.0 | 33.7 | 23.3 | 33.5 |
| Murder of Policeman | 30.6 | 34.9 | 24.9 | 37.6 |
| Prostitution | 23.2 | 23.2 | 24.3 | 30.9 |
| Rape | 30.3 | 33.9 | 26.9 | 33.1 |
| Robbery | 25.3 | 31.6 | 22.4 | 29.3 |
| Selling Marijuana | 21.3 | 24.6 | 30.5 | 31.8 |
| Shoplifting | 25.6 | 30.0 | 31.0 | 30.7 |
| Statutory Rape | 23.0 | 27.1 | 27.8 | 23.4 |
| Insider Trading | 26.8 | 24.9 | 25.6 | 22.5 |

## APPENDIX C

### Comments by Judges

I am in receipt of your request that I complete a brief survey with regard to the admissibility (or otherwise) of prior criminal convictions of a testifying defendant.

I simply do not believe that I can answer this survey in any way, given that the decision to admit a prior conviction, assuming the legal prerequisites are present, depends greatly on the context in which the prior conviction is offered, based upon the testimony of the defendant which the prior conviction seeks to impeach, as well as upon the overall context of the case, as it has developed, including the charge on which the defendant is presently standing trial.

If I have, somehow, missed the purpose of the survey or, for that matter, have misconstrued the nature of the question asked, please feel free to so advise, and I will do the very best I can in answering your questions, based upon your explanation.

* * * *

I am unable to participate in your Rule 609 Judicial Survey, but I don't want to ignore your efforts. I think you should know my reasons for not participating.

I think the reduction of judicial decision making to quantitative data based on hypothetical facts is inappropriate. I never decide questions regarding the admissibility of prior convictions based on Rule 609 without a full consideration of the context in which the question arises. A mechanical application is something I never do. There may be a case in which the prior conviction is for assault causing minor injury in which I would admit the fact of the conviction and in yet another case charging the same offense I would not. The same applies to the other offenses you list. Much of the exercise of my discretion depends on the degree of distortion from the truth that either or both sides is presenting in the case itself. If the prosecution's case is weak, I probably wouldn't admit it; if the defense is fanciful or generally misleading, I probably would. If both were occurring, I would weigh the question very carefully knowing full well it is a close call.

As an additional point, I never use so-called standard instructions. I use pattern jury instructions as one of many sources for constructing my own instructions tailored to each case, and I use these instructions repeatedly throughout the trial, from *voir dire* to the conclusion of closing arguments.

I know that you are trying to establish patterns, but I don't think or decide in patterns. As an example, in over 39 years on the bench, I have never sentenced according to the Sentencing Guidelines and to apply them in rote

fashion would in my view constitute a violation of my oath of office. Sometimes the sentences I impose serendipitously coincide with a Guideline calculation, but I have never imposed a sentence because it was formulated or dictated by the Guidelines.

I sincerely hope this letter is of use to you.

* * * *

I cannot assign percentages. This demonstrates what I might let someone use for impeachment, but it depends on the case. [This judge used checkmarks instead of numbers – checking in the probative value column if s/he might admit the conviction, and the unfair prejudice if s/he would never admit]

This is impossible to answer without more information regarding the crime for which the defendant is on trial. There is no scenario, in my view, where the prior conviction is probative. Jury prior conviction is prejudicial.

"Felony only" means that the opposing party would only be able to ask if the declarant was convicted of a Felony without referring to the specific charge. [This respondent wrote "Felony only" on the survey sheet any time s/he gave a prior conviction a probative value greater than zero].

Please note several of these examples do not appear to be felonies or crimes involving dishonesty or false statement, e.g. underage drinking, prostitution, marijuana possession, etc. Thus, a 609 analysis is impossible.

Best wishes as you continue to strive to assist our profession in its search for justice. Under the facts underlined above, I would not permit any of the suggested criminal convictions listed to be used to impeach the defendant's testimony. The relative harm caused by the crimes is not relevant to my determination.

I was a California State Court judge before becoming a federal judge. There is significant amounts of case law on this topic in California which I continue to use as a benchmark. If previously deemed admissible and within 10 years, I let it in. If not, I generally do not but will take argument.

More facts are really needed for better analysis—answer is like answer to most evidentiary questions—it depends.

If the limiting instruction is given, I believe the fact that the defendant has a prior felony conviction is always probative on the issue of his credibility, and does not unfairly prejudice the defendant's right to a fair trial. Here, we are not told what the prior conviction was, so I cannot say whether I would give the "sanitizing" instruction, but generally, that would depend

upon how serious the prior felony was and how similar it might be to the crime or crimes charged.

My basis for determining probative value is based on experience in observing persons with like crimes who more likely than not will be dishonest in their dealings with the court and the judicial system at one time or another. Having said that it is one factor to take into account and be assessed along with other person specific factors that are typically taken into account when assessing credibility. In that, the final determination may be that the person with the most heinous of past crimes at the time being assessed may be absolutely truthful, while the person with the least serious conviction in the past on the occasion being tested on a credibility issue may be determined to be completely dishonest.

Sanitizing the specifics often helps tip the balance.

It seems pretty artificial to opine not knowing the nature of the instant offence. Also, the sliders [the tool used on the online survey] are tedious to work. I don't have time to go back and make little adjustments. They are not more than rough approximations.