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IMPEACHMENT BY UNRELIABLE CONVICTION

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Abstract: This Article offers a new critique of Federal Rule of Evidence 609, which permits impeachment of criminal defendants by means of their prior criminal convictions. In admitting convictions as impeachment evidence, courts are wrongly assuming that such convictions are necessarily reliable indicators of relative culpability. Courts assume that convictions are the product of a fair fight, that they demonstrate relative culpability, and that they connote moral culpability. But current prosecutorial practice and other data undermine each of these assumptions. Accordingly, this Article proposes that before a conviction is used for impeachment, there should be an assessment of the extent to which it is a reliable indicator of relative culpability. In support of its proposals, this Article draws two new sources into the impeachment context. First, in a groundbreaking sentencing opinion, Judge Nancy Gertner refused to give the prescribed weight to the defendant's prior convictions, because she feared that they were the product of racial profiling and that she would be compounding disparities. Second, the prosecution's ethical duty to "do justice" militates in favor of a prosecutorial assessment of a conviction's reliability before the prosecution proffers it for impeachment. Through these kinds of judicial and prosecutorial inquiries, the law of impeachment will hew more closely to the realities of the criminal justice system, and to justice itself.

INTRODUCTION

The practice of impeaching criminal defendants by means of their prior criminal convictions has a long history. Of more recent prominence within the criminal justice system are various challenges to the reliability of a conviction as an indicator of relative culpability—the growing body of data on wrongful convictions, for example, and on disparities in law enforcement, and on the nature and dominance of plea-bargaining.¹ This Article explores the ways in

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¹ See Montré D. Carodine, "The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule, 84 IND. L.J. 521, 526 (2009); Keith A. Findley, *Judicial*

which the federal impeachment regime fails to take account of these challenges to reliability, and the ways in which it might.²

Federal Rule of Evidence 609 allows the government to impeach criminal defendants through two main routes, each of which rests on various assumptions.³ First, they may be impeached by a felony conviction, if its probative worth is deemed to outweigh its prejudicial effect.⁴ This form of impeachment relies on the assumption that a felony conviction in itself has some probative worth on the issue of credibility: the conviction is viewed as indicating the defendant's willingness to violate the law, and thus suggesting a willingness to violate the laws of perjury.⁵

Second, a criminal defendant may be impeached by a conviction that required the proof or admission of a "dishonest act or false statement," regardless of whether it is a felony or a misdemeanor, and regardless of its probative worth or prejudicial effect.⁶ This form of impeachment relies on the assumption that the conviction suggests a dishonest character, and that such a propensity toward dishonesty will again make perjury likely.⁷

These sorts of assumptions, and the rules that rest thereon, have been subjected to critique. For example, scholars have demonstrated that social science data contradict these assumptions.⁸ Scholars have also catalogued the harms that the liberal admission of criminal convictions for impeachment purposes brings—for instance, in one recent study of exonerated defendants, the most common reason given for their decision not to testify was their fear of prior conviction impeachment.⁹ Moreover, they argue that the countervail-

Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence, 47 GA. L. REV. 723, 725 (2013).

² As discussed below, numerous states have been influenced by Federal Rule of Evidence 609 in drafting their own impeachment rules, and twenty-six states have impeachment rules that are the same as, or substantially similar to, the federal rule. The prescriptions in this Article, therefore, have implications for numerous state regimes.

³ Federal Rule of Evidence 609 applies in civil as well as criminal trials, and governs impeachment not only of criminal defendants but also of other witnesses. The scope of this Article, however, will be limited to those portions of the rule that apply to the impeachment of criminal defendants.

⁴ FED. R. EVID. 609(a)(1)(B).

⁵ See *United States v. Estrada*, 430 F.3d 606, 617 (2d. Cir. 2005) (stating that "many [felonies] are significantly probative of a witness's propensity for truthfulness").

⁶ FED. R. EVID. 609(a)(2).

⁷ See Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2310–11 (1994) ("Convictions for crimes involving acts of untruthfulness allegedly increase the probability that the witness has that specific character trait and, thus, might lie when testifying.").

⁸ See, e.g., Teree E. Foster, *Rule 609(a) in the Civil Context: A Recommendation for Reform*, 57 FORDHAM L. REV. 1, 5 (1988); Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 47 B.C. L. REV. 949, 964 (2006).

⁹ See John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 483 n.19 (2008).

ing benefits are minimal, especially given the numerous other ways to impeach.¹⁰ Finally, scholars have pointed out the illogicalities within the impeachment rule.¹¹ These critiques have made little headway; although the Federal Rule has been amended several times, its core remains unchanged, and the liberal judicial admission of convictions continues.¹²

Yet the most basic assumption of all—the one on which all the others are built—has received far less attention: the assumption that the conviction is a reliable indicator of the defendant’s relative culpability. The use of convictions to impeach has powerful effects. It may deter defendants from trial, even if they have a viable defense, and thus increase the number of cases that are resolved by plea bargain. Even if it does not deter defendants from trial, it still increases their chances of conviction.¹³ And without an examination of the reliability of convictions proffered for impeachment, a vicious cycle continues to be perpetuated: convictions that may have been the product of something less than a fair fight may help to make the next fight less fair, and convictions that may not have been based on culpability may help bring about more convictions of the same kind.

This Article describes the failure of rules drafters, courts, and commentators to identify the importance of scrutinizing a conviction for reliability before permitting its use for impeachment. It then explores ways in which—either within the text of the rules, or by changing the existing text of the rules—reliability might be investigated. In addition to scrutinizing the text and judicial interpretation of Federal Rule of Evidence 609, and proposing possible textual changes, it introduces two new approaches to the practice of impeachment in an era of challenges to reliability. First, it explores the extent to which the prosecutor’s ethical duty to “do justice” militates in favor of a more rigorous prosecutorial screening of convictions before they are proffered. Second, it draws from the sentencing context a case that might offer inspiration to courts concerned about the implications of giving a conviction anything other than its assumed weight and meaning.

In 1998, in *United States v. Leviner*, Judge Nancy Gertner of the U.S. District Court for the District of Massachusetts was required to sentence a man whose prior convictions and sentences carried a presumptive weight for sentencing purposes.¹⁴ Judge Gertner declined to accept the presumptive

¹⁰ See, e.g., FED. R. EVID. 613 (impeachment by prior inconsistent statement); *id.* 608(b) (impeachment by past acts).

¹¹ See Edward E. Gainor, *Character Evidence by Any Other Name . . . : A Proposal to Limit Impeachment by Prior Conviction Under Rule 609*, 58 GEO. WASH. L. REV. 762, 780 & n.112 (1990).

¹² FED. R. EVID. 609 advisory committee’s note (providing commentary on the rule’s enactment in 1975 and its amendments in 1987, 1990, 2006, and 2011).

¹³ See Blume, *supra* note 9, at 493.

¹⁴ 31 F. Supp. 2d 23, 25 (D. Mass. 1998).

weight, and instead examined the circumstances of the convictions.¹⁵ They left her concerned that some of the convictions had been the product of racial profiling, that the corresponding sentences had been affected by disparities, and that she would be compounding injustice were she to “give literal credit to the record.”¹⁶ Given these concerns, she sentenced Mr. Leviner as if these prior convictions did not exist.¹⁷

This Article investigates whether in the impeachment context there is room for courts to step in, where they need to, and ensure that permitting a secondary use of convictions does not magnify disparities or other flaws that might have inhered in those earlier convictions. Part I describes the key components of Federal Rule of Evidence 609 and the case law interpreting this rule.¹⁸ Part II then summarizes the ways in which scholars have challenged almost all of the assumptions underlying this rule.¹⁹ Part III explains why an additional assumption—the assumption that a conviction is a reliable indicator of relative culpability—underlies all of the other assumptions, and needs to be given commensurate attention. It demonstrates the vulnerability of this particular assumption by showing three ways in which it is belied by the reality of contemporary criminal justice.²⁰ Courts often assume that convictions are the product of a fair fight—despite the nature of plea-bargaining, the collapse of public defense, and the data on wrongful convictions. Moreover, courts often assume that convictions demonstrate relative culpability—despite the racial and other disparities that pervade law enforcement. And lastly, courts often assume that convictions connote moral culpability—despite the growth of prosecutions that require no culpable mental state.

Because these kinds of vulnerabilities are typically not examined in the existing impeachment regime, Part IV addresses ways in which they might be.²¹ Given the striking resilience of the core of the rule, Part IV begins by exploring options within the existing text—including an expanded judicial inquiry that is inspired by Judge Gertner, and an expanded prosecutorial role—before examining possible changes to the rule where additional leeway is needed in order to incorporate a reliability analysis. Part V examines and responds to possible objections.²²

¹⁵ *Id.* at 25 (“I conclude that Leviner’s criminal history vastly overstates his true culpability and his likelihood of recidivism on this offense.”).

¹⁶ Nancy Gertner, *Federal Sentencing Guidelines: A View From the Bench*, HUM. RTS., Winter 2002, at 6, 23.

¹⁷ *Leviner*, 31 F. Supp. 2d at 25.

¹⁸ See *infra* notes 23–76 and accompanying text.

¹⁹ See *infra* notes 77–123 and accompanying text.

²⁰ See *infra* notes 124–219 and accompanying text.

²¹ See *infra* notes 220–323 and accompanying text.

²² See *infra* notes 324–335 and accompanying text.

I. IMPEACHMENT RULES IN FEDERAL COURT

This Part lays out the key provisions of Federal Rule of Evidence 609 governing impeachment of criminal defendants by means of their criminal convictions, as well as case law interpreting these provisions. Section A outlines the structure of Rule 609.²³ Section B then examines judicial interpretations of Rule 609(a)(1)(B) and Rule 609(a)(2).²⁴

A. Federal Rule of Evidence 609

In the context of criminal convictions as grounds for impeachment, Federal Rule of Evidence 609 establishes two main standards for admissibility, each related to the type of conviction. First, for “a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year,”²⁵ evidence of the conviction “must be admitted . . . if the probative value of the evidence outweighs its prejudicial effect to [the] defendant.”²⁶ Second, 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 [defendant’s] admitting—a dishonest act or false statement.”²⁷ Thus, broadly speaking, Rule 609(a)(1)(B) mandates the admission of evidence of a felony conviction if the prosecution satisfies a probative-prejudicial balancing test,²⁸ and 609(a)(2) mandates the admission of a conviction—whether felony or misdemeanor—without a balancing test, so long as the court can “readily determine” that the conviction required the proof or admission of a “dishonest act or false statement.”²⁹ Under the latter provision, the conviction could be as prejudicial as one could imagine—it could, for example, be precisely the same offense as the one charged.³⁰ De-

²³ See *infra* notes 25–37 and accompanying text.

²⁴ See *infra* notes 38–76 and accompanying text.

²⁵ This parallels the federal definition of a felony. See 18 U.S.C. § 3559 (2012) (classifying all crimes punishable by imprisonment for greater than one year as various types of felonies and all crimes punishable by imprisonment for one year or less as various types of misdemeanors).

²⁶ FED. R. EVID. 609(a)(1)(B).

²⁷ *Id.* 609(a)(2).

²⁸ See *id.* 609(a)(1)(B).

²⁹ *Id.* 609(a)(2).

³⁰ See, e.g., *United States v. Pucio*, 453 F.2d 539, 542 (2d Cir. 1971) (“The potential for prejudice is greatly enhanced where . . . the prior offense is similar to the one for which the defendant is on trial.”); *United States v. Johnson*, No. 08 CR 466, 2011 WL 809194, at *1 (N.D. Ill. Mar. 2, 2011) (denying a motion to bar the introduction of wire fraud conviction in wire fraud trial); Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 B.Y.U. L. REV. 1547, 1580–81 (noting that “if the prior conviction is for a crime of dishonesty, it must be allowed for impeachment under Rule 609(a)(2) even if the defendant is currently charged with the identical crime”); Aviva Orenstein, *Insisting That Judges Employ a Balancing Test Before Admitting the Accused’s Convictions Under Federal Rule of Evidence 609(A)(2)*, 75 BROOK. L. REV. 1291, 1303–04 (2010).

spite this, the conviction would still be mandatorily admissible.³¹ The inability of trial courts to apply a probative-prejudicial balancing test under this provision is highly unusual because Federal Rule of Evidence 403 contains a balancing test that applies almost universally.³²

Rule 609 gives defendants increased protection from impeachment by prior conviction under two circumstances. First, if ten years have passed since the defendant's conviction or release from confinement, evidence of the conviction is admissible only if "its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect"³³ and "the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use."³⁴ Second, juvenile adjudications are not admissible at all against defendants.³⁵

Rule 609 regulates the admissibility of all adult convictions—state, federal, and foreign—for purposes of impeachment in federal trials. Twenty-six states have impeachment rules that are the same as, or substantially similar to, the federal rule;³⁶ other states have implemented variations on the federal rule, some of which will be discussed below.³⁷

B. Judicial Interpretation of Federal Rule of Evidence 609

This Section discusses judicial interpretations of Rule 609.³⁸ Subsection 1 describes interpretations of Rule 609(a)(1)(B).³⁹ Subsection 2 then describes interpretations of Rule 609(a)(2).⁴⁰ Finally, Subsection 3 discusses interpretations governing both Rule 609(a)(1)(B) and Rule 609(a)(2).⁴¹

³¹ FED. R. EVID. 609(a) advisory committee's note (stating that because prior convictions involving dishonesty and false statement are "peculiarly probative of credibility . . . [they] are always to be admitted").

³² *See id.* 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."); CRIMINAL JUSTICE SECTION, AM. BAR ASS'N, FEDERAL RULES OF EVIDENCE: A FRESH REVIEW AND EVALUATION, reprinted in 120 F.R.D. 299, 360 (1987) [hereinafter A FRESH REVIEW] (stating that "Rule 403 currently applies to the Rules other than 609"). Note, however, that some courts apply Rule 403 to determinations of which details of an admissible conviction should be admitted. *See infra* notes 69–76 and accompanying text.

³³ FED. R. EVID. 609(b).

³⁴ *Id.*

³⁵ *Id.*

³⁶ Blume, *supra* note 9, at 483 n.19.

³⁷ *See infra* notes 307–322 and accompanying text.

³⁸ *See infra* notes 42–76 and accompanying text.

³⁹ *See infra* notes 42–57 and accompanying text.

⁴⁰ *See infra* notes 58–68 and accompanying text.

⁴¹ *See infra* notes 69–76 and accompanying text.

1. Rule 609(a)(1)(B)

The main question for courts interpreting Rule 609(a)(1)(B) has been how to determine whether the “probative value of the evidence outweighs its prejudicial effect to [the] defendant.”⁴² Certain preliminary issues have been easily resolved: it has been established, for example, that the burden lies with the proponent,⁴³ and that the proponent’s burden is heavier than under the balancing test of Rule 403.⁴⁴ The more stubborn question concerns what factors a court may use in assessing whether the proponent has met its burden. The rule itself gives no guidance to the courts on this issue.⁴⁵

Most federal circuits have settled on a five-prong test to balance the probative value of the prior conviction against its prejudicial effect.⁴⁶ This multi-factor test originated in case law preceding the Federal Rules of Evidence,⁴⁷ and was imported into the ambit of Rule 609 by the U.S. Court of Appeals for the Seventh Circuit’s 1976 decision in *United States v. Mahone*.⁴⁸ In *Mahone*, the Seventh Circuit stated that some of the factors that a court should consider under the Rule 609(a)(1)(B) balancing test are those articulated by the U.S. Court of Appeals for the D.C. Circuit in its 1967 *Gordon v. United States* decision: “(1) The impeachment value of the prior crime[;] (2) The point in time of the conviction and the witness’ subsequent history[;] (3) The similarity between the past crime and the charged crime[;] (4) The importance of the defendant’s testimony[;] and (5) The centrality of the credibility issue.”⁴⁹

Despite the near-universal adoption of these factors, their application is fraught with confusion. With respect to the third factor—“the similarity between the past crime and the charged crime”—the case law from which this five-factor test developed regarded similarity as something that militated

⁴² FED. R. EVID. 609(a)(1)(B).

⁴³ *United States v. Meserve*, 271 F.3d 314, 327 (1st Cir. 2001). Note that in multi-defendant cases, the proponent might be one of the defense attorneys. This Article will focus on the more common scenario, in which the proponent is the prosecution. Here, the burden lies with the prosecution.

⁴⁴ Compare FED. R. EVID. 609(a)(1)(B) (stating that evidence “must be admitted . . . if the probative value of the evidence outweighs its prejudicial effect”), with *id.* 403 (stating that the “court may exclude [evidence] . . . if its probative value is substantially outweighed by a danger of . . . unfair prejudice”).

⁴⁵ Donald H. Zeigler, *Harmonizing Rules 609 and 608(B) of the Federal Rules of Evidence*, 2003 UTAH L. REV. 635, 655; see FED. R. EVID. 609(a)(1)(B).

⁴⁶ 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, 317 n.110 (2008) (“*Mahone*’s five-factor framework, or a close variant, governs review of impeachment rulings in 10 of the 12 federal circuits that consider criminal appeals, excepting only the Fourth and Eighth Circuits.”).

⁴⁷ See *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976) (citing *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967)); Bellin, *supra* note 46, at 312–13, 316–17 & n.110.

⁴⁸ 537 F.2d at 929.

⁴⁹ *Id.* (citing *Gordon*, 383 F.2d at 940).

against admissibility because it increased the risk that the conviction would be interpreted as relevant to a defendant's propensity to commit that crime, rather than to a defendant's credibility.⁵⁰ Some subsequent case law, however, has interpreted similarity as a reason to *favor* admissibility.⁵¹ Similarly, with respect to the fourth factor—"the importance of the defendant's testimony"—the more important the testimony, the more wary courts were about permitting impeachment in the case law from which this test developed.⁵² As subsequently interpreted by a number of courts, however, the more important the testimony, the more the testifying defendant needs to be impeached.⁵³ Finally, with respect to the fifth factor—the "centrality of the credibility issue"—some courts have effectively read this factor out of the analysis by concluding that credibility is a central issue in every case in which a defendant testifies.⁵⁴

Each of these "confusions" trends toward admissibility, and impeachment by prior conviction is widely permitted under current applications of this balancing test.⁵⁵ Trial courts have admitted a broad range of offenses under this rule,⁵⁶ and appellate courts almost always uphold the admission of this evidence.⁵⁷

2. Rule 609(a)(2)

Under Rule 609(a)(2), courts have the vexing task of determining which convictions fall within the category of convictions that are automatically admissible, whatever the attendant prejudice.⁵⁸ This category has been described differently in the various iterations of the rule, but the most recent

⁵⁰ See Gainor, *supra* note 11, at 780 & n.112.

⁵¹ See *United States v. Dees*, Crim. No. 11-0110, 2012 WL 5499977, at *3 (W.D. Pa. Nov. 13, 2012); Gainor, *supra* note 11, at 780 & n.112.

⁵² See Bellin, *supra* note 46, at 327–28.

⁵³ See *United States v. Frazier*, 314 F. App'x 801, 805 (6th Cir. 2008); *United States v. Greenidge*, 495 F.3d 85, 97 (3d Cir. 2007) (upholding the district court's decision to permit the impeachment, in part because "the statements' importance to the case cannot be overstated"); *United States v. Alexander*, 48 F.3d 1477, 1489 (9th Cir. 1995); *United States v. Browne*, 829 F.2d 760, 763 (9th Cir. 1987); *United States v. Vasquez*, 840 F. Supp. 2d 564, 572 (E.D.N.Y. 2011); see also Bellin, *supra* note 46, at 327 n.148; Gainor, *supra* note 11, at 783 & n.129.

⁵⁴ See Gainor, *supra* note 11, at 782 & nn.124–25; see, e.g., *United States v. Sanders*, Crim. No. 06-173, 2006 WL 3531462, at *2 (E.D. Pa. Nov. 30, 2006) (stating that if the defendant "testifies at trial, his testimony—like that of all defendants who make this decidedly serious and fundamental voluntary choice—will be important, and his credibility instantly will become a central issue at trial").

⁵⁵ See Ted Sampsell-Jones, *Preventive Detention, Character Evidence, and the New Criminal Law*, 2010 UTAH L. REV. 723, 732.

⁵⁶ See *United States v. Pettiford*, 238 F.R.D. 33, 42 (D.D.C. 2006) (referring to "the general trend toward admissibility under Rule 609(a)").

⁵⁷ See Alan D. Homstein, *Between Rock and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 VILL. L. REV. 1, 14–15 nn.70–72 (1997).

⁵⁸ See FED. R. EVID. 609(a)(2).

version applies to convictions requiring proof or admission of a “dishonest act or false statement.”⁵⁹

The prior version of this rule, which mandated admission of convictions “involving dishonesty or false statement,” provoked a great deal of disagreement among courts concerning its breadth.⁶⁰ Its accompanying Advisory Committee’s Notes, and legislative history, gave support to those judges who were inclined to read the rule narrowly.⁶¹ The House Committee Conference Report, for example, offered a list of offenses (so-called *crimina falsi*) that might fall into this category.⁶² Yet the list was a nonexclusive one, and some courts permitted impeachment when they deemed a crime outside that list to have been committed in a deceitful way.⁶³

The current version aimed to provide clarity to courts about how to apply this rule. The Advisory Committee affirmed its adherence to the legislative intent to limit the convictions covered by Rule 609(a)(2), quoting from the House Committee Conference Report’s list of illustrative offenses.⁶⁴ The Committee rejected the broad reading of the rule that some courts had adopted, stating that “evidence that a witness was convicted for a crime of violence, such as murder, is not admissible under Rule 609(a)(2), even if the wit-

⁵⁹ *Id.*

⁶⁰ See A FRESH REVIEW, *supra* note 32, at 360 (“Endless dispute has resulted from the inclusion of ‘dishonesty’ in the Rule.”); Zeigler, *supra* note 45, at 656. According to one commentator:

[T]he rule fails to specify which crimes involve dishonesty or false statement . . . [The Conference Report] does not adequately explain which crimes qualify. While the Report specifies several crimes that involve dishonesty or false statement, it also includes a general catch-all of ‘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.’ Historically, there has been little agreement on which crimes are *crimen falsi*. Consequently, by failing to define the term, Congress left the federal courts to choose among the diverse common law views.

Zeigler, *supra* note 45, at 656.

⁶¹ See, e.g., Cree v. Hatcher, 969 F.2d 34, 37 (3d Cir. 1992) (“Because the district court lacks the discretion to engage in balancing, 609(a)(2) must be interpreted narrowly to apply to only those crimes that, in the words of the Conference Committee, bear on a witness’s propensity to testify truthfully.”); United States v. Fearwell, 595 F.2d 771, 777 (D.C. Cir. 1978).

⁶² See H.R. REP. NO. 93-1597, at 9 (1974) (Conf. Rep.) (explaining that the phrase “offenses involv[ing] false statement or dishonesty” 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”).

⁶³ See, e.g., United States v. Foster, 227 F.3d 1096, 1100 n.2 (9th Cir. 2000); United States v. Glenn, 667 F.2d 1269, 1273 (9th Cir. 1982) (“A conviction for burglary or theft may . . . be admissible under [Rule 609(a)(2)] if the crime was actually committed by fraudulent or deceitful means.”).

⁶⁴ See FED. R. EVID. 609(a)(2) advisory committee’s note.

ness acted deceitfully in the course of committing the crime.”⁶⁵ At the time of its 2006 amendment to the rule, the Committee gave additional guidelines about what the proponent must offer, and how the judge must conduct the inquiry.⁶⁶ It permitted some scrutiny of the case file in order to resolve uncertainty, but cautioned against a “mini-trial.”⁶⁷ Judicial responses to the rule’s language and the Committee’s Notes are still developing.⁶⁸

3. Interpretations Governing Rule 609(a)(1)(B) and Rule 609(a)(2)

Courts have developed standards that are common to both these classes of impeachment evidence. Two of these standards serve to present the defendant with a choice: mitigate prosecutorial impeachment, or preserve the right to appeal the impeachment ruling.⁶⁹ First, in 1984, in *Luce v. United States*, the Supreme Court held that if, in response to an evidentiary ruling permitting impeachment, a defendant refrains from testifying, the defendant cannot then appeal the evidentiary ruling.⁷⁰ Second, in 2000, in *Ohler v. United States*, the Court relied on *Luce* to hold that if a defendant attempts to “take the sting” out of an adverse evidentiary ruling of this kind by discussing his or her criminal record on direct examination, the defendant cannot then

⁶⁵ *Id.*

⁶⁶ *See id.* Regarding the 2006 amendment to Rule 609(a)(2), the Committee provided, in part:

The amendment requires that the proponent have ready proof that the conviction required the factfinder to find, or the defendant to admit, an act of dishonesty or false statement. Ordinarily, the statutory elements of the crime will indicate whether it is one of dishonesty or false statement. Where the deceitful nature of the crime is not apparent from the statute and the face of the judgment—as, for example, where the conviction simply records a finding of guilt for a statutory offense that does not reference deceit expressly—a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the factfinder had to find, or the defendant had to admit, an act of dishonesty or false statement in order for the witness to have been convicted. . . . But the amendment does not contemplate a ‘mini-trial’ in which the court plumbs the record of the previous proceeding in order to determine whether the crime was in the nature of *crimen falsi*.

Id.

⁶⁷ *Id.*

⁶⁸ Compare *United States v. VanHoesen*, 450 F. App’x 57, 64 (2d Cir. 2011) (upholding refusal to admit a witness intimidation conviction under Rule 609(a)(2) because the elements of the crime did not require proving an act of dishonesty or false statement), with *United States v. Jefferson*, 623 F.3d 227, 234–35 (5th Cir. 2010) (applying the amendment and its Advisory Committee’s Note to conclude that the defendant’s convictions for bribery and obstruction of justice were admissible under Rule 609(a)(2)).

⁶⁹ *See Ohler v. United States*, 529 U.S. 753, 760 (2000); *Luce v. United States*, 469 U.S. 38, 43 (1984).

⁷⁰ 469 U.S. at 43.

appeal the evidentiary ruling.⁷¹ Similarly, if a defendant attempts either to correct the impression created by the impeachment or to contextualize the conviction, this may “open the door” to additional impeaching details that would otherwise be barred.⁷²

Courts have also addressed the question of what type of “evidence of a criminal conviction” may be admitted because the rule does not make this clear.⁷³ Typically, courts permit the name of the crime, the date of the crime, and the sentence that was imposed.⁷⁴ Once the decision to admit evidence of a criminal conviction is made, some courts use a Rule 403 balancing test to determine which of its details will be admitted.⁷⁵ A court may rule, for example, that evidence of the sentence is inadmissible if it finds that it lacks probative value.⁷⁶

⁷¹ See 529 U.S. at 760 (“[A] defendant who preemptively introduces evidence of a prior conviction on direct examination may not on appeal claim that the admission of such evidence was error.”).

⁷² A FRESH REVIEW, *supra* note 32, at 365; see, e.g., *Sanchez v. McCray*, 349 F. App’x 479, 483 (11th Cir. 2009) (stating that the defendant “‘opened the door’ to the admission of all of the convictions by testifying on direct examination that he was not guilty of prior crimes and only ‘pled guilty out of convenience’” (quoting *United States v. Vigliatura*, 878 F.2d 1346, 1351 (11th Cir. 1989))); *United States v. Collier*, 527 F.3d 695, 700 (8th Cir. 2008) (recognizing that a court may allow a more specific cross examination if the defendant, “on direct examination, attempts to minimize his guilt or culpability”); *United States v. Villanueva*, 249 F. App’x 413, 418 (6th Cir. 2007) (“A defendant opens the door to [questioning about the nature and circumstances of a conviction] by offering testimony that is inconsistent with the facts underlying a conviction or that attempts to explain away a conviction.”); *United States v. Marrero*, 219 F. App’x 892, 897 (11th Cir. 2007); *United States v. Smith*, 454 F.3d 707, 716–17 (7th Cir. 2006) (“Where a defendant attempts to explain away the prior conviction by giving his or her own version of events, the door has been opened to impeachment by the prosecution on the details of the prior conviction.”).

⁷³ See FED. R. EVID. 609(a) (referring to “evidence of a criminal conviction”).

⁷⁴ See *Smith*, 454 F.3d at 716 (stating that a proponent is limited to “identify[ing] the particular felony charged, the date, and the disposition of a prior conviction”); *United States v. Albers*, 93 F.3d 1469, 1480 (10th Cir. 1996) (finding that the defendant’s “prior conviction, its general nature, and punishment of felony range [are] fair game for testing the defendant’s credibility”); *United States v. Gordon*, 780 F.2d 1165, 1176 (5th Cir. 1986) (limiting cross-examination to “the number of convictions, the nature of the crimes and the dates and times of the convictions”); *United States v. Wolf*, 561 F.2d 1376, 1381 (10th Cir. 1977) (finding that prosecution’s cross-examination about the prior convictions should be confined “to a showing of the essential facts of convictions, the nature of the crimes, and the punishment”).

⁷⁵ See, e.g., *United States v. Chaco*, 801 F. Supp. 2d 1217, 1222 (D.N.M. 2011) (“Ordinarily, evidence of a witness’s felony conviction shall include information about the nature of that conviction unless, after Rule 403 balancing, the probative value of such evidence is outweighed by its prejudicial effect.” (quoting *United States v. Howell*, 285 F.3d 1263, 1268–69 (10th Cir. 2002))).

⁷⁶ See *Giles v. Rhodes*, No. 94-cv-6385, 2000 U.S. Dist. LEXIS 13980, at *40–41 (S.D.N.Y. Sept. 26, 2000).

II. EXISTING CRITIQUES OF THE IMPEACHMENT RULES

Recent critiques of this impeachment regime have largely taken four forms: concern about the rule's harmful consequences;⁷⁷ concern that the rule's benefits do not outweigh its dangers;⁷⁸ demonstration of the ways in which the "common sense" assumptions on which this rule is based float free of social science findings;⁷⁹ and exploration of the illogicalities and inconsistencies that the rule contains.⁸⁰

Critics detect harmful consequences whether or not a defendant facing impeachment decides to testify. If he or she does testify, the risk of prejudice is significant,⁸¹ especially if the impeaching conviction is similar to the charge at trial.⁸² If, as is likely, the defendant is deterred from testifying,⁸³ the harms are also significant. Despite the presumption of innocence, a defendant's silence is generally thought to raise suspicions of guilt among jurors,⁸⁴ whether or not they know the reason for the silence.⁸⁵

⁷⁷ See Blume, *supra* note 9, at 493.

⁷⁸ See Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules That Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851, 885 (2008).

⁷⁹ See Robert D. Okun, *Character and Credibility: A Proposal to Realign Federal Rules of Evidence 608 and 609*, 37 VILL. L. REV. 533, 536 (1992) ("[T]he practice of impeachment with prior crimes and bad acts is consistent with what has been variously described as 'common sense,' 'intuition,' and 'social consensus.'").

⁸⁰ See Hornstein, *supra* note 57, at 13.

⁸¹ See Blume, *supra* note 9, at 493 ("[T]hreatening a defendant with the introduction of his prior record contributes to wrongful convictions either directly—in cases where the defendant is impeached with the prior record and the jury draws the propensity inference—or indirectly—by keeping the defendant off the stand.").

⁸² See *United States v. Toney*, 615 F.2d 277, 283 (5th Cir. 1980) (Tuttle, J., dissenting) (rejecting the majority's conclusion that crimes involving "dishonesty or false statement" must be admitted without any probative-prejudicial balancing test, particularly where the impeachment conviction and the current charge were for the same crime).

⁸³ See Bellin, *supra* note 46, at 301 n.40 (explaining that the fear of impeachment is the most powerful incentive not to testify).

⁸⁴ See Barbara Allen Babcock, *Introduction: Taking the Stand*, 35 WM. & MARY L. REV. 1, 13 (1993) ("Jurors believe that an innocent person proclaims it from the rooftops."); Bellin, *supra* note 46, at 335; Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1, 47 (1999); see also George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 977–78 (2000) ("[T]he jurors all know . . . that the defendant has the privilege (as it is called) of making himself a witness if he sees fit; and they also know that he would if he dared.' Therefore, his silence 'will, and inevitably must, create a presumption against him, even if every page of the statute-book contained a provision that it should not. The statutes might as well prohibit the tide from rising . . .'" (quoting Note, *Testimony of Person Accused of Crime*, 1 AM. L. REV. 443, 444 (1867))).

⁸⁵ See Fisher, *supra* note 84, at 981 ("An experienced juror discovers that the district attorney cannot prove the prison record . . . of the defendant unless the latter subjects himself to cross-examination by taking the witness stand, and hence is likely to suspect that any defendant who does not testify is an ex-convict.").

In addition, this silence deprives jurors of information that may enhance the quality of their factfinding:⁸⁶ a large number of factually innocent defendants with prior convictions have sat silently through trial before being found guilty.⁸⁷ This silence also deprives those in the courtroom of socially useful information.⁸⁸ Finally, it keeps the defendant from experiencing one core aspect of procedural justice: the experience of having a voice in the proceedings.⁸⁹

Deciding that testifying carries too much risk might increase the likelihood that a defendant will take a plea,⁹⁰ as the loss of the defendant's testimony may mean that not only the best, but also the most affordable, line of defense is gone.⁹¹ Thus this rule has the potential to increase prosecutorial leverage and the overwhelming dominance of the criminal plea,⁹² thereby limiting the extent to which the government or the law itself are subject to public scrutiny and perhaps reform.⁹³

⁸⁶ See Bellin, *supra* note 78, at 853 (claiming that defendant testimony increases the reliability of criminal trial outcomes); see also Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1114 (2006) (explaining how "stereotype effects recede as people learn more about each other as individuals, with individuating information often overwhelming stereotype information").

⁸⁷ Blume, *supra* note 9, at 490; see Bellin, *supra* note 46, at 335 n.168; Blume, *supra* note 9, at 477 (describing how in a sample of cases where defendants were convicted despite factual innocence, defense counsel gave fear of impeachment by prior conviction as the primary reason that their clients did not take the stand).

⁸⁸ Bellin, *supra* note 78, at 858; Montré D. Carodine, "Street Cred," 46 U.C. DAVIS. L. REV. 1583, 1590 (2013); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1461 (2005) (critiquing the silencing of the criminal defendant through impeachment, as at many other stages of the criminal process); see also Richard Delgado, *The Wretched of the Earth*, 2 ALA. C.R. & C.L. L. REV. 1, 21 (2011) ("At a minimum, we ought to permit [hypothetical defendant Rashon] . . . to tell his story. Perhaps hearing about the dispiriting circumstances of his upbringing and the near-total absence of community and parental supports . . . will prompt us to resolve to build a better society. Perhaps it will make Rashon feel better . . .").

⁸⁹ See E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 208 (1988) ("Procedures are viewed as fairer when they vest process control or voice in those affected by a decision."); David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 451 (2013) ("[A]lmost no one thinks that losing [defendants'] testimony is a good thing. It deprives the jury of the opportunity to hear the defendant's own story, it filters out the voices and perspectives of defendants . . . , and it may well undermine the rehabilitative and reintegrative purposes of the criminal process.").

⁹⁰ See DEBRA S. EMMELMAN, *JUSTICE FOR THE POOR: A STUDY OF CRIMINAL DEFENSE WORK* 41 (2003).

⁹¹ See Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.U. SCH. L. REV. 911, 914 (2011) (explaining that defense attorneys often fail to conduct meaningful independent investigation).

⁹² Montré D. Carodine, *Keeping It Real: Reforming the "Untried Conviction" Impeachment Rule*, 69 MD. L. REV. 501, 507, 526 (2010) (describing the prior conviction impeachment rule as a "strong ally" of the plea-bargaining system).

⁹³ See Jenny E. Carroll, *The Jury's Second Coming*, 100 GEO. L.J. 657, 706 (2012) ("Nullification forces the law into motion and expansion. The law cannot remain idle and static in the face

Critics have noted the disparate effects of this rule on vulnerable groups. First, impeachment by prior conviction not only resembles a second punishment,⁹⁴ but also, like other consequences of conviction, threatens to ensure that those who have one conviction face tremendous obstacles in avoiding a second one.⁹⁵ Second, due to uneven distributions of criminal convictions,⁹⁶ and because of race-based assumptions of guilt,⁹⁷ the rule disproportionately affects people of color.⁹⁸

In comparing these various negative consequences with the purported benefits, commentators frequently assert that the benefits are minimal. Impeachment by prior criminal conviction not only rests on false assumptions about the nature of character and veracity⁹⁹ but is also unnecessary for successful impeachment.¹⁰⁰ There are numerous other ways in which a criminal

of ordinary men and women granted a momentary and limited power to judge, interpret, and define the law by their very commonality.”).

⁹⁴ Bellin, *supra* note 46, at 296. The punitive appearance of this form of impeachment may not be surprising, given that the precursor of impeachment (disqualification of those with felony convictions from testifying) was originally designed as punishment. See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 511 (1989) (“At common law a person who had been convicted of a felony was not competent to testify as a witness”); *Chaco*, 801 F. Supp. 2d at 1221 (“The disqualification arose as part of the punishment for the crime, only later being rationalized on the basis that such a person was unworthy of belief.” (quoting 3 J. WEINSTEIN & M. BERGER, WEINSTEIN’S EVIDENCE ¶ 609[02], at 609–58 (1988))) (internal quotation marks omitted); Stuart P. Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of Crimen Falsi*, 90 J. CRIM. L. & CRIMINOLOGY 1087, 1105 (2000); H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar’s Tale*, 42 DUKE L.J. 776, 831 (1993).

⁹⁵ See Carodine, *supra* note 92, at 572 (“[P]ersons with prior records know, perhaps better than anyone else, that they are targets of law enforcement and that they will be rounded up as ‘the usual suspects’ in criminal investigations.”); Carodine, *supra* note 1, at 526 (“Once a Black person is convicted of a crime (a likely scenario given the current statistics), that conviction will help to convict him again if he is ever charged with another crime (another very likely outcome given the ‘repeat offender’ statistics for Blacks).”). This risk of a downward spiral is, of course, in stark tension with ideals of reentry and reintegration.

⁹⁶ See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 7 (2010) (“[I]n major cities wracked by the drug war, as many as 80 percent of young African American men now have criminal records and are thus subject to legalized discrimination for the rest of their lives.”).

⁹⁷ Carodine, *supra* note 92, at 536.

⁹⁸ See Stephen J. Fortunato, *Judges, Racism, and the Problem of Actual Innocence*, 57 ME. L. REV. 481, 504 (2005) (pointing out the disparate impact on people of color).

⁹⁹ See *infra* notes 104–108 and accompanying text.

¹⁰⁰ See Bellin, *supra* note 78, at 885 (“[T]he need for additional credibility impeachment of any particular defendant’s testimony is generally minimal.”); John Leubsdorf, *Evidence Law as a System of Incentives*, 95 IOWA L. REV. 1621, 1646–47 (2010) (“Impeachment of any sort has some tendency to deter criminal defendants and other parties from taking the stand. After all, who wishes to be portrayed as forgetful, biased, inconsistent, unobservant, crazy, drugged, or otherwise unreliable?”); Foster, *supra* note 8, at 26.

defendant's story can be impeached,¹⁰¹ including impeachment by past acts¹⁰² or by prior inconsistent statements.¹⁰³

Commentators have also drawn on social science to attack some of the key assumptions on which the rule is based. First, the assumptions supporting the rule—that convictions reveal character, and that character predicts veracity¹⁰⁴—focus on the influence of individual traits on behavior, which is reminiscent of “trait theory.”¹⁰⁵ The rule therefore seems absurd to those who reject “trait theory” in favor of two alternative interpretations of conduct: “interactionist theory” and “situationism.”¹⁰⁶ According to these social science schools, interactions and situations respectively play a greater role in shaping conduct.¹⁰⁷ Moreover, the interaction and situation created by testifying in one's own defense are powerfully influential.¹⁰⁸

Second, critics also frequently attack the assumption that instructions to the jury to use this evidence solely for the purpose of assessing credibility will be effective.¹⁰⁹ First, the instructions are often misunderstood.¹¹⁰ Second,

¹⁰¹ *State v. Santiago*, 492 P.2d 657, 661 (Haw. 1971) (finding “little need for evidence of prior convictions,” given that “the jury is presumably qualified to determine whether or not a witness is lying from his demeanor and his reaction to probing cross-examination”); Foster, *supra* note 8, at 26 (noting a number of alternative ways to impeach a witness, such as finding flaws in the witness's perception and memory, using prior statements, and contradictions by non-collateral information).

¹⁰² FED. R. EVID. 608(b).

¹⁰³ *Id.* 613(b).

¹⁰⁴ See Foster, *supra* note 8, at 5 (finding this assumption “intuitively appealing,” but nevertheless “thoroughly undermined by social psychology research”).

¹⁰⁵ See Sampsell-Jones, *supra* note 55, at 734.

¹⁰⁶ See JEROME BALLETT ET AL., FREEDOM, RESPONSIBILITY AND ECONOMICS OF THE PERSON 119 (2013) (“Situationism seeks to highlight the fact that traits of character cannot be used to predict how people will behave and that, on the contrary, situations have a major influence on their behaviour”); Park & Saks, *supra* note 8, at 964 (“The theory that character evidence lacks probative value finds support in a view of personality that sees situational pressures as being more important as a cause of human behavior than are general traits of character.”).

¹⁰⁷ See Foster, *supra* note 8, at 32 nn.147–48; Edward J. Imwinkelried, *Reshaping the “Grotesque” Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 SW. U. L. REV. 741, 763–64 (2008) (stating that interactionist research “provides strong support for earlier commentators’ . . . conclusion that impeachment by proof of the fact of prior conviction, especially a felony conviction not involving false statement, relies upon assumptions and inferences that lack scientific validity” (quoting Susan Marlene Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 532–33 (1991))).

¹⁰⁸ See Uviller, *supra* note 94, at 813.

¹⁰⁹ See Bellin, *supra* note 46, at 300; Foster, *supra* note 8, at 32–33 nn.150–52; Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 323–24 (2013) (finding “no data-based reason” to conclude that it is more difficult for jurors to follow instructions regarding confessions—an area in which the Supreme Court has acknowledged that jury instructions may fail to cure prejudice—than with respect to prior convictions); Sally Lloyd-Bostock, *The Effects on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study*, 2000 CRIM. L. REV. 734, 738 (“What is clear is that it cannot be assumed that jurors will follow an

it is unrealistic to hope that the instructions could serve to prevent jurors from using this evidence in forbidden ways, such as viewing it as a sign of a defendant's propensity to commit crimes, or as a sign that a defendant is better off locked up.¹¹¹ Third, these instructions may in fact increase the weight that jurors give to this evidence.¹¹² Thus, not only does impeachment evidence significantly increase the likelihood of convictions, but, scholars postulate, it may be increasing the likelihood of *wrongful* convictions.¹¹³

Finally, commentators point to the illogicalities and inconsistencies within the rule and its application. Judicial interpretations of the rule are muddled.¹¹⁴ They have diverged from not only the plain language¹¹⁵ but also the intent of the rule,¹¹⁶ and in the process have skewed toward permitting impeachment.¹¹⁷ Scholars point out the irony of using convictions as examples of a lack of credibility, when in most cases the convictions will have been garnered through a guilty plea that the trial court implicitly assumes was truthfully made.¹¹⁸ They critique the ten-year time period, after which proffer-

instruction on the use of evidence of previous convictions"). For an example of a jury instruction on this issue, see COMM. ON PATTERN JURY INSTRUCTIONS, DIST. JUDGES ASS'N, FIFTH CIRCUIT, PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) 1.11 (2012). The instruction states:

You have been told that the defendant . . . was found guilty . . . of _____. This conviction has been brought to your attention only because you may wish to consider it when you decide, as with any witness, how much of the defendant's testimony you will believe in this trial. The fact that the defendant was previously found guilty of another crime does not mean that the defendant committed the crime for which the defendant is on trial, and you must not use this prior conviction as proof of the crime charged in this case.

Id.

¹¹⁰ See Bellin, *supra* note 46, at 39.

¹¹¹ Sampsell-Jones, *supra* note 55, at 732.

¹¹² See Bellin, *supra* note 46, at 295 n.18; Dodson, *supra* note 80, at 44 (suggesting that such instructions may undermine a defendant's case because "the jury hears the defendant is a criminal for a second time"); Sklansky, *supra* note 89, at 450.

¹¹³ Blume, *supra* note 9, at 493 ("[T]hreatening a defendant with the introduction of his prior record contributes to wrongful convictions either directly—in cases where the defendant is impeached with the prior record and the jury draws the propensity inference—or indirectly—by keeping the defendant off the stand."); Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1389 (2009) ("The enhanced conviction probability that prior record evidence supplies in close cases may well contribute to erroneous convictions.").

¹¹⁴ See *supra* notes 42–57 and accompanying text.

¹¹⁵ See Bellin, *supra* note 46, at 316.

¹¹⁶ See *id.* at 309–10, 310 n.78, 334 n.163; Sampsell-Jones, *supra* note 55, at 732.

¹¹⁷ See Bellin, *supra* note 46, at 334 (concluding that "federal case law now essentially dictates admission of prior convictions"); *id.* at 292 n.5, 312 n.88; Carodine, *supra* note 91, at 546.

¹¹⁸ Hornstein, *supra* note 57, at 13 ("The prior guilty plea is some evidence that the defendant was truthful about her legal misadventure and, hence, ought to be more worthy of belief rather than less."); see *United States v. Lipscomb*, 702 F.2d 1049, 1066 (D.C. Cir. 1983) (quoting then-Senator Joseph Biden as stating that "a guilty plea in a way is almost speaking for their credibility,

ing convictions becomes more difficult, describing it as “arbitrary”¹¹⁹ and too long.¹²⁰ Moreover, such critics point out that the same alleged conduct could provoke a felony charge in one jurisdiction and a misdemeanor in another.¹²¹ They also critique the assumption embedded in this difference in treatment, namely that all felony convictions have some probative value on the issue of credibility.¹²²

None of these objections, however, has done anything to shake the core of Federal Rule of Evidence 609. Through four sets of amendments, the basic tenets of the rule have persisted.¹²³

III. AN ADDITIONAL CRITIQUE OF THE IMPEACHMENT RULES

Part II described the various critiques that have tried to shake the foundations of Rule 609 and failed to spur real reform. This Part explores a less well-developed area of critique, which is arguably more fundamental than some of these others.¹²⁴ This area of critique asserts that before arriving at the question of what a conviction indicates about character—and, ultimately,

having acknowledged they did it” (quoting 120 CONG. REC. 37,082 (1974) (statement of Sen. Joseph Biden)) (internal quotation marks omitted)).

¹¹⁹ See HAW. R. EVID. 609 commentary (stating that Rule 609 of the Federal Rules of Evidence “establishes an arbitrary, ten-year time limit for usable prior convictions, without regard to the nature of the crime”).

¹²⁰ Stacy A. Hickox & Mark V. Roehling, *Negative Credentials: Fair and Effective Consideration of Criminal Records*, 50 AM. BUS. L.J. 201, 273 (2013) (concluding that the ten-year time limit in Rule 609 could be reduced due to studies which suggest that a person who has not committed a criminal offense for seven years is no more likely to commit a new offense than a person who has no criminal history); see also FED. R. EVID. 609(a)(1)(B) (applicable only to felony convictions).

¹²¹ See *Lipscomb*, 702 F.2d at 1056.

¹²² See MT. R. EVID. 609 commission commentary (giving “manslaughter caused by an automobile accident” as an example of a situation “where the conviction has no relation to credibility”). But see *Lipscomb*, 702 F.2d at 1059 (“The legislative history of Rule 609 . . . supports the view that all felony convictions are probative of credibility to some degree.”).

¹²³ Federal Rule of Evidence 609 was enacted in 1975, and was subject to amendment in 1987, 1990, 2006, and 2011. See FED. R. EVID. 609 advisory committee’s note.

¹²⁴ A small number of scholars have addressed discrete aspects of the reliability problem in the impeachment context; however, a holistic analysis has not yet been provided. See Carodine, *supra* note 92, at 522 (racial disparity); Carodine, *supra* note 88, at 501–02 (plea bargaining); Hornstein, *supra* note 57, at 13–14 (identifying several inferences that must be made before concluding that a prior conviction is probative of the credibility of a witness’s testimony, including “(1) that the defendant in fact committed the acts that were the subject matter of the conviction; (2) that those acts are a valid indicator of the defendant’s character for mendacity; and (3) that the defendant is acting in conformity with that supposed trait . . .”); Zeigler, *supra* note 45, at 679 (“A conviction merely makes it somewhat more likely the misconduct occurred.”).

about veracity—one must first investigate whether the conviction is itself a reliable indicator of relative culpability.¹²⁵

Three increasingly prominent aspects of the criminal justice system militate in favor of an opportunity for courts (and a duty for prosecutors) to assess the reliability of convictions as indicators of relative culpability when they screen convictions for possible impeachment use. First, a growing sense of adversarial collapse, bolstered by wrongful convictions data, makes increasingly tenuous an unquestioning assumption that a conviction is a reliable indicator of factual guilt.¹²⁶ Second, unequal enforcement at every stage of the criminal process undermines the notion that a conviction provides sufficient indication of relative culpability, even if founded on factual guilt.¹²⁷ Third, the widening reach of criminal prosecutions, including felony prosecutions, beyond the zone of *malum in se* offenses and into the realm of *malum prohibitum* and strict liability undermines the moral sense of “culpability” that the law of impeachment often assumes is intrinsic to a criminal conviction.¹²⁸

Accordingly, the question of whether a proffered conviction can be taken as a reliable indicator of relative culpability, as this Part will show, can no longer be assumed to be “yes.”¹²⁹ Part IV will explore possible ways in which the question might be asked.

A. Lack of a Fair Fight

The use of convictions as impeachment evidence—and indeed their very admissibility despite their hearsay status—rests on an assumption of their reliability.¹³⁰ This assumption of reliability is based on the notion that convictions are the product of a fair fight between relatively evenly matched adversaries,¹³¹ culminating in a finding of proof beyond a reasonable doubt.¹³² In

¹²⁵ See, e.g., George Edward Spencer, Comment, *Interpreting the New Rule 609(a)(2)*, 57 CASE W. RES. L. REV. 717, 718 (2007) (“The critical issue is to determine what types of prior convictions demonstrate an untruthful character.”).

¹²⁶ See *infra* notes 130–174 and accompanying text.

¹²⁷ See *infra* notes 175–183 and accompanying text.

¹²⁸ See *infra* notes 184–206 and accompanying text.

¹²⁹ See Carodine, *supra* note 92, at 514 (“[T]here are enough serious flaws in the system as a whole that we should not compound the criminal justice system’s mistakes by using convictions as evidence in subsequent cases, or we should at least view prior convictions offered into evidence with much more skepticism.”).

¹³⁰ See Hiroshi Motomura, *Using Judgments as Evidence*, 70 MINN. L. REV. 979, 980–89 (1986) (stating that whereas prior judgments are technically hearsay, they are generally admitted under an exception to the rule against hearsay because they are seen as reliable and trustworthy—given the incentives to defend against serious charges, the high burden of proof, and safeguards surrounding the plea-bargaining process).

¹³¹ See Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 740 (“[T]he premise of our adversarial system is that the clash between partisan advocates produces reliable, accurate results.”); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 61 (1991) (noting

the vast majority of convictions, however, there is no finding of proof beyond a reasonable doubt.¹³³ Even if there is, the notion of a fair fight between relatively evenly matched adversaries¹³⁴—or even any fight at all—is increasingly being challenged.¹³⁵ The assumption of reliability therefore needs to be reexamined.¹³⁶

Provision of defense counsel—on whose shoulders rests the protection of so many rights¹³⁷—is sorely inadequate. The public defense system, as one recent article has reported, is in “a state of crisis,”¹³⁸ as many public defenders represent as many as four or five hundred clients.¹³⁹ Whether the public defender divides his or her time equally—approximately six minutes per week for each client—or, as one recent article has suggested, deals with the inevitable triage by choosing at random which cases to prioritize,¹⁴⁰ the kind of representation that can help to ensure reliability is often lacking.¹⁴¹ These problems are particularly intense in the state public defense systems, which

that the adversarial system of criminal justice “necessarily presumes that the competing attorneys will be roughly equivalent in quality and possess a similar level of resources with which to pursue the litigation”).

¹³² See, e.g., *United States v. Werbrouck*, 589 F.2d 273, 278 (7th Cir. 1978) (holding that a municipal board’s set of findings that resulted in the discharge of a municipal employee was not equivalent to a criminal conviction because it did not involve a comparable standard of proof or rules of evidence designed to protect employees).

¹³³ See Federal Criminal Case Processing Statistics, BUREAU OF JUST. STAT., <http://bjs.gov/fjsrc/> (follow “Offenders sentenced: tables” hyperlink: then select year “2009”; then select “Case disposition”; then select “All values”; then select “Frequencies” and “Percents”; then select “HTML”) (showing that roughly ninety-six percent of those sentenced resolved their cases by guilty plea). Conviction by plea does not require a showing of proof beyond a reasonable doubt. See Hornstein, *supra* note 57, at 10 (questioning whether the reasonable doubt standard guarantees the integrity of prior convictions because a significant majority of criminal convictions result from plea-bargaining); David L. Shapiro, *Should a Guilty Plea Have Preclusive Effect?*, 70 IOWA L. REV. 27, 43 (1984) (stating that probable cause is probably sufficient at the plea stage).

¹³⁴ Findley, *supra* note 91, at 912 (“The current American system is marked by an adversary process so compromised by imbalance between the parties—in terms of resources and access to evidence—that true adversary testing is virtually impossible.”).

¹³⁵ See Uphoff, *supra* note 131, at 741–42 (describing assistance of counsel for defendants as often involving “little more than counsel’s help in facilitating a guilty plea”).

¹³⁶ See Findley, *supra* note 91, at 912 (“If one were asked to start from scratch and devise a system best suited to ascertaining the truth in criminal cases, . . . [i]t is inconceivable that one would create a system bearing much resemblance to the criminal justice process we now have in the United States.”).

¹³⁷ See Uphoff, *supra* note 131, at 740.

¹³⁸ L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2631 (2013).

¹³⁹ E.g., Angela Caputo, *Swallowed by the System*, CHI. REP. (Jan. 1, 2013), <http://www.chicago-reporter.com/swallowed-system#UtvzB2Qo5sM>, archived at <http://perma.cc/TD7F-Y3BY> (explaining that the Cook County Public Defenders must divide 251,135 cases among 481 attorneys).

¹⁴⁰ Richardson & Goff, *supra* note 138, at 2644 (suggesting that one way to improve the current system of public defender triage would be “to prioritize cases randomly”).

¹⁴¹ See Uphoff, *supra* note 131, at 740–41 (“A one-sided, untested presentation of the facts compromises reliability and increases the likelihood of error.”).

have traditionally received less funding than the federal system.¹⁴² Nor are the failures limited to public defense: the quality of representation for clients who are poor but do not qualify for “indigent” defense is also frequently subpar.¹⁴³

A lack of defense counsel resources not only makes zealous representation difficult,¹⁴⁴ but also contributes to a resource disparity that makes a fair fight unlikely. Certainly prosecution offices frequently deal with high case-loads¹⁴⁵—a fact that increases the incentives on all sides to seek out a quick, rather than keenly fought, resolution. Still, the prosecution’s resources are usually superior to those of the defense.¹⁴⁶ The power and leverage possessed by the prosecution creates a risk that defense counsel will be deterred from seeming to advocate too zealously.¹⁴⁷

Resolution of a criminal case by plea is the area in which concerns about a lack of a fair fight may be most intense. Plea bargains can be swiftly accomplished,¹⁴⁸ and countless pressures push defendants toward this outcome.¹⁴⁹ The first pressure is the lack and disparity of resources: one may shrink from going to trial with an advocate who appears to have only six minutes per week to devote to the case.¹⁵⁰ Second, the prosecution and judge are able to threaten a far higher sentence after trial than the sentence attached

¹⁴² See Carodine, *supra* note 92, at 550.

¹⁴³ See Uphoff, *supra* note 131, at 741 (recognizing that nearly all of the nation’s working poor receive inadequate criminal defense).

¹⁴⁴ See Alexandra Natapoff, *Gideon Skepticism*, 70 WASH. & LEE L. REV. 1049, 1070 (2013) (noting that the lack of resources prevents most people charged with misdemeanors from receiving adequate defense).

¹⁴⁵ See Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 601 (2005).

¹⁴⁶ See Findley, *supra* note 91, at 912.

¹⁴⁷ See William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2558 (2004) (“[G]iven the array of weapons the law provides, prosecutors are often in a position to dictate outcomes, and almost always have much more to say about those outcomes than do defense attorneys.”); Note, *Breathing New Life into Prosecutorial Vindictiveness Doctrine*, 114 HARV. L. REV. 2074, 2080–86 (2001) (arguing that defense litigation risks provoking the filing of more serious charges and/or prosecutorial attempts to obtain higher sentences).

¹⁴⁸ See Natapoff, *supra* note 144, at 1081–82 (explaining that in misdemeanor court “defendants typically get scant time with their attorneys and are therefore presumed to understand and consent to their convictions based on little or no consultation”); Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1093–94 (2013) (noting that misdemeanor cases are relatively cheap for the system because of the speed with which pleas are obtained, and stating that in some jurisdictions “almost 70% of lower criminal court cases are resolved at arraignment”).

¹⁴⁹ See Natapoff, *supra* note 144, at 1072 (describing “a world where it makes sense even for innocent defendants to plead guilty”); Hornstein, *supra* note 57, at 10–11 (describing the factors that might make a plea “the overwhelmingly likely scenario” for a hypothetical defendant, regardless of guilt or innocence).

¹⁵⁰ See Natapoff, *supra* note 144, at 1070.

to a plea.¹⁵¹ Third, the prosecution need not reveal the strength of its evidence before a plea is taken, thereby increasing the defendant's perception of risk.¹⁵² Fourth, overloaded dockets often mean an extended wait for trial, which can impose a crushing pressure on the defendant, most obviously in the case of pretrial detention,¹⁵³ but also if economic survival is threatened by frequent visits to court.¹⁵⁴ And finally, defendants may well be aware of the types of risk other than evidence that exist at trial, such as the risk of factfinder bias, whether because of associations between race and criminality,¹⁵⁵ or because of associations between one's very status as a defendant and criminality.¹⁵⁶

All of these pressures work to push defendants toward a plea, whether or not the defendant has a viable defense: in at least some circumstances, as one scholar puts it, "the adversarial truth-seeking process . . . has become increasingly irrelevant."¹⁵⁷ Nor is there much of a safeguard against the innocent pleading guilty.¹⁵⁸ Indeed, one is permitted to maintain one's innocence while pleading guilty,¹⁵⁹ and pleas may be taken to "legally impossible" offenses.¹⁶⁰ Although with a plea entered in federal court there needs to be a finding that the plea has a factual basis,¹⁶¹ this is satisfied by a recitation of alleged facts

¹⁵¹ See *id.* at 1051 ("Innocent defendants may plead guilty . . . because the trial penalty is too great relative to the plea offer.").

¹⁵² *United States v. Ruiz*, 536 U.S. 622, 625 (2010); Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 218 (2011) ("One cannot ignore the fact that defendants are forced to make fateful choices based on sparse and uncertain evidence, which will likely never be scrutinized.").

¹⁵³ See Natapoff, *supra* note 144, at 1051 ("Innocent defendants may plead guilty because they cannot afford bail pending trial and will lose jobs, homes, or children by remaining incarcerated. . . .").

¹⁵⁴ See *id.*

¹⁵⁵ See Justin D. Levinson, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 207 (2010) (demonstrating that mock jurors held "strong associations between Black and Guilty, relative to White and Guilty, and [that] these implicit associations predicted the way mock jurors evaluated ambiguous evidence"); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1196–97 (2009) (finding that judges hold implicit racial biases, and that these biases can affect their judgment).

¹⁵⁶ See Nancy Gertner, *Is the Jury Worth Saving?*, 75 B.U. L. REV. 923, 931 & n.44 (1995) (noting a study that shows that juries believe that because defendants are on trial, they are probably guilty of something).

¹⁵⁷ Natapoff, *supra* note 144, at 1072 (adding that "the misdemeanor system burdens and pressures defendants regardless of the evidence, their rights, or their culpability").

¹⁵⁸ See R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 45 (1981).

¹⁵⁹ Note the fact that *Alford* pleas may be permitted for impeachment purposes, as may pleas of *nolo contendere*. See, e.g., *United States v. Lipscomb*, 702 F.2d 1049, 1070 (D.C. Cir. 1983).

¹⁶⁰ *Gill v. INS*, 420 F.3d 82, 84 (2d Cir. 2005) (describing the defendant's conviction for "attempted reckless assault" as "legally impossible").

¹⁶¹ The same is not universally true in state courts. See Shapiro, *supra* note 133, at 42 n.72.

from the prosecution.¹⁶² Thus, far from a fair fight, the conviction-production process is often a scramble to grab the least bad option before the risk of trial. It would be a miracle if the results were reliable.¹⁶³

Moreover, reliability concerns are not confined to convictions garnered through pleas. Resource-starved defense attorneys often fail to conduct meaningful independent investigation, and rarely hire expert witnesses, thereby jeopardizing the effectiveness of trial litigation.¹⁶⁴ As with guilty pleas, fact-finder bias also jeopardizes the fairness of the trial, whether the factfinder is a jury or a judge.¹⁶⁵

Wrongful convictions data that have emerged over the last two-and-a-half decades—a period termed “the age of innocence”¹⁶⁶—indicate that concerns that criminal justice processes may not be leading to reliable results are well founded. The National Registry of Exonerations currently contains 1339 exonerees, 136 of whom received their convictions through guilty pleas.¹⁶⁷ These are likely only a mere fraction of the number of cases of conviction in the absence of guilt.¹⁶⁸

For example, misdemeanor convictions—where plea-bargaining is particularly dominant, particularly swift, and particularly detached from notions of guilt or innocence¹⁶⁹—are unlikely to be subject to investigation, and thus

¹⁶² See FED. R. CRIM. P. 11; Shapiro, *supra* note 133, at 42–43 (adding that probable cause is probably sufficient at the plea stage).

¹⁶³ See Darryl K. Brown, *American Prosecutors' Powers and Obligations in the Era of Plea Bargaining*, in THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE 199, 204 (E. Luna & M. Wade eds., 2012) (“[W]hen pleas replace trials, most of the systemic components of public adjudication that serve the objectives of factual reliability and accurate normative judgment are missing—the jury, evidentiary disclosure, rules of evidence, formal adversarial challenges to state evidence, and so on.”).

¹⁶⁴ See Findley, *supra* note 91, at 914–16.

¹⁶⁵ See Levinson, *supra* note 155, at 207; Rachlinski et. al, *supra* note 155, at 1196–97 (finding that judges harbor implicit racial biases, and that these biases can affect their judgment).

¹⁶⁶ Findley, *supra* note 1, at 756 (“[S]ociety has entered into what Marvin Zalman has called the ‘age of innocence’—when the nature and risks of unreliable evidence have been recognized as never before”); see *id.* at 725 (discussing the “growing number of exonerations over the past two-and-a-half decades,” which “casts new doubts on the effectiveness of [existing] rules and mechanisms for guarding against unreliable evidence”).

¹⁶⁷ NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx>, archived at <http://perma.cc/LHD2-ATRP> (last visited Mar. 1, 2014). These figures are current as of March 27, 2014.

¹⁶⁸ Findley, *supra* note 91, at 918 (acknowledging that recorded exonerations “undoubtedly represent, as numerous observers have put it, the tip of what is surely a very large iceberg”); SAMUEL R. GROSS & MICHAEL SHAFFER, NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989–2012, at 3 (2012).

¹⁶⁹ Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1370 (2012) (“[T]he misdemeanor process widely confers criminal records on potentially innocent people without checking whether they are actually guilty or not.”); *id.* at 1317 (“[E]very year, the criminal system punishes thousands of petty offenders who are not guilty.”).

their shaky foundation is unlikely ever to be uncovered.¹⁷⁰ The same is probably true of certain felony convictions.¹⁷¹ Some scholars estimate that the actual proportion of convictions that are wrongful could be one in twenty, or higher, perhaps even one in ten.¹⁷² Thus, though some scholars have explored the notion that current impeachment rules might bring about wrongful convictions,¹⁷³ scholarship must also investigate the ways in which wrongful, or otherwise unreliable, convictions are being used to impeach because of an assumed reliability, unsupported by the facts.¹⁷⁴

B. Disparities in Enforcement

If the purpose of proffering a defendant's prior conviction is to give jurors information about the relative culpability, and thus credibility, of that defendant, there must be some indication that neither chance alone nor disparities tracking historical patterns of subordination led that defendant to have a conviction while others do not.¹⁷⁵ Admittedly, it is unrealistic to expect patterns of enforcement to mirror patterns of law-breaking exactly. The criminal justice system, after all, is pervaded by discretion.¹⁷⁶ Nevertheless, marked

¹⁷⁰ See 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, 931 (2008) (stating that in contrast to prolonged post-conviction investigations for major felonies, "It is hard to imagine anybody going through that sort of trouble to clear an innocent defendant who pled guilty to a misdemeanor, or even to a felony for which the defendant was immediately released").

¹⁷¹ *Id.*

¹⁷² Findley, *supra* note 91, at 918; Gross & O'Brien, *supra* note 170, at 929.

¹⁷³ See, e.g., Blume, *supra* note 9, at 477; Eisenberg & Hans, *supra* note 113, at 1389 ("The enhanced conviction probability that prior record evidence supplies in close cases may well contribute to erroneous convictions."); Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for the Truth*, 38 SETON HALL L. REV. 893, 927 (2008) (describing Rule 609 as a rule that "put[s] innocents at risk").

¹⁷⁴ See Simon, *supra* note 152, at 146 ("The prospect of error is generally ignored or denied by those entrusted with governing the criminal justice system, and is not adequately recognized in the scholarly debate.").

¹⁷⁵ See AM. BAR ASS'N, JUSTICE KENNEDY COMMISSION 52 (2004), available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_kennedy_JusticeKennedyCommissionReportsFinal.authcheckdam.pdf, archived at <http://perma.cc/TB7W-CMCL> (acknowledging that due to the extensive opportunities for discretion throughout a criminal proceeding, many convictions are influenced by decisions made during the process); Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157, 1240 (1999) (highlighting the role of discriminatory policing in shaping criminal records); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 37 (1998) (concluding that because of disparities in policing, "the existence or nonexistence of an arrest or conviction record may or may not reflect relative criminality in black and white defendants").

¹⁷⁶ See AM. BAR ASS'N, *supra* note 175, at 52; Rebecca S. Henry, *The Virtue in Discretion: Ethics, Justice, and Why Judges Must Be "Students of the Soul,"* 25 N.Y.U. REV. L. & SOC. CHANGE 65, 105 (1999) ("[P]olice are (comparatively) unconstrained in their discretion to arrest, investigators are unconstrained in their discretion to collect evidence, prosecutors are uncon-

disparities in enforcement necessarily call into question any suggestion that a conviction is a reliable indicator of relative culpability.¹⁷⁷

Major disparities of enforcement exist throughout the criminal justice system.¹⁷⁸ Racial and/or ethnic disparities, for example, have been found in police stops and arrests,¹⁷⁹ and at each of the main points of prosecutorial discretion.¹⁸⁰ Given the disparate configuration of convictions,¹⁸¹ if one took the idea that a conviction is a mark of relative credibility to its logical extension, one would be at risk of suggesting that levels of credibility vary according to racial group, or according to socioeconomic status.¹⁸² Judges and rules drafters do not voice that view, even while they adopt the assumptions that tend toward it.¹⁸³

strained in their discretion to charge, and juries (or in bench trials, judges) are unconstrained in their discretion to find facts.”).

¹⁷⁷ Carodine, *supra* note 92, at 544 (“It is undeniable that ‘[p]rosecutors can [and do] charge a handful of defendants and ignore hundreds of thousands of violators.’” (alteration in original) (quoting William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 791 (2006))).

¹⁷⁸ Carodine, *supra* note 92, at 526 n.24; Kevin R. Johnson, *Hernandez v. Texas: Legacies of Justice and Injustice*, 25 CHICANO-LATINO L. REV. 153, 193 (2005) (“Race-based law enforcement has plagued the nation for centuries and continues to do so.”).

¹⁷⁹ See, e.g., *Floyd v. City of New York*, No. 08 Civ. 1034(SAS), 2013 WL 4046209, at *25 (S.D.N.Y. Aug. 12, 2013) (finding that the New York City Police Department “instituted a policy of indirect racial profiling . . . targeting blacks and Hispanics for stops and frisks at a higher rate than similarly situated whites”); AM. CIVIL LIBERTIES UNION, *THE WAR ON MARIJUANA IN BLACK AND WHITE 4* (2013), available at <https://www.aclu.org/sites/default/files/assets/1114413-mj-report-rfs-re11.pdf>, archived at <http://perma.cc/9UF4-RHSD> (finding marijuana use roughly equal among Blacks and Whites, but that Blacks are 3.73 times as likely to be arrested for marijuana possession).

¹⁸⁰ See VERA INST. OF JUSTICE, *DO RACE AND ETHNICITY MATTER IN PROSECUTION?: A REVIEW OF EMPIRICAL STUDIES 3–4* (2012) (identifying six prosecutorial discretion points, and citing empirical research showing racial and/or ethnic disparities as to each of them); Manny Garcia & Jason Grotto, *Odds Favor Whites for Plea Deals*, MIAMI HERALD, Jan. 26, 2004, at 1A (explaining that whites obtain more favorable plea deals, including more frequent expungement of convictions); M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Charging and Its Sentencing Consequences 1–3* (Univ. of Mich. Program in Law & Econ., Working Paper No. 12-002, 2012), available at [http://www.fjc.gov/public/pdf.nsf/lookup/NSPI201213.pdf/\\$file/NSPI201213.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/NSPI201213.pdf/$file/NSPI201213.pdf), archived at <http://perma.cc/JX7K-EDDV> (demonstrating charging disparity in federal district court).

¹⁸¹ J. McGregor Smyth, Jr., *From Arrest to Reintegration: A Model for Mitigating Collateral Consequences of Criminal Proceedings*, 24 CRIM. JUST. 42, 43 (2009).

¹⁸² See Carodine, *supra* note 92, at 549 (noting that most criminal defendants are indigent).

¹⁸³ See Zeigler, *supra* note 45, at 653 (“Should a witness with an antisocial background be allowed to stand on the same basis of believability before juries as law-abiding citizens with unblemished records? I think not.” (quoting 120 CONG. REC. 2,376 (1974) (statement of Rep. Lawrence Hogan)) (internal quotation marks omitted)).

C. Limits to Culpability

While Section A explored the weaknesses in the assumption that a conviction is a reliable indicator of culpability—in the sense of factual guilt—and Section B explored the weaknesses in the assumption that a conviction is a reliable indicator of relative culpability—in the sense of factual guilt that marks a reliably assessed deviation from the norm—this Section explores a different type of “culpability.”

The type of “culpability” explored in this Section involves moral culpability. Just as Section A explored the way in which the criminal process and its errors undermine assumptions of reliable determinations of factual guilt, and Section B explored the way in which unequal enforcement undermines assumptions of reliable indications of relative culpability, this Section explores the way in which the nature and expanding reach of the criminal justice system undermine the assumption that convictions necessarily connote moral culpability.

In order to justify the use of criminal convictions for impeachment, particularly felony convictions, courts and rules drafters often identify and rely on a particular meaning of a conviction: that it indicates a “readiness to do evil” on the part of the convicted person.¹⁸⁴ An inference is then drawn from that assumed meaning: if someone is ready and willing to do evil, then he or she will be ready and willing to spout untruths from the witness stand, in defiance of the prohibition against perjury.¹⁸⁵ This readiness is phrased in various ways: defendants with convictions are said to have “sinned,”¹⁸⁶ to have “transgressed society’s norms,”¹⁸⁷ or to have shown a “willingness to ignore the law.”¹⁸⁸

¹⁸⁴ *Gertz v. Fitchburg R.R.*, 137 Mass. 77, 78 (1884) (stating that given this readiness, “the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact”).

¹⁸⁵ See *United States v. Barnes*, 622 F.2d 107, 109 (5th Cir. 1980); *United States v. Harding*, 525 F.2d 84, 89 (7th Cir. 1975) (“The fact that the defendant has sinned in the past implies that he is more likely to give false testimony than other witnesses.”).

¹⁸⁶ *Harding*, 525 F.2d at 89.

¹⁸⁷ *United States v. Headbird*, 461 F.3d 1074, 1078 (8th Cir. 2006) (stating that prior convictions are “highly probative of . . . credibility ‘because of the common sense proposition that one who has transgressed society’s norms by committing a felony is less likely than most to be deterred from lying under oath’” (quoting *United States v. Chauncey*, 420 F.3d 864, 874 (8th Cir. 2005))); see *Mills v. Estelle*, 552 F.2d 119, 120 (5th Cir. 1977) (“[A] person whose prior criminal record evinces a disrespect for the social norms evidenced by positive law is unlikely to have the normal witness’ respect for the necessity of giving truthful testimony.”).

¹⁸⁸ *United States v. Estrada*, 430 F.3d 606, 618 (2d. Cir. 2005) (stating that “the gravity of an offense may bear on truthfulness, to the extent that more serious offenses indicate a stronger willingness to ignore the law”); see *United States v. Hudson*, Crim. No. 09-171, 2011 WL 5357902, at *1 (E.D. La. Nov. 7, 2011) (stating that Rule 609 “is premised on the belief that a witness’s criminal past is indicative of a dishonest character or a willingness to flaunt the law” (quoting STEVEN GOODE & OLIN GUY WELLBORN III, *COURTROOM HANDBOOK ON FEDERAL EVIDENCE* 432 (2011)) (internal quotation marks omitted)); Zeigler, *supra* note 45, at 653 (“A demonstrated in-

During the development of rules disqualifying those with felony convictions from testifying¹⁸⁹—the precursors of rules permitting impeachment by prior conviction¹⁹⁰—there was greater support for these kinds of assumptions. Felonies were a narrow group of offenses,¹⁹¹ all punishable by death,¹⁹² and all deemed to be “inherently morally wrong.”¹⁹³

The meaning, use, and scope of the criminal law—and of the felony—has changed. Now there are “numerous felonies, but not all are serious, or *mala in se*, or life-endangering.”¹⁹⁴ Garnering a criminal conviction—even a felony conviction—does not necessarily require readiness, or evil. “Readiness,” in the sense of willingness knowingly to violate the law, is not always required because the family of strict liability offenses is growing and even includes some felonies.¹⁹⁵ Thus, convictions can occur in the absence of any culpable mental state.¹⁹⁶ In addition, mistake of law is typically no defense.¹⁹⁷ Thus, convictions can occur in the absence of any understanding that the law is being broken.¹⁹⁸ Even if “evil” were an apt term for what is detected in the

stance of willingness to engage in conduct in disregard of accepted patterns is translatable into willingness to give false testimony.” (quoting 120 CONG. REC. 2,376 (1974) (statement of Rep. Lawrence Hogan)) (internal quotation marks omitted).

¹⁸⁹ The precursor of rules governing impeachment by prior conviction consisted of a common law provision, probably dating to the early seventeenth century, barring all those convicted of felonies from the witness stand. See Green, *supra* note 94, at 1105.

¹⁹⁰ See *id.*

¹⁹¹ See Elizabeth Kelly, *State v. Fields: Felony Murder and Psychological Use of a Deadly Weapon*, 65 N.C.L. REV. 1220, 1220 n.1 (1987).

¹⁹² James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces That Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1446 (1994).

¹⁹³ *Id.* at 1445–46.

¹⁹⁴ *Id.* at 1447 (describing the expansion of felonies to include crimes outside the concept of moral wrongfulness); see Johnson, *supra* note 178, at 191 (noting the “dramatic expansion of the crimes that constitute felonies”); Margaret Colgate Love, *What’s in a Name? A Lot, When the Name Is “Felon,”* CRIME REPORT (Mar. 13, 2012, 11:00 AM), <http://www.thecrimereport.org/viewpoints/2012-03-whats-in-a-name-a-lot-when-the-name-is-felon>, archived at <http://perma.cc/8NV3-7Q2T> (stating that there are more than twenty million Americans with felony convictions).

¹⁹⁵ See *Perez v. State*, 11 S.W.3d 218, 221 (Tex. Crim. App. 2000) (en banc) (stating that felony driving while intoxicated does not require a culpable mental state); see also John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. CRIMINOLOGY 653, 684 (2012) (“Strict liability offenses punish the defendant’s conduct without requiring proof of any culpable state of mind relating to such conduct.”).

¹⁹⁶ Jeffrey A. Meyer, *Authentically Innocent: Juries and Federal Regulatory Crimes*, 59 HASTINGS L.J. 137, 137 (2007) (“For a wide range of the most commonly charged federal crimes, judges routinely instruct juries to convict defendants regardless of their moral culpability—that is, even if there is no proof or finding that the defendant knew she was doing something wrong.”); see Stinneford, *supra* note 195, at 684.

¹⁹⁷ See Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 726–27 (2012).

¹⁹⁸ See *id.* at 740 (suggesting that mistake of law doctrine should be reconsidered in light of the fact that, with over 300,000 ways of violating the federal criminal law, one can no longer be presumed to know the law).

more serious *mala in se* offenses, it is a tiny portion of our criminal courts' focus.¹⁹⁹

Whereas courts are wont to repeat the statement that Rule 609 is “premissed on the common sense proposition that one who has transgressed society's norms by committing a felony is less likely than most to be deterred from lying under oath,”²⁰⁰ this version of common sense may be out of step with the current shape of criminal justice. Attorney Harvey Silverglate's assertion that each of us unwittingly commits three felonies a day suggests that law breaking may *be*, rather than be transgressing, a societal norm.²⁰¹

The dilution of moral meaning in the criminal law has come about not only because of a shift in culpability requirements of conviction, but also because of the characteristics of those who are most likely to be subject to a criminal conviction. The prevalence of social disadvantage among the convicted complicates the notion that character flaws are responsible for criminal convictions.²⁰² Such characteristics militate against the notion that a criminal conviction results from a free and flagrant choice to do evil.²⁰³

Courts have not adjusted to these changes. In the early case law from which cases such as *Mahone* developed, courts investigated the extent to which a proffered conviction constituted a *malum prohibitum*, and thus an unworthy basis for impeachment.²⁰⁴ But that concern has waned. Courts often

¹⁹⁹ See Natapoff, *supra* note 169, at 1315 (“Serious cases are exceptional both in number and in the resources they command, while misdemeanors comprise the bulk of the justice process”).

²⁰⁰ See, e.g., *Headbird*, 461 F.3d at 1078.

²⁰¹ L. Gordon Crovitz, *You Commit Three Felonies a Day*, WALL ST. J. (Sept. 27, 2009, 11:09 PM), <http://online.wsj.com/article/SB10001424052748704471504574438900830760842.html>, archived at <http://perma.cc/VGV8-ELQ9>; see Douglas Husak, *Is the Criminal Law Important?*, 1 OHIO ST. J. CRIM. L. 261, 268 (2003) (“It is hard to believe that many of us have not committed countless state and federal offenses.”).

²⁰² See DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 336 (2008) (stating that qualifications such as “no prior felony convictions” are “standards rather easily met by the middle-class but which easily ensnare the poor”); Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 319 (2004) (noting that an “unjust distribution of society's goods” means that “citizens will differ dramatically in terms of both the pressures and temptations they face to offend against others, and the economic and moral resources with which they are equipped to resist such pressures and temptations”); Natapoff, *supra* note 144, at 1080 (“[M]ost of the criminal justice population is poor, undereducated, suffering from substance abuse and/or mental health challenges.”).

²⁰³ See Delgado, *supra* note 88, at 11 (“[L]aw, alone among major disciplines, proceeds . . . as though two individuals raised under radically different circumstances have equal chances to conform their behavior to society's dictates.”).

²⁰⁴ See notes 47–49 and accompanying text (describing *Mahone*). In 1965, in *Luck v. United States*—a precursor to *Gordon and Mahone*—the U.S. Court of Appeals for the D.C. Circuit cited its 1932 case *Clawans v. District of Columbia* in support of what would develop into the first *Mahone* factor—the nature of the prior crime. *Luck v. United States*, 348 F.2d 763, 769 & n.9 (D.C. Cir. 1965) (citing *Clawans v. District of Columbia*, 62 F.2d 383, 384 (D.C. Cir. 1932)). In *Clawans*, the court refused to allow a proffered conviction to be used for impeachment because it

treat convictions as necessarily implying some sort of moral brand,²⁰⁵ without scrutinizing and adapting to the changing nature and reach of the criminal law.²⁰⁶ They fail to scrutinize the extent to which the conviction actually has anything to say about “evil,” or a readiness to engage therein.

* * *

Federal Rule of Evidence 609 fails to mention these three categories of factors that have the potential to undermine a conviction’s status as a reliable indicator of relative culpability.²⁰⁷ Federal courts often ignore them, too.²⁰⁸ Courts examine various other dimensions of a conviction—especially the type of offense of conviction, which assumes a kind of talismanic significance.²⁰⁹ But with regards to the dimension examined by this Article, they often assume that all convictions are the same: all are reliable indicators of relative culpability.

Court language sometimes reveals the outdated assumptions on which the practice of impeachment rests. A court, for example, may justify the use

was but a mere *malum prohibitum*, and thus far removed from the proper focus of an impeachment rule. See 62 F.2d at 384. The court stated:

While the rule is that a defendant who voluntarily offers himself as a witness in his own behalf is, like any other witness, subject to have his evidence impeached by a showing that he had been convicted of a crime, the rule, so far as we can determine, has never been carried to the extent of permitting conviction for the violation of a municipal ordinance to be shown as affecting credibility—certainly unless the ordinance covered an offense *malum in se*. . . .

. . . But the basis of the admissibility of convictions always was and always should be grounded upon the theory that the depraved character of persons who commit crimes involving moral corruption makes them unworthy of trust in testifying. This theory, however, has little or no basis in the violation of municipal ordinances, or for that matter misdemeanors, involving no element of inherent wickedness.

Id. See generally *United States v. Edmonds*, 524 F.2d 62 (D.C. Cir. 1975) (collecting cases); *Stevens v. United States*, 370 F.2d 485 (D.C. Cir. 1966).

²⁰⁵ See *Morissette v. United States*, 342 U.S. 246, 250 n.4 (1952) (“Historically, our substantive criminal law is based on a theory of punishing the [vicious] will. It postulates a free agent confronted with a choice between doing right and wrong, and choosing freely to do wrong.”).

²⁰⁶ See John B. Mitchell, *Crimes of Misery and Theories of Punishment*, 15 NEW CRIM. L. REV. 465, 476–77 (2012).

²⁰⁷ See FED. R. EVID. 609.

²⁰⁸ This Article focuses on published federal opinions that post-date the last substantive amendments, issued in 2006, as well as earlier seminal federal cases. Findley points out more broadly that “[c]ourts have proven reluctant to apply reliability-based exclusionary rules rigorously.” Findley, *supra* note 1, at 728.

²⁰⁹ See *United States v. Cordoba*, 104 F.3d 225, 229 (9th Cir. 1997) (stating that prior drug convictions are probative of truthfulness); *United States v. Hernandez*, 106 F.3d 737, 739–40 (7th Cir. 1997) (holding that prior convictions for possession of cocaine and marijuana are admissible for impeachment); *United States v. Pratt*, 531 F.2d 395, 398 (9th Cir. 1976).

of prior convictions to impeach on the basis that they have the reliability that stems from proof beyond a reasonable doubt²¹⁰—even though resolution by plea is now far more common.²¹¹ They may allude to the notion that a conviction demonstrates a level of credibility that is lower than that of someone with no criminal record,²¹² without acknowledging the extent to which enforcement is now known to be unequal.²¹³ Moreover, they may assume that a conviction evinces readiness or willingness to do evil,²¹⁴ or to sin,²¹⁵ without examining the extent to which the particular conviction before the court required a showing of any such depravity.

Courts and other interpretive bodies permit the circumstances surrounding the prior conviction to influence the decision concerning its use for impeachment only in two narrow areas: first, when the prior conviction suffered from certain constitutional infirmities;²¹⁶ and second, when the defendant testified in the prior case, based on the amendment to Rule 609 proposed by the American Bar Association (ABA), which echoes older case law in this respect.²¹⁷ The latter exception, however, seems to stem less from concerns about whether the defendant was afforded an opportunity actively and meaningfully to duke it out with the prosecution, and more from an interest in whether a jury had a chance, if only implicitly, to pass judgment on the defendant's credibility.²¹⁸

²¹⁰ See, e.g., *Werbrouck*, 589 F.2d at 277 (holding that a municipal board's set of findings that resulted in the discharge of a municipal employee was not equivalent to a criminal conviction because it did not involve a comparable standard of proof or rules of evidence designed to protect employees).

²¹¹ See Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815, 853 (2007) (noting that significantly more than ninety percent of cases are resolved through guilty pleas, and that of those, the overwhelming majority involve plea bargains).

²¹² See, e.g., *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967) (stating that the legitimate purpose of impeachment "is, of course, not to show that the accused who takes the stand is a 'bad' person but rather to show background facts which bear directly on whether jurors ought to believe him rather than other and conflicting witnesses"); *id.* at 941.

²¹³ ALEXANDER, *supra* note 96, at 7; Carodine, *supra* note 92, at 536.

²¹⁴ See *supra* note 184 and accompanying text.

²¹⁵ See *supra* note 186 and accompanying text.

²¹⁶ See, e.g., *Loper v. Beto*, 405 U.S. 473, 483 (1972) (plurality opinion) (declaring that impeachment by prior convictions that were invalid due to lack of counsel violates due process); *Billier v. Lopes*, 834 F.2d 41, 45 (2d Cir. 1987) (ruling that impeachment by means of a conviction obtained by coerced testimony constitutes violation of due process); *United States v. Fisher*, 106 F.3d 622, 630 (5th Cir. 1997) (granting new trial because defendant was impeached with a conviction that was obtained in violation of due process).

²¹⁷ See A FRESH REVIEW, *supra* note 32, at 361 (citing *United States v. Hayes*, 553 F.2d 824, 828 (2d Cir. 1977); *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976)).

²¹⁸ See A FRESH REVIEW, *supra* note 32, at 357–58; *Gordon*, 383 F.2d at 939–40 n.8 (“[T]he accused affirmatively puts his own veracity in issue when he testifies so that the jury’s verdict amounted to rejection of his testimony; the verdict is in a sense a de facto finding that the accused did not tell the truth when sworn to do so.”).

Impeachment law must acknowledge and respond to these three aspects of the criminal justice system—the frequent lack of a fair fight, pervasive disparity, and the criminal law’s expansion beyond offenses that have anything to do with morality.²¹⁹ Impeachment law must assess how their influences on a conviction might affect its suitability for impeachment. The next Part considers how an examination of these factors might be implemented.

IV. POSSIBLE APPROACHES TO ADDRESS THIS FORM OF CRITIQUE

This Part considers possible adjustments to the impeachment regime to ensure that appropriate investigation is conducted into whether a conviction is a sufficiently reliable indicator of relative culpability. Because of the remarkable resilience of the core structure of the rule—it has stood firm through the critiques mentioned above, and through several amendments—this Article assumes that, as in the majority of states, this form of impeachment is likely to continue.²²⁰ This Part, therefore, begins with proposals that would not require any changes to the text of the rule.²²¹ It considers first the potential of an expanded judicial inquiry, and second the potential of an expanded conception of prosecutorial ethics.²²² Having considered the extent to which reliability of prior convictions could be investigated within the existing structures, this Part then considers how the rule might be most conservatively adjusted in order to permit this investigation.²²³

A. Expanded Judicial Inquiry

As noted above, judges interpreting the current version of Federal Rule of Evidence 609 often appear to take as a given the reliability of the conviction as an indicator of relative culpability.²²⁴ Two possible concerns may seem to dictate this result. First, the rule, as written and interpreted, may not

²¹⁹ See, e.g., FED. R. EVID. 102 (identifying purposes of the Federal Rules of Evidence, including “promot[ing] the development of evidence law”); Findley, *supra* note 1, at 725 (calling for the reexamination of constitutional and evidentiary rules that have been based upon assumptions that new understandings about wrongful convictions undermine); Foster, *supra* note 8, at 5 (“Periodic questioning of the values and premises underlying evidentiary rules is necessary to streamline the rules, eliminate anachronistic provisions, and bring the law of evidence closer to reality in its truth-finding function.”).

²²⁰ See Bellin, *supra* note 46, at 308 n.69; Richard Lempert, *The Economic Analysis of Evidence Law: Common Sense on Stilts*, 87 VA. L. REV. 1619, 1627–28 (2001) (“[I]s it politically feasible to ban felony impeachment? In most jurisdictions, no. Prosecutors would scream too loudly When prosecutors scream loudly, they are usually heard by legislators. Does this mean that criticizing the felony impeachment rule for its purported unfairness and irrationality is pointless? No.”).

²²¹ See *infra* notes 224–278 and accompanying text.

²²² See *infra* notes 279–304 and accompanying text.

²²³ See *infra* notes 305–323 and accompanying text.

²²⁴ See *supra* notes 184–206 and accompanying text.

appear to give them the scope to investigate this question. And second, judges may assume that the role of judge does not give them that scope. This Section addresses these two issues in turn, concluding that neither the rule nor the judicial role precludes this sort of investigation. It then examines the possible ways of conducting such an investigation, and the benefits that might result.

1. Scope to Investigate Reliability Within the Rule as Written and Interpreted

The most obvious site for this investigation is in the consideration under Rule 609(a)(1)(B) of the probative value of the conviction, as weighed against its prejudicial effect.²²⁵ The rules drafters did not specify what considerations were to be included in this analysis, and courts have broad discretion in conducting it,²²⁶ as they do throughout their consideration of the admissibility of proffered impeachment evidence.²²⁷ Though a majority of circuits have adopted the five-factor *Mahone* test, there are several reasons why the omission of “reliability” from this test does not preclude such an inquiry. First, the five factors are not exclusive,²²⁸ a fact that the ABA has exploited in proposing the addition of a sixth factor.²²⁹ Second, the *Mahone* test lacks canonical stature: its application is full of incoherence and confusion,²³⁰ it was adopted from precedent that predates the Federal Rules of Evidence,²³¹ it predates much of the research on which this Article’s reliability concerns are based, and it is commonly understood to have been adopted because there was nothing better on the table.²³²

²²⁵ See Bellin, *supra* note 78, at 892 (noting that district courts have “broad discretion under Rule 609 to exclude prior convictions based on their ‘prejudicial effect’”).

²²⁶ See Gold, *supra* note 7, at 2324 (“Some courts have concluded that this discretionary power is so broad, trial court balancing under Rule 609(a)(1) is ‘virtually unreviewable.’”); Peter Nicolas, *De Novo Review in Deferential Robes?: A Deconstruction of the Standard of Review of Evidentiary Errors in the Federal System*, 54 SYRACUSE L. REV. 531, 586 (2004).

²²⁷ This discretion has led to widely differing results. See Zeigler, *supra* note 45, at 662.

²²⁸ See *United States v. Sims*, 588 F.2d 1145, 1149 (6th Cir. 1978); *United States v. Pettiford*, 238 F.R.D. 33, 33 (D.D.C. 2006).

²²⁹ See *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976); A FRESH REVIEW, *supra* note 32, at 361 (citing *United States v. Hayes*, 553 F.2d 824, 828 (2d Cir. 1977)). This factor—whether the prior conviction stemmed from a trial at which the defendant testified—seems largely to have faded from the case law. See *United States v. Langston*, 576 F.2d 1138, 1139 (5th Cir. 1978) (determining that the fact that defendant did not testify at his earlier trials is irrelevant to the balancing test); Carodine, *supra* note 92, at 531.

²³⁰ See *supra* notes 42–57 and accompanying text (discussing this point).

²³¹ See *supra* notes 42–57 and accompanying text (discussing this point).

²³² See Bellin, *supra* note 46, at 312 n.89, 317; see also Roderick Surratt, *Prior-Conviction Impeachment Under the Federal Rules of Evidence: A Suggested Approach to Applying the “Balancing” Provision of Rule 609(a)*, 31 SYRACUSE L. REV. 907, 942 (1980) (suggesting that courts have adopted the test simply “because it’s there,” and have not subjected the factors to critical review).

Even within the five factors, there is room to consider reliability. Courts have traditionally interpreted the first factor—the impeachment value of the conviction—merely to require that courts look at the name of the conviction, and then refer to precedent to determine whether such an offense either does or does not have impeachment value.²³³ Nevertheless, there is an opportunity—and perhaps a need—to make that factor more meaningful by including an investigation of the extent to which the conviction reliably indicates relative culpability.

Federal Rule of Evidence 609(a)(2), by contrast, does not permit much consideration of the reliability of the conviction because it mandates admission, without any balancing test, 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.”²³⁴ When one trial court attempted to escape this discretion-free zone by invoking the “interests of justice” to exclude convictions that appeared to fall within the plain language of the rule, the attempt was tersely batted away on appeal.²³⁵

2. Scope to Investigate Reliability Within the Judicial Role

Judges may hesitate to accord anything other than the assumed meaning to a conviction proffered for impeachment purposes, namely the meaning that it is a reliable indicator of relative culpability. Yet case law outside the impeachment context, and the development of rules within the impeachment context, might offer them encouragement.

A powerful precedent from the sentencing context indicates the ability—and perhaps the responsibility—of judges to question the assumed meaning of a conviction before allowing it to lead to secondary harms for the defendant, and should be considered by judges in connection with impeachment. In determining the sentence of a defendant before her in the U.S. District Court

²³³ See *United States v. Gaston*, 509 F. App’x 158, 160 (3d Cir. 2013); *United States v. Murphy*, 172 F. App’x 461, 463 (3d Cir. 2006) (upholding the district court’s decision that relied on Second Circuit precedent to the effect that “a narcotics trafficker lives a life of secrecy and dissembling” in order to reach the conclusion that prior drug convictions satisfied the first *Mahone* factor); *United States v. Johnson*, 302 F.3d 139 152–53 (3d Cir. 2002); *United States v. Hernandez*, 106 F.3d 737, 739–40 (7th Cir. 1997) (reasoning that prior convictions for possession of cocaine and marijuana are admissible for impeachment); *United States v. Lane*, No. CR-12-01419-PHX-DGC, 2013 WL 3759903, at *2 (D. Ariz. July 16, 2013) (stating that the Ninth Circuit has noted that “prior convictions for robbery are probative of veracity”); *United States v. Borrome*, No. Crim. 07-00224-01, 1997 WL 786436, at *3 (E.D. Pa. Dec. 3, 1997) (stating that prior convictions for drug offenses are probative of veracity).

²³⁴ FED. R. EVID. 609(a)(2).

²³⁵ See *United States v. Jefferson*, 623 F.3d 227, 235 (5th Cir. 2010) (“The district court’s decision to avoid applying Rule 609(a)(2) due to its view that the ‘overriding principal [sic] is constitutional law in the criminal context [and] is to avoid manifest injustice period’ was an abuse of discretion.” (quoting *United States v. Atkins*, 294 F. App’x 892, 894 (5th Cir.2008))).

for the District of Massachusetts, Judge Nancy Gertner had to decide whether to “give literal credit to the record.”²³⁶ The defendant, Alexander Leviner, had been convicted of being a “felon in possession of a firearm,” and the Department of Probation (the “Department”) had examined his state court convictions in order to calculate a “criminal history” score.²³⁷ The Department calculated eleven “criminal history points,” placing him in the second highest criminal history category, based on the number of prior convictions and the length of the corresponding sentences.²³⁸ With this score, Mr. Leviner’s sentence would have been between forty-six and fifty-seven months.²³⁹

To a casual observer, Mr. Leviner’s numerous prior convictions might have put him in the category of incorrigible “recidivist.”²⁴⁰ But Judge Gertner was no casual observer. Rather, she “looked closely” at these convictions.²⁴¹ She found that the bulk of the “criminal history points” tallied by the Department came from motor vehicle offenses—in all but one instance, driving with a suspended license²⁴²—and she found no indication in the case records of why Mr. Leviner had been stopped in the first place.²⁴³ Given that Mr. Leviner was African American, she “strongly suspected ‘Driving While Black.’”²⁴⁴ In other words, if Mr. Leviner had been white, he might not have been subjected to arrest, and thus could continue to drive with impunity without a license. Judge Gertner also feared that basing her sentence on Mr. Leviner’s earlier sentences would magnify disparities.²⁴⁵ She therefore refused to award any “criminal history points” for these motor vehicle offenses.

²³⁶ Gertner, *supra* note 16, at 23; see also Henry, *supra* note 174, at 105 (“Crimes in the same grid box will get the same sentence, but there is no guarantee that what put them in the same grid box was an equitable application of the rule of law.”).

²³⁷ See *United States v. Leviner*, 31 F. Supp. 2d 23, 25 (D. Mass. 1998).

²³⁸ See *id.*

²³⁹ See Patricia Nealon, *Judge Ties Sentence to Race, Gives Some Pause*, BOS. GLOBE, Dec. 20, 1998, at B7.

²⁴⁰ See *Leviner*, 31 F. Supp. 2d at 25 (“If I were to apply the Sentencing Guidelines to this case uncritically, none of these facts would make much of a difference. Instead, what would matter most in determining Leviner’s sentence would be two numbers on a grid . . .”).

²⁴¹ Gertner, *supra* note 16, at 23.

²⁴² *Id.* (noting that Leviner’s record showed “not one charge involv[ing] driving erratically, or violating a traffic law”).

²⁴³ See *id.*

²⁴⁴ See *id.*

²⁴⁵ See *Leviner*, 31 F. Supp. 2d at 33; Gertner, *supra* note 16, at 23 (stating that if “African American motorists are stopped and prosecuted for traffic stops, more than any other citizen,” it is “not unreasonable to believe that African Americans would also be imprisoned at a higher rate for these offenses”). Leviner’s convictions only “counted” because he received more than thirty days’ imprisonment for each of them. Judge Gertner’s comment on that issue was that “without knowing the specific facts surrounding each sentence, this record raises concerns at the very least. Would others have received the same sentence who were similarly situated, no matter how often they had been apprehended driving after their license had been suspended?” *Leviner*, 31 F. Supp. 2d at 33.

es.²⁴⁶ Dipping below the recommended sentencing range, she sentenced Mr. Leviner to thirty months in prison.²⁴⁷

Despite the mandatory nature of the sentencing guidelines at the time, Judge Gertner was able to deviate from them because of a provision permitting federal judges to adjust a sentence upward or downward if the guidelines would otherwise misapprehend the culpability of a defendant.²⁴⁸ In the impeachment context also, while some judicial discretion has been removed,²⁴⁹ judges—and, as discussed below, prosecutors—should find opportunities within the rule to “look[] closely” and to determine whether the content of a conviction can in fact sustain the meaning that it is assumed to have.²⁵⁰

Despite the differences between the sentencing context and the impeachment context, several aspects of Gertner’s analysis are applicable. First, Gertner’s concern that by building her sentence in part on sentences previously imposed she might be enhancing disparities resonates in the impeachment context.²⁵¹ As discussed above, racial disparity in enforcement can contribute to the garnering of a conviction, meaning that the very use of the conviction may embody a disparity, and say more about relative vulnerability than relative culpability or credibility.²⁵² In addition, the sentence imposed for a prior conviction is often one of the “essential facts” admitted for impeachment purposes.²⁵³ Because sentence length may vary according to race,²⁵⁴ its admission may compound disparities. Finally, as defense counsel argued in another sentencing case, the Gertner analysis should be extended to prior sentences that were the length they were only because the defendant was too poor to pay bond, and was given a sentence that corresponded to “time

²⁴⁶ *Leviner*, 31 F. Supp. 2d at 33.

²⁴⁷ *Id.* at 25 (concluding that the defendant’s convictions “vastly overstate[] his true culpability and his likelihood of recidivism on this offense”).

²⁴⁸ See U.S. SENTENCING GUIDELINES MANUAL § 4A1.3(b)(1) (2012) (indicating that a downward departure may be warranted when “a defendant’s criminal history category substantially over-represents the seriousness of a defendant’s criminal history or the likelihood that the defendant will commit other crimes”).

²⁴⁹ Compare FED. R. EVID. 609(a)(2) (“[F]or 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.” (emphasis added)), with *Luck v. United States*, 348 F.2d 763, 769 (D.C. Cir. 1965) (acknowledging the “sensitivity” that experienced trial judges have in balancing the defendant’s interests and the public interest, which can usually be relied upon when determining whether to admit a defendant’s prior convictions).

²⁵⁰ Gertner, *supra* note 16, at 23.

²⁵¹ See *id.*

²⁵² See James Forman, Jr., *The Black Poor, Black Elites, and America’s Prisons*, 32 CARDOZO L. REV. 791, 804 (2011) (“For drug crimes especially, where police concentrate their resources determines who goes to prison as much as who chooses to break the law. Yet [Judge Gertner’s] choice to factor this into the sentencing decision was rare, and has been followed by few courts.”).

²⁵³ *United States v. Wolf*, 561 F.2d 1376, 1381 (10th Cir. 1977).

²⁵⁴ See *Leviner*, 31 F. Supp. 2d at 33.

served.”²⁵⁵ Sentences determined in this way are arbitrary in length, but treated under the sentencing guidelines as if they have a particular meaning.²⁵⁶ Likewise, the use of sentence length as a component of impeachment may mean that defendants are impeached with their own poverty.

In addition to Gertner’s precedent in the sentencing context, one development within Rule 609 itself should give some encouragement to courts interested in investigating the reliability of convictions proffered for impeachment. During the drafting process, the Advisory Committee concluded that defendants cannot be impeached by means of juvenile adjudications.²⁵⁷ The Notes of the Advisory Committee on Proposed Rule 609 state that the “prevailing view . . . that a juvenile adjudication is not usable for impeachment” was “based upon a variety of circumstances.”²⁵⁸ For example, “[b]y virtue of its informality, frequently diminished quantum of required proof, and other departures from accepted standards for criminal trials under the theory of *parens patriae*, the juvenile adjudication was considered to lack the precision and general probative value of the criminal conviction.”²⁵⁹ Thus, not everything that gets adjudicated in a courtroom leads to an outcome that is valuable for impeachment purposes. The Advisory Committee’s Notes further suggest that some of the features of the current system of plea bargaining—informality, the evaporation of the proof beyond a reasonable doubt standard, and other weakened standards, such as the lack of discovery requirements in the plea bargaining context²⁶⁰—might be relevant to the question of whether a conviction born of this process can be used to impeach.

3. Ways in Which Courts Might Investigate Reliability

Drawing on the scope given by the language of Rule 609 itself, and the inspiration given by its drafters and the sentencing precedent, this Subsection proposes that the application of Rule 609(a)(1)(B) include consideration of the reliability of convictions as indicators of relative culpability. Because Rule 609(a)(2) leaves little room for judicial investigation of this sort,²⁶¹ it will be considered below, in Section C.

²⁵⁵ See Motion for Departure, Objections to Presentence Report and Sentencing Memorandum, *United States v. Yuselew*, No. CR 09-1035 JB (D.N.M. Aug. 5, 2010), 2010 WL 4854683 [hereinafter Motion for Departure].

²⁵⁶ *Id.* (“The sentence does not reflect the severity of the offense or particular characteristics of the defendant, other than his inability to post bond and the length of his pretrial detention.”).

²⁵⁷ See FED. R. EVID. 609(d)(2).

²⁵⁸ *Id.* 609(d) advisory committee’s note.

²⁵⁹ *Id.*

²⁶⁰ See Brown, *supra* note 163, at 204.

²⁶¹ Note, however, that a Rule 403 balancing can still be conducted with respect to whether particular aspects of a conviction can be admitted, and that this balancing can consider possible disparities embodied within sentences. See *supra* notes 69–76 and accompanying text.

As described above, the *Mahone* factors that are commonly used to conduct the probative-prejudicial balancing test under Rule 609(a)(1)(B) cannot claim canonical stature: they were not developed with the rule in mind, they are not included in the rule, they were not intended to be exclusive, and they do not function effectively.²⁶² The ABA has already proposed that an additional factor be added, namely whether the earlier conviction stemmed from a trial at which the defendant testified.²⁶³

This Article proposes that a broader factor be added to the factors weighed by courts in conducting the balancing test, namely the extent to which the proffered conviction appears to be a reliable indicator of relative culpability. Courts have great discretion in applying this balancing test,²⁶⁴ and seminal precedent indicates that it includes the “discretion to determine when to inquire into the facts and circumstances underlying a prior conviction and how extensive an inquiry to conduct.”²⁶⁵

There are a variety of considerations that trial courts could usefully weigh in considering a reliability factor. At least one scholar, who views a conviction as making it only “somewhat more likely the offense occurred,”²⁶⁶ suggests asking whether a *prima facie* showing can be made that the defendant did indeed commit the prior offense.²⁶⁷ Other possible inquiries that could respond to some of the reliability concerns laid out above would include: whether there was a trial, and if so, whether the defendant testified;²⁶⁸ whether, if there was a plea, the plea colloquy suggests a knowing and voluntary admission of guilt; whether there is reason to be concerned, as in *Leviner*, that racial disparity played a significant part in the garnering of the conviction; and whether the crime of conviction contained a *mens rea* requirement that approached something resembling the “willingness to ignore the law” on which the whole premise of 609(a)(1)(B) is based.²⁶⁹ As expressed in the sen-

²⁶² See *supra* notes 184–206 and accompanying text.

²⁶³ See *supra* notes 184–206 and accompanying text.

²⁶⁴ See *infra* notes 265–276 and accompanying text.

²⁶⁵ *United States v. Lipscomb*, 702 F.2d 1049, 1068 (D.C. Cir. 1983).

²⁶⁶ Zeigler, *supra* note 45, at 637.

²⁶⁷ See *id.* at 690–92 (“Because a guilty plea may affirmatively misrepresent a defendant’s wrongdoing, courts should require additional proof of what a witness actually did wrong beyond a court record or rap sheet that merely lists the charge pled to.”).

²⁶⁸ This is not to say that defendant testimony is a guarantee of a conviction’s reliability. Testifying defendants are vulnerable to a variety of biases, as described above. Numerous defendants now known to have been wrongfully convicted testified at their trial with no success. In addition, of course, defendants may be successfully impeached with their prior convictions at trial.

²⁶⁹ See Darryl K. Brown, *American Prosecutors’ Powers and Obligations in the Era of Plea Bargaining*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 200, 212 (Erik Luna & Marianne L. Wade eds., 2012). Other questions of potential relevance seem too hard to get at, given the existing state of recordkeeping. They would include, “How many clients did the defendant’s lawyer have? How many minutes did that lawyer spend with the defendant? What resources did the lawyer have, in comparison to the prosecution?” and so on. See Natapoff, *supra* note 144, at 1081

tencing context, reliance on prior sentences can magnify disparities based on race or poverty.²⁷⁰ Therefore, courts should be particularly careful when they conduct a probative-prejudicial balancing with respect to whether a sentence can be admitted for impeachment purposes,²⁷¹ given that such a detail may prove little other than societal inequity. The plain language of the rule permits courts this leeway.²⁷²

The fact that the burden lies on the prosecution to demonstrate that the probative value of the proffered conviction outweighs its prejudicial effect increases the benefit of this proposal beyond helping to secure a fair trial in the case before the court.²⁷³ Scholars have highlighted the dangers of the lack of prosecutorial accountability,²⁷⁴ manifested in part in the lack of incentives for prosecutors to do anything other than win convictions.²⁷⁵ They have proposed various ways of adjusting prosecutorial incentives, some of which involve creating additional prosecutorial accountability, through increased self-policing and self-awareness.²⁷⁶

This Article's proposal—that prosecutors, in attempting to meet their burden under the balancing test, should have to consider the factor of whether earlier convictions overseen by other prosecutors met acceptable standards of reliability—shares some of the benefits and rationales of these other proposals. It curbs the harmful incentives involved in a system where prosecutors' unreliable convictions may benefit other prosecutors.²⁷⁷ It incentivizes

(“A defendant whose lawyer takes ten minutes in a courthouse hallway to convey a plea offer is unlikely to feel either that his lawyer truly functioned as his representative, or that he had much choice about the resolution of his case.”).

²⁷⁰ See, e.g., AM. BAR ASS'N, *supra* note 175, at 18 (discussing racial disparities in the choice of whether to charge drug offenses in state or federal court, and related disparities in sentencing).

²⁷¹ This balancing is conducted under Federal Rule of Evidence 403. See *supra* notes 69–76 and accompanying text.

²⁷² See FED. R. EVID. 609 (referring to “evidence of a criminal conviction,” without specifying the sort of evidence).

²⁷³ See Carodine, *supra* note 92, at 545–47 (discussing the benefits of the internal quality control involved in the policing of prosecutors by prosecutors). There is also benefit in the notion that through reliability investigations federal courts would learn more about what is happening under the auspices of other courts, perhaps particularly state courts, where reliability concerns may be greater than in the federal system. See Shapiro, *supra* note 133, at 42 (suggesting that with respect to whether a factual basis is required for guilty pleas, “the gap between theory and practice may be widest in the busiest state courts, where the bulk of the nation's criminal business is carried on by overworked prosecutors, defense counsel, and judges”).

²⁷⁴ See, e.g., Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 396 (2001); Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1365 (1987) (“[F]ew operate in a vacuum so . . . devoid of externally enforceable constraints.”).

²⁷⁵ See Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 636–37 (2013).

²⁷⁶ See *id.*

²⁷⁷ For another exploration of how evidentiary rules might be adjusted in order to enhance law enforcement incentive structures, see generally Carodine, *supra* note 88.

prosecutors to care about the reliability of their own convictions, because of the consequences for other prosecutors, and to care about the reliability of other prosecutors' convictions, because of the consequences for their own prosecutions.²⁷⁸

B. Expanded Prosecutorial Ethics

Prosecutors should not just comply with judicial inquiries into reliability, but should play a proactive role in conducting their own investigations into reliability. Only one scholar has commented on the relevance of the prosecutor's ethical duties in the context of impeachment,²⁷⁹ and, indeed, one commentator has asserted that "[t]here is little doubt that admission of prior conviction evidence makes a prosecutor's job easier."²⁸⁰ That would unquestionably be true if the prosecutor's job were to score a conviction by any means necessary: impeachment by prior conviction has the potential to cause a defendant significant prejudice.²⁸¹ That is not the prosecutor's job, however. Even within this adversarial system, prosecutors have a duty to "do justice,"²⁸² which encompasses a duty to see that "procedural justice" is provided to every defendant.²⁸³

These duties are not being fully realized.²⁸⁴ Prosecutors are frequently obtaining permission to impeach—defendants are impeached in over seventy

²⁷⁸ See Daniel C. Richman, *Framing the Prosecution 2* (Columbia Law School, Pub. Law & Legal Theory Work Paper No. 13-361, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2295132, archived at <http://perma.cc/KX3R-FVHN> (arguing that trials still create strong rules for prosecutorial conduct, which in turn send signals and create incentives for prosecutors).

²⁷⁹ See David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1585 n.345 (1998) (suggesting that Christopher Darden, in prosecuting O.J. Simpson, arguably had discretion—thanks to his ethical obligation to "seek justice"—to refuse to oppose the introduction of evidence impeaching the credibility of Mark Fuhrman after he had been presented with "conclusive evidence that Fuhrman lied under oath about using racial epithets").

²⁸⁰ Dodson, *supra* note 84, at 44.

²⁸¹ See *supra* notes 78–123 and accompanying text.

²⁸² See *Berger v. United States*, 295 U.S. 78, 88 (1935) (stating that U.S. attorneys are the representatives "not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done"); MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. (1983); MODEL CODE OF PROF'L RESPONSIBILITY R. 7-13 (1980); ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION §§ 3-1.2, 3-1.3 cmt. (3d ed. 1992) [hereinafter PROSECUTION FUNCTION].

²⁸³ MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1.

²⁸⁴ Compare *Berger*, 295 U.S. at 88 (stating that the interest of the government in a criminal prosecution "is not that it shall win a case, but that justice shall be done"), with Paul Butler, *Gideon's Muted Trumpet*, N.Y. TIMES, Mar. 17, 2013, at A21 (describing this statement, in the current system, as "just words on paper").

percent of cases²⁸⁵—and presumably prosecutors seek that permission still more often.²⁸⁶ Simply put, the opportunity to introduce a defendant’s criminal record as impeachment evidence “is something never missed by the prosecuting attorney.”²⁸⁷ More importantly, the quantity of this evidence is not being matched by its quality: prosecutors are thought to proffer this evidence *with the intention* that it be used for unauthorized purposes.²⁸⁸ In cases where the nature and number of convictions admitted seems to amount to “piling on,”²⁸⁹ it is not only the activity of the judge that needs to be scrutinized, but also the activity of the prosecutor, who proffered at least that many convictions.²⁹⁰

A prosecutor’s ethical duties in this context dovetail with what a conscientious prosecutor should already be doing. In addition to the duty to do justice, and to ensure procedural justice, prosecutors have a duty to improve the administration of criminal justice.²⁹¹ It is hard to envisage improving the administration of justice without taking an active interest in the manner in which justice is being administered. Thus while the conscientious prosecutor—if, as is commonly the case, he or she is going to rely heavily on convictions in making decisions about bail requests, charges to file, pleas to offer, and sentences to recommend²⁹²—will investigate the nature and reliability of those

²⁸⁵ Carodine, *supra* note 92, at 546.

²⁸⁶ See Jeffrey Bellin, *Reconceptualizing the Fifth Amendment Prohibition of Adverse Comment on Criminal Defendants’ Trial Silence*, 71 OHIO ST. L.J. 229, 269–72 (2010).

²⁸⁷ Mason Ladd, *Credibility Tests*, 89 U. PA. L. REV. 166, 190 (1940).

²⁸⁸ See Bellin, *supra* note 46, at 296 (asserting that prosecutors intend that the evidence be used for propensity purposes); Sherry F. Colb, “Whodunit” Versus “What Was Done”: *When to Admit Character Evidence in Criminal Cases*, 79 N.C. L. REV. 939, 961 (2001) (same); Gene R. Nichol, Jr., *Prior Crime Impeachment of Criminal Defendants: A Constitutional Analysis of Rule 609*, 82 W. VA. L. REV. 391, 403, 409 (1980) (noting the assumption that “prosecutors often use past conviction evidence hoping that jurors will be unable to follow the instructions of the court” and asserting that “[p]rior crime impeachment . . . serves no legitimate interest in the conduct of federal criminal trials”).

²⁸⁹ *United States v. Brown*, 606 F. Supp. 2d 306, 314 (E.D.N.Y. 2009) (“The court will not permit the government to resort to a ‘piling on’ effect by introducing Brown’s older (July 22, 1997) conviction.”).

²⁹⁰ See *United States v. Chaco*, 801 F. Supp. 2d 1217, 1222 (D.N.M. 2011); *Brown*, 606 F. Supp. 2d at 314; *Daniels v. Loizzo*, 986 F. Supp. 245, 252 (S.D.N.Y. 1997); see also Gainor, *supra* note 11, at 780 (describing decisions of courts to permit impeachment by similar offense).

²⁹¹ See PROSECUTION FUNCTION, *supra* note 282, § 3-1.2 (stating that a prosecutor’s duty is to “seek to reform and improve the administration of criminal justice”); *id.* (“When inadequacies or injustices in the substantive or procedural law come to the prosecutor’s attention, he or she should stimulate efforts for remedial action.”).

²⁹² See Justin Murray, *Reimagining Criminal Prosecution: Toward a Color-Conscious Professional Ethic for Prosecutors*, 49 AM. CRIM. L. REV. 1541, 1578–79 (2012) (“[P]rosecutors often consider criminal history in deciding which charges (if any) to bring, how lenient of a plea agreement to offer, whether to seek statutory penalty enhancements (for instance, under ‘Three Strikes’ laws) and what sentence to recommend to the judge after the defendant is convicted.”).

convictions,²⁹³ so also will the ethical prosecutor, who strives toward justice and toward understanding the operation of the criminal justice system in which he or she plays such a powerful part.²⁹⁴ If, in asking questions about the reliability of these prior convictions, the prosecutor finds that those questions cannot be satisfactorily answered, he or she could—and should—decline to proffer them for impeachment purposes.²⁹⁵ Instead, the prosecutor may rely on the myriad other ways to prove a case and—if appropriate—impeach a defendant.²⁹⁶ The prosecutor could exercise the discretion that Rule 609(a)(2) has stripped from the trial judge.²⁹⁷ Under that provision courts must admit proffered convictions, no matter the prejudice they bring, if they required proof or admission of a “dishonest act or false statement.”²⁹⁸ Prosecutors are under no similar duty to proffer them for the court’s consideration.

Prosecutors have opportunities in this area to attempt to address some of the racial disparities that plague the work that they do,²⁹⁹ and that in certain instances they have expressed a willingness to address.³⁰⁰ One scholar has recently developed the concept of the “color-conscious prosecutor,” who would factor into his or her decisions the racial impact of his or her work.³⁰¹

²⁹³ See *Lipscomb*, 702 F.2d at 1068 (“[W]e find it hard to imagine a conscientious prosecutor not making a reasonable effort to obtain at least some details of the defendant’s past convictions before deciding whether to seek an indictment, which charges to bring, or what sort of plea bargain to offer.”); Zeigler, *supra* note 45, at 693 (asserting that a conscientious prosecutor should not rely on a rap sheet).

²⁹⁴ See Natapoff, *supra* note 144, at 1078–79 (shaping her reform proposal in light of the fact that the prosecutor “holds many if not most of the cards, and that therefore it makes sense to impose on those powerful players greater responsibilities for the overall integrity of the system”).

²⁹⁵ See K. Babe Howell, *Prosecutorial Discretion and Justice in an Overburdened System*, 27 GEO. J. L. ETHICS 285, 306 (2014) (arguing that prosecutors should decline to prosecute certain offenses, pursuant to their duty to seek justice).

²⁹⁶ See *supra* note 100 and accompanying text.

²⁹⁷ Compare FED. R. EVID. 609(a)(2) (“[F]or 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” (emphasis added)), with *Luck*, 348 F.2d at 769 (acknowledging the “sensitivity” that experienced trial judges have in balancing the defendant’s interests and the public interest, which can usually be relied upon when determining whether to admit a defendant’s prior convictions). Moreover, in determining whether a conviction is to be admitted under Federal Rule of Evidence 609, the trial judge is deprived of the typical Rule 403 balancing test. FED. R. EVID. 403 (“[E]vidence may be excluded if its probative value is substantially outweighed by the . . . needless presentation of cumulative evidence.”).

²⁹⁸ FED. R. EVID. 609(a)(2); see *Jefferson*, 623 F.3d at 235 (“[T]he district court’s decision to avoid applying Rule 609(a)(2) due to its view that the ‘overriding principal [sic] is constitutional law in the criminal context [and] is to avoid manifest injustice period’ was an abuse of discretion.”).

²⁹⁹ See *supra* notes 175–183 and accompanying text.

³⁰⁰ See Howell, *supra* note 295, at 288 (describing participation of several prosecutors’ offices in initiatives by the Vera Institute of Justice designed to address racial disparities within their offices).

³⁰¹ See Murray, *supra* note 292, at 1579.

Although this model relates to the use of convictions to indicate propensity, a similar analysis could be done in the context of convictions proffered for impeachment purposes.³⁰²

Just as Judge Gertner considered the likelihood of racially disparate targeting in Mr. Leviner's criminal record, prosecutors—who themselves hold a quasi-judicial role³⁰³ and are thus appropriately tasked with conducting their own probative-prejudicial balancing—could include as part of their balancing the risk that they would be enhancing racial disparities by proffering convictions that the judge either might, or would be bound to, accept into evidence.³⁰⁴

C. Altering the Text of the Federal Rule

Although the text of Federal Rule of Evidence 609 permits judges to weigh reliability under 609(a)(1)(B) and permits prosecutors to adhere to their ethical duties by screening convictions before proffering them under 609(a)(1)(B) or 609(a)(2), this Section will consider the option of altering the text of the rule in the service of reliability.

The most drastic form of alteration would be the prohibition of impeachment of criminal defendants by means of criminal conviction. The drafters could conclude, as they did in the case of juvenile adjudications, that criminal convictions currently lack the precision and reliability required in order for them to hold the meaning that impeachment assumes them to hold.³⁰⁵ Hawaii, Montana, and Kansas have all taken this step in their evidence rules, albeit with some qualifications.³⁰⁶ Though scholars have called

³⁰² Cf. *id.* (“[C]olor-conscious prosecutors should . . . strive to discern which portions of the defendant’s record truly reflect his or her actual criminal propensity, and which parts are more likely to have resulted from the arresting officers’ racially charged criteria for deciding who is suspicious enough to investigate.”).

³⁰³ See Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 *FORDHAM URB. L.J.* 607, 632 (1999).

³⁰⁴ For this notion in the context of charging and plea bargaining decisions, see Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 *COLUM. HUM. RTS. L. REV.* 202, 209 (2007), which suggests that prosecutors may rely too much on prior arrests because they may overlook the racial disparities that led to those arrests. For this notion in the context of assessments of “dangerousness,” see Murray, *supra* note 292, at 1580, noting that where the applicable rules “leave room for discretion,” prosecutors “should take into consideration the race of the defendant, the crime categories reflected in the defendant’s prior record, and the statistical evidence of racial profiling within those crime categories” to determine “whether the defendant’s prior record reflects his or her actual dangerousness, or just his or her race.”

³⁰⁵ See *supra* notes 237–261 and accompanying text.

³⁰⁶ See HAW. REV. STAT. § 626-1 (2013) (stating that when a defendant testifies in a criminal case, “the defendant shall not be questioned or evidence introduced as to whether the defendant has been convicted of a crime for the sole purpose of attacking credibility unless the defendant has himself or herself introduced testimony for the purpose of establishing the defendant’s credibility as a witness”); KAN. STAT. ANN. § 60-421 (2012) (“[N]o evidence of [a criminal defend-

for this solution within the federal system,³⁰⁷ Rule 609 has thus far weathered all the scholarly critiques and all the social science data described in Part II, subject only to amendments that have done nothing to alter its core.³⁰⁸ This Article therefore assumes that abolition of this form of impeachment in the federal system is an unlikely prospect.

If Rule 609 remains in place, its drafters could consider the most conservative form of alteration: following the example of state rules that have the potential to lessen the risk of impeachment by unreliable conviction. Several states have rules that restrict impeachment of criminal defendants more tightly than the federal regime, perhaps because of a greater awareness at the state level of the threats to reliability.³⁰⁹ For example, some limit impeachment to crimes of dishonesty;³¹⁰ some restrict it to felonies;³¹¹ and some prohibit certain details of a conviction, such as the sentence it involved.³¹²

Each of these models would help limit the use of unreliable convictions. First, crimes of dishonesty are unlikely to be offenses that lack a requirement of a culpable mental state. Moreover, felonies are less likely to involve the conveyor-belt processing that has become common in the misdemeanor context.³¹³ Finally, limiting admissible details, so that length of sentence is not revealed, helps remove the risk that a sentence is taken to be a more reliable indicator of relative culpability than it might be.³¹⁴

ant's] conviction of a crime shall be admissible for the sole purpose of impairing his or her credibility unless the witness has first introduced evidence admissible solely for the purpose of supporting his or her credibility.”); MONT. R. EVID. 609 (“For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible.”); *State v. Santiago*, 492 P.2d 657, 661 (Haw. 1971) (striking down on federal and state due process grounds the prior version of the impeachment rule, in light of the court’s assessment that the burdening of the right to testify is not outweighed by any probative value offered by prior convictions).

³⁰⁷ See, e.g., Dodson, *supra* note 84, at 4; Richard D. Friedman, *Character Impeachment Evidence: The Asymmetrical Interaction Between Personality and Situation*, 43 DUKE L.J. 816, 831 (1994).

³⁰⁸ See *supra* notes 77–123 and accompanying text.

³⁰⁹ See Shapiro, *supra* note 133, at 42.

³¹⁰ ALASKA R. EVID. 609 (dishonesty or false statement); MICH. R. EVID. 609 (dishonesty, false statement, or theft); PA. R. EVID. 609 (dishonesty or false statement); W. VA. R. EVID. 609 (perjury or false swearing).

³¹¹ See, e.g., COLO. REV. STAT. ANN. § 13-90-101 (West 2013); NEV. REV. STAT. ANN. § 50.095 (West 2013); WIS. STAT. ANN. § 906.09 (West 2013); CAL. EVID. CODE §§ 787, 788 (West 2013); CONN. CODE OF EVID. § 6-7; IDAHO R. EVID. 609; TEX. R. EVID. 609 (felony or crime of moral turpitude).

³¹² See, e.g., CONN. CODE OF EVID. § 6-7 (requiring courts to limit evidence of a prior conviction “to the name of the crime and when and where the conviction was rendered, except that (1) the court may exclude evidence of the name of the crime and (2) if the witness denies the conviction, the court may permit evidence of the punishment imposed”).

³¹³ See *supra* notes 124–174 and accompanying text.

³¹⁴ See Natapoff, *supra* note 144, at 1052–53.

The drafters of the federal rules could also consider several arrangements followed not only by several states, but also by the ABA in its proposed amendment to Rule 609.³¹⁵ As in an early draft of the original rule,³¹⁶ one approach would subject all convictions to a probative-prejudicial balancing test, whatever the nature of the conviction.³¹⁷ This type of provision means that there is always a way for a court, concerned by an apparent lack of reliability, to exclude the proffered conviction, even if it falls within the *crimina falsi* family, and even if prosecutorial discretion has failed to screen out the conviction. Judge Gertner was able to offer relief to Mr. Leviner because the Sentencing Commission had “recogniz[ed] that the criminal history measure was not a creature of scientific precision.”³¹⁸ Judges need discretion in the impeachment context, in recognition of the same truth.³¹⁹

Another arrangement shared by several state rules and the ABA is the requirement that the proffering party give notice to the other side of any convictions intended to be used for impeachment.³²⁰ This permits the defense attorney to prepare to assert the kinds of unreliability discussed above. Finally, several states and the ABA have diverted from the rule announced in the Supreme Court’s 2000 decision in *Ohler v. United States*, which held that attempting to explain convictions on direct examination precluded any appeal against the use of prior conviction impeachment on cross examination.³²¹

³¹⁵ See *supra* notes 184–206 and accompanying text.

³¹⁶ See ROGER C. PARK & RICHARD D. FRIEDMAN, EVIDENCE: CASES AND MATERIALS 525 (2012) (describing an earlier draft of Rule 609(a), which would have explicitly given a trial judge authority to exclude both felony and *crimina falsi* convictions if the judge determined that their prejudicial effect substantially outweighed their probative value); Zeigler, *supra* note 45, at 651–52 (giving further details of legislative history); see also Luck, 348 F.2d at 767–69 (providing the genesis of Rule 609).

³¹⁷ See A FRESH REVIEW, *supra* note 32, at 360 (justifying this balancing test, an analog of the Rule 403 standard, because Rule 403’s “application to this rule is particularly appropriate in criminal cases where care must be taken that a defendant is not convicted because the jury considers him a bad person”). For state examples of this balancing test, see WIS. STAT. ANN. § 906.09 (West 2013); ALASKA R. EVID. 609; ARIZ. R. EVID. 609; CONN. CODE OF EVID. § 6-7; IDAHO R. EVID. 609; ME. R. EVID. 609; TENN. R. EVID. 609; TEX. R. EVID. 609; VT. R. EVID. 609.

³¹⁸ Motion for Departure, *supra* note 255; see *Leviner*, 31 F. Supp. 2d at 25 (“I conclude that Leviner’s criminal history vastly overstates his true culpability and his likelihood of recidivism on this offense.”); see also Motion for Departure, *supra* note 255 (adding that “in promulgating 4A1.3, the Commission established . . . an enormous reservoir of judicial discretion to achieve the purposes of sentencing” (quoting Spencer Freedman, *In Defense of Criminal History Departures*, FED. SENT’G REP., May–June 2001, at 311, 313)).

³¹⁹ Cf. FED. R. EVID. 609(d) advisory committee’s note (excluding juvenile adjudications from the rule because they “lack the precision and general probative value of the criminal conviction”).

³²⁰ See, e.g., ALASKA R. EVID. 609; TENN. R. EVID. 609; TEX. R. EVID. 609 (required upon request). Currently, notice is only required in federal court with respect to convictions more than ten years old. See *United States v. Williams*, 472 F.3d 81, 87 (3d Cir. 2007).

³²¹ See *State v. Daly*, 623 N.W.2d 799, 801 (Iowa 1999); *Zola v. Kelley*, 826 A.2d 589, 593 (N.H. 2003); *State v. Gary M.B.*, 676 N.W.2d 475, 482–83 (Wis. 2004).

Naturally, the *Ohler* rule disincentivizes the provision of context or explanation of a prior conviction. By departing from it, the rules drafters might help ensure that jurors get a fuller picture of the extent to which the conviction provides a reliable basis for impeachment.

As discussed above, the ABA proposal included a further change to Rule 609, which would increase the extent to which unreliable convictions might be screened out. That proposal codifies the factors that must be considered in the probative-prejudicial weighing that is conducted for every proffered conviction, and adds to the five *Mahone* factors the factor of whether the defendant testified in a trial before acquiring the conviction in question.³²² Codifying the five *Mahone* factors is inadvisable, given the confusion that they have engendered.³²³ Were the drafters to codify them, however, a sixth factor could usefully be added, which would be broader than the ABA's proposal, and would address the extent to which the conviction appears to be a reliable indicator of relative culpability.

V. ANTICIPATING OBJECTIONS

This Part addresses potential objections to the notion that courts could include a reliability assessment of convictions proffered for impeachment purposes, whether within the existing language of Rule 609, or with provision made for this by alterations to the text. First, critics may object to such an assessment as inefficient.³²⁴ In addition, critics may find the implications of such an inquiry to be troubling.³²⁵

A. Efficiency

The first potential objection relates to the extra time needed to investigate the reliability of proffered convictions. Indeed, it is more than a potential objection: Alan Hornstein follows his analysis of the risk that a wrongful conviction might be proffered for impeachment with a conclusion that it would be impractical to do anything to assess that risk in the impeachment context.³²⁶

The first response to that criticism is that this is an investigation whose importance justifies an expenditure of time.³²⁷ Because of the likelihood that

³²² See *supra* notes 184–206 and accompanying text.

³²³ See *supra* notes 42–57 and accompanying text.

³²⁴ See *infra* notes 326–333 and accompanying text.

³²⁵ See *infra* notes 334–335 and accompanying text.

³²⁶ See Hornstein, *supra* note 57, at 12 (“It would be unrealistic to expect the legal system to question the integrity of convictions based on plea bargains, especially in the context of their use merely as impeaching evidence.”).

³²⁷ See *United States v. Lipscomb*, 702 F.2d 1049, 1068 (D.C. Cir. 1983) (“[W]e are unwilling to tell the trial judge to decide without adequate information the important question of whether

fact finders will interpret prior convictions as evidence of guilt, this is not a “collateral” matter.³²⁸ The potential harm from an impeachment ruling extends both to those who testify and to those who do not.³²⁹

Moreover, in a properly functioning system, not only might the increased expenditure of time be minimal, there might even be net efficiency gains. As described above, the conscientious and ethical prosecutor already takes steps to ascertain the reliability of a defendant’s prior convictions before those first moments—the filing of charges and request for bail³³⁰—when he or she needs to decide whether and how they should be used.³³¹ The conscientious and ethical prosecutor will also assess the weight and meaning of convictions at the plea-bargaining stage,³³² and, as a result, will already be well acquainted with the nature and circumstances of the defendant’s criminal record when it is time to decide whether to proffer impeachment evidence. Thus, the prosecutor will presumably hesitate to impeach through convictions that were the product of adversarial collapse or unequal enforcement, or those that say nothing about culpability. There are net efficiency gains when the screening of prior convictions indicates that they do not have the weight or meaning that would justify the loss of liberty that they could help bring about. Perhaps a day of court time was spent as Judge Gertner delved into Mr. Leviner’s record. Two years of prison time were saved.³³³

B. Implications

A second potential objection relates to the possible extent of the implications of a reliability investigation. Judges may hesitate to accord anything other than full credit to a defendant’s criminal record.³³⁴ They might ask, if a judge finds that the prosecution has not satisfied the reliability prong with

to admit a prior conviction, simply because the government finds it a nuisance to gather the information.”).

³²⁸ See Carodine, *supra* note 92, at 584–85.

³²⁹ See Blume, *supra* note 9, at 493 (“[T]hreatening a defendant with the introduction of his prior record contributes to wrongful convictions either directly—in cases where the defendant is impeached with the prior record and the jury draws the propensity inference—or indirectly—by keeping the defendant off the stand.”).

³³⁰ See U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL, § 9-27.230 (2008) (listing “[t]he person’s history with respect to criminal activity” as one factor that must be considered in deciding whether to decline to file criminal charges against that person).

³³¹ See *Lipscomb*, 702 F.2d at 1068 (reasoning that “there need be no delay at all if the government makes a regular practice of obtaining this basic information before trial”).

³³² See *supra* notes 279–304 and accompanying text.

³³³ See *supra* notes 224–278 and accompanying text.

³³⁴ See 28 U.S.C. § 1738 (2012) (“Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.”).

respect to a conviction, whether there are grounds to argue that that conviction should never have been imposed, whether no punishment or collateral consequences should flow from it, whether it should have played no part in any bail decision, and whether it should play no part in sentencing. Judges might ask whether the prosecutor will be barred from introducing it for any other evidentiary purposes.

The implications, however, are not so radical. If reliability is included within the list of factors that courts can assess in conducting a probative-prejudicial balancing, it would not mean that the court would decide whether the conviction was wrongful. That assessment is not something that could be done within the scope of this kind of evidentiary determination. Courts would not even have to decide whether the conviction was a reliable indicator of relative culpability. Rather, they would decide whether, based on an examination of the various pieces of evidence that were presented on the various factors (including reliability), the prosecutor made a showing that probative value outweighed prejudice. It would be understood in such a balancing that the prosecution can choose which factors to focus its energies on—and that the prosecution can choose instead of focusing its energies on an impeachment proffer to spend its time focusing on the strength of its own case at trial. Indeed, if the prosecution is concerned about the implications of what the court might make of the reliability of its proffered impeachment evidence, it can refrain from making a proffer of impeachment evidence.³³⁵ This will encourage the prosecution to proffer only those convictions in whose reliability it has faith.

CONCLUSION

Federal Rule of Evidence 609 and the case law that interprets it rely on assumptions about the reliability of convictions that are undermined by our growing understanding of the contemporary criminal justice system. Courts and rules drafters should respond to this new understanding by permitting judicial inquiry into the reliability of proffered convictions, as part of their duty to ensure that evidence law is, itself, evidence-based. Prosecutors should respond to this new understanding by investigating the reliability of convictions before proffering them for impeachment, as part of their ethical duties. Through these kinds of judicial and prosecutorial inquiries, Federal Rule of Evidence 609 can hew closer not only to the realities of the criminal justice system, but to justice itself.

³³⁵ See Carodine, *supra* note 92, at 587 (“If the prosecution is concerned about judicial economy, there is a simple solution: do not offer the prior conviction into evidence.”).