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Robert D. Okun

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CHARACTER AND CREDIBILITY: A PROPOSAL TO REALIGN FEDERAL RULES OF EVIDENCE 608 AND 609

ROBERT D. OKUN*

I. INTRODUCTION

One of the bedrock principles of Anglo-American jurisprudence is that we try cases rather than people.1 In accord with this principle, a jury must consider only the facts of a particular case, not a defendant’s general character or prior bad acts, in reaching a proper verdict.2 This principle has been codified in the Federal Rules of Evidence, which prohibit the admissibility of prior crimes or bad acts to prove the general character of a person or to establish the propensity of a person to commit crimes or bad acts.3

It also is axiomatic, however, that the primary purpose of a trial is to discover the truth.4 This axiom likewise finds expression in the Federal

* Former Assistant United States Attorney, United States Attorney’s Office for the District of Columbia. B.A. 1981, University of Pennsylvania; J.D. 1984, Harvard Law School. The views expressed in this Article are solely those of the author and do not represent the opinion of the United States Attorney’s Office for the District of Columbia.

1. See, e.g., People v. Allen, 420 N.W.2d 499, 504 (Mich. 1988) ("[I]n our system of jurisprudence, we try cases, rather than persons, and thus a jury may look only to the evidence of the events in question, not to defendants’ prior acts in reaching its verdict.") (citing United States v. Mitchell, 2 U.S. (2 Dall.) 348, 357 (1795)).

2. See id. The rationale for this principle is twofold. As one commentator has noted:

On a theoretical level, we base our criminal justice on the precept that a person will be convicted only for what he does, not who he is or what he has done prior to the events in question. On a practical level, we will not run the risk of convicting the innocent that a propensity theorem entails.


3. The prohibition against this type of propensity evidence is found in Rule 404(b) of the Federal Rules of Evidence. The Rule states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Fed. R. Evid. 404(b).

4. See, e.g., Funk v. United States, 290 U.S. 371, 381 (1933) (stating that "[t]he fundamental base on which all rules of evidence rest—if they are to rest
Rules of Evidence, which provide that the rules should be interpreted "to the end that the truth may be ascertained and proceedings justly determined."5 Consistent with this provision, the Federal Rules of Evidence mandate that all relevant evidence be admissible, except as otherwise proscribed by the rules, the Constitution or congressional enactments.6

Thus, the Federal Rules of Evidence reflect two important jurisprudential principles that do not always live in peaceful coexistence. On the one hand, the rules are designed to maximize the amount of relevant information we provide to our triers of fact, on the ground that juries (and judges) should consider all relevant information when determining what actually occurred in any given case. On the other hand, through provisions such as the prohibition against propensity evidence, the rules also are designed to limit the amount of information we provide to our triers of fact, because certain information, though logically relevant, is likely to be given too much weight, particularly when the triers of fact are jurors rather than judges.7

The uneasy coexistence of these competing principles can be seen in the interplay between the prohibition against using prior bad acts to prove propensity and the provisions of Federal Rules of Evidence 608 and 609(a), which allow the use of certain prior bad acts and criminal convictions to impeach the credibility of a defendant testifying on his or her own behalf.8 As presently constituted, Rule 609(a)(2) permits a defendant in a criminal case to be impeached with proof of any conviction that involves dishonesty or false statement, regardless of the punish-

5. FED. R. EVID. 102. The full text of Rule 102 states: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Id.

6. FED. R. EVID. 402. Rule 402 states that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." Id.

7. Other provisions of the Federal Rules of Evidence also limit the information that can be considered by the trier of fact, in part because of this same fear that such information will be given too much weight. See, e.g., FED. R. EVID. 407-412 (prohibiting, with limited exceptions, admissibility of subsequent remedial measures, compromises and offers to compromise, payment of medical expenses, pleas, liability insurance, and rape victims' past behavior).

8. Rules 608 and 609 apply to all witnesses, not just defendants in criminal cases. The focus of this Article, however, will be on the relationship of these two rules to the criminal defendant who wishes to testify on his or her own behalf. For the text of Rules 608 and 609(a), see infra notes 9-10.
ment; Rule 609(a)(1) allows impeachment with any felony conviction if the probative value of the conviction outweighs the prejudice to the defendant. 9 Rule 608(b), meanwhile, allows a defendant to be impeached with specific instances of conduct that have not resulted in convictions, but only if these specific instances are probative of the defendant's character for truthfulness. 10 Thus, Rules 608 and 609 are designed to provide the trier of fact with evidence about the defendant's credibility if he or she testifies, and to exclude evidence that is too indirectly related to the defendant's credibility or too likely to cause impermissible propensity inferences.

Many commentators, however, have criticized the balance struck by the Rules to accommodate these competing interests and have argued

9. Fed. R. Evid. 609(a). Rule 609(a) provides:
   For the purpose of attacking the credibility of a witness,
   (1) evidence that a witness other than the accused has been convicted
   of a crime shall be admitted, subject to Rule 403, if the crime was pun-
  ishable by death or imprisonment in excess of one year under the law
   under which the witness was convicted, and evidence that an accused
   has been convicted of such a crime shall be admitted if the court deter-
   mines that the probative value of admitting this evidence outweighs its
   prejudicial effect to the accused; and
   (2) evidence that any witness has been convicted of a crime shall be
   admitted if it involved dishonesty or false statement, regardless of the
   punishment.

Id. Rule 609 was amended in 1990. The amendment made two changes to the Rule. See Fed. R. Evid. 609 advisory committee's note (stating that first change removed limitation that conviction may only be elicited on cross-examination; second change resolved ambiguity concerning impeachment of witnesses other than criminal defendant). For further discussion of Rule 609, see infra notes 39-46 and accompanying text.

10. Fed. R. Evid. 608(b). Rule 608 provides:
   (a) Opinion and reputation evidence of character. The credibility
   of a witness may be attacked or supported by evidence in the form of
   opinion or reputation, but subject to these limitations: (1) the evidence
   may refer only to character for truthfulness or untruthfulness, and
   (2) evidence of truthful character is admissible only after the character
   of the witness for truthfulness has been attacked by opinion or reputa-
   tion evidence or otherwise.

   (b) Specific instances of conduct. Specific instances of the conduct
   of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

   The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to mat-
   ters which relate only to credibility.

Id. For further discussion of Rule 608, see infra notes 52-57 and accompanying text.
for greater restrictions on the use of criminal convictions to impeach a defendant’s credibility.11 These arguments have been supported by an extensive body of scientific research demonstrating that convictions and bad acts are poor indicators of a person’s veracity on the witness stand,12 that the admissibility of convictions and prior bad acts can substantially prejudice a criminal defendant,13 and that limiting instructions do not cure the prejudice against a defendant who is impeached with prior instances of misconduct.14

On the other hand, there are countervailing reasons to continue the practice of impeachment with prior convictions and bad acts in certain situations. First, a blanket prohibition against impeachment with prior crimes or bad acts would seriously skew the truth-finding process in cases where a defendant presents evidence to show that he or she is a truthful or law-abiding person.15 Second, the practice of impeachment with prior crimes and bad acts is consistent with what has been variously described as “common sense,” “intuition,” and “social consensus.”16


Although most of the legal commentary has focused on impeachment with prior convictions, many of the criticisms of such impeachment apply with similar force to impeachment with prior bad acts that were not the subject of convictions. See, e.g., Teree E. Foster, Rule 609(a) in the Civil Context: A Recommendation for Reform, 57 FORDHAM L. REV. 1, 7 n.16 (1988) (recognizing that criticisms of use of prior conviction evidence are “equally applicable” to use of prior bad acts evidence). Therefore, this author regards research that has focused only on impeachment with prior convictions to be applicable to both convictions and non-conviction bad acts.

12. For a discussion of this research, see infra notes 62-73 and accompanying text.

13. For a discussion of this prejudice, see infra notes 77-94 and accompanying text.

14. For a discussion of limiting instructions in this context, see infra notes 95-107 and accompanying text.

15. For a discussion of reasons to continue the use of prior convictions, see infra notes 136-46 and accompanying text.

16. See Campbell v. Greer, 831 F.2d 700, 707 (7th Cir. 1987) (stating “the
Although these terms may not comport with current psychological theory on this issue, they cannot be disregarded entirely in the formulation of rules that depend upon community consensus for their acceptance and continued vitality.

The purpose of this Article, therefore, is not to call for a complete elimination of impeachment under Rules 608 and 609, but to urge that such impeachment be limited to those situations where a defendant affirmatively places his or her character for truthful or law-abiding behavior in issue. Impeachment under these circumstances clearly would further the truth-seeking process and also would present the smallest risk that the trier of fact will engage in impermissible propensity inferences.

The remainder of this Article is divided into five sections: Parts II and III discuss the evolution of impeachment with prior convictions and bad acts and the current scope of these practices under the Federal Rules of Evidence; Part IV reviews the criticisms that have been directed towards the practice of impeachment with prior convictions and bad acts, focusing on the psychological and social science research conducted on these practices; Part V addresses some of the countervailing reasons supporting the practice of impeachment with prior convictions and bad acts; and Part VI sets forth a proposed revision of the Federal Rules governing impeachment with prior convictions and bad acts. This proposed revision attempts to incorporate both the criticisms against impeachment with prior convictions and bad acts and the reasons supporting these impeachment practices.

II. USE OF PRIOR CONVICTIONS UNDER FEDERAL RULE OF EVIDENCE 609

A. Historical Background

At common law, a convicted felon "was not competent to testify as a witness." Although this disqualification was originally "part of the punishment for the crime," it subsequently was rationalized on the theory that a convicted felon "was not worthy of belief." As the law common sense proposition that a [convicted felon] . . . is less likely than other members of society to be deterred from lying under oath"; David P. Leonard, The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence, 58 U. Col. L. Rev. 1, 32, 43 (1986) (stating that law of evidence relies to great extent "on hunch and intuition in deriving rules").

17. See infra notes 21-57 and accompanying text.
18. See infra notes 58-108 and accompanying text.
20. See infra notes 147-50 and accompanying text.
evolved, however, this automatic disqualification was supplanted by rules that allowed convicted felons to testify, but also provided that these witnesses could be impeached with proof of their prior convictions. The rules on this subject varied among jurisdictions, but the most common rule prior to the enactment of the Federal Rules of Evidence, in both federal and state courts, mandated the admissibility of all prior felony convictions and all prior convictions for "crimen falsi," regardless of the punishment.

Starting roughly in the middle of this century, some efforts were made to restrict the practice of impeachment by prior convictions. For example, in 1942, the American Law Institute proposed a rule that would have prohibited evidence of a prior conviction from being introduced against a criminal defendant unless the defendant first introduced "evidence for the sole purpose of supporting his credibility." Similarly, in 1953, the National Conference of Commissioners proposed a rule that would have permitted impeachment of a witness other than the criminal defendant only with prior convictions involving dishonesty or false statement, and would have allowed impeachment of a prior criminal defendant only if the defendant first presented evidence solely to

1940)); see also Williams v. United States, 3 F.2d 129, 130 (8th Cir. 1924) (explaining that disqualification existed because convicted criminals were "so destitute of moral honesty that truth could not within them dwell").

23. Bock Laundry, 490 U.S. at 511-12. The common law disqualification was revoked in the federal courts in 1917. See Rosen v. United States, 245 U.S. 467 (1917) (holding common law rule disqualifying convicted felons from testifying inapplicable for determining witness competency).

24. See Bock Laundry, 490 U.S. at 512 (citing 10 JAMES W. MOORE & HELEN I. BENDIX, MOORE'S FEDERAL PRACTICE § 609.02 (2d ed. 1988)). "Crimen falsi" is a term that originated under Roman law and included "not only forgery, but every species of fraud and deceit." United States v. Smith, 551 F.2d 348, 362 n.26 (D.C. Cir. 1976) (quoting 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 373 & n.3 (16th ed. 1899)). At common law, however, the term had a more limited meaning, encompassing only those crimes that supposedly bore directly on credibility, and that were directly tied to the judicial process. Id. at 362-63 n.26 (quoting Ex parte Wilson, 114 U.S. 417, 423 (1885); Greenleaf, supra, § 373).

25. MODEL CODE OF EVIDENCE Rule 106(3) (1942). The proposed rule stated:

If an accused who testifies at the trial introduces no evidence for the sole purpose of supporting his credibility, no evidence concerning his commission or conviction of crime shall, for the sole purpose of impairing his credibility, be elicited on his cross-examination or be otherwise introduced against him; if he introduces evidence for the sole purpose of supporting his credibility, all evidence admissible under Paragraph (1) shall be admissible against him.

Id. Paragraph (1) of the proposed rule prohibited admission of extrinsic evidence of a witness' "conviction of crime not involving dishonesty or false statement, or ... of specific instances of [a witness'] conduct relevant only as tending to prove a trait of his character." Id. Rule 106(1)(b), (c). Thus, under the Model Code, only prior convictions involving false statements or dishonesty could be admitted.
bolster his or her credibility. 

The first major restriction on impeachment by prior conviction by a federal court appeared in 1965 in Luck v. United States. In that case, the United States Court of Appeals for the District of Columbia Circuit held that the District of Columbia Code did not mandate the admission of prior convictions offered to impeach a criminal defendant. Instead, the court held that trial courts should employ a balancing test to determine whether to admit prior convictions for impeachment purposes. Under this test, trial courts were directed to consider several factors, including:

- the nature of the prior crimes,
- the length of the criminal record,
- the age and circumstances of the defendant,
- and, above all, the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant’s story than to know of a prior conviction.

In reaching this holding, the Luck court emphasized that the determination of admissibility was discretionary and that it was relying on the ex-

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26. **UNIFORM RULE OF EVIDENCE** 21 (1953). This rule stated: Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility. If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility.

*Id.*

27. 348 F.2d 763 (D.C. Cir. 1965).

28. *Id.* at 768. The trial court had admitted evidence of the defendant’s prior grand larceny conviction for impeachment purposes. *Id.* at 766-67. Luck argued that the trial court should have excluded this evidence because the conviction had occurred while he was a juvenile, and specific provisions of the District of Columbia Code were “designed to relieve proceedings in the Juvenile Court from the consequences which customarily accompany conviction of crime in a tribunal of general jurisdiction.” *Id.* at 767. The court of appeals rejected this argument. *Id.* at 767-69. The appellate court, however, also rejected what it believed to be an implicit argument of the government—that the prosecution “is always entitled to introduce a juvenile’s earlier conviction.” *Id.* The court stated that the statute’s use of the word “may,” as opposed to “shall,” was significant, and “[t]he trial court is not required to allow impeachment by prior conviction every time a defendant takes the stand in his own defense.” *Id.* at 768 (quoting 14 D.C. Code § 305 (1961)).

29. *Id.* at 768-69. According to the court: “The statute, in our view, leaves room for the operation of a sound judicial discretion to play upon the circumstances as they unfold in a particular case.” *Id.* at 768.

30. *Id.* at 769 (footnote omitted). The court stated that “[t]he goal of a criminal trial is the disposition of the charge in accordance with the truth.” *Id.* In line with this goal, the court implied that another factor for a trial court to consider is “the possibility of a rehearsal of the defendant’s criminal record in a given case, especially if it means that the jury will be left without one version of the truth.” *Id.*
perience of trial judges to balance the interests of the defendant against the public interest.\(^{31}\)

Two years after Luck, the District of Columbia Circuit clarified the factors to be considered by trial courts in applying the Luck balancing test. In Gordon v. United States,\(^{32}\) the court set forth five factors for consideration: the degree to which the prior conviction is probative of veracity; the age of the prior conviction; the similarity between the prior conviction and the crime charged; the importance of the defendant's testimony; and the importance of the issue of credibility.\(^{33}\) In weighing these factors, the court noted that crimes involving dishonest conduct, such as fraud, cheating and stealing, relate more directly to credibility than violent or assaultive crimes, and that prior convictions that have occurred long ago have less bearing on the witness' present credibility than more recent convictions.\(^{34}\) The court also warned that prior convictions for the same crime as the charged crime should be "admitted sparingly."\(^{35}\) Finally, the court pointed out that there is greater reason to admit prior convictions when a case has been "narrowed down to the credibility of two persons—the accused and his accuser."\(^{36}\)

\(^{31}\) Id.


\(^{33}\) Id. at 940-41. Before outlining these factors, the court first emphasized the rationale of Luck: "[A] showing of prior convictions can have genuine probative value on the issue of credibility, but . . . because of the potential for prejudice, the receiving of such convictions as impeachment [i]s discretionary." Id. at 939. The court then reiterated the Luck test:

[T]o bar [criminal convictions] as impeachment, the court must find that the prejudice must "far outweigh" the probative relevance to credibility, or that even if relevant the "cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction."

Id. (quoting Luck v. United States, 348 F.2d 763, 768 (1965)). The court also noted that the legitimate purpose of impeachment is "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 940.

\(^{34}\) Id.

\(^{35}\) Id. The court explained that evidence of prior convictions of the same crime may be prejudicial to the defendant "because of the inevitable pressure on lay jurors to believe that 'if he did it before he probably did so this time.'" Id. at 941. This proposition has been criticized by many commentators who have noted that there is a greater need for the defendant's testimony when the case has been narrowed down to a credibility contest between the accused and his or her accuser. See, e.g., Roderick Surrratt, 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, 943 (1980) (admitting evidence of prior conviction in such context helps in assessment of defendant's credibility, but discourages defendant from testifying); Bruce P. Garren, Note, Impeachment by Prior Conviction: Adjusting to Federal Rule of Evidence 609, 64 CORNELL L. REV. 416, 435 n.114 (1979) (recognizing that "as the need for the defendant's testimony becomes more critical, so does the credibility issue").
The *Luck* rule, however, was short-lived in the District of Columbia. In 1970, Congress explicitly rejected this balancing test when it amended the District of Columbia Code to mandate the admissibility of a conviction for any felony and for any crime involving dishonesty or false statement. Nonetheless, this rule did inform the debate over the proper scope of impeachment for the proposed Federal Rules of Evidence and also served as the prototype for Rule 609.

### B. Federal Rule of Evidence 609

Rule 609 was "one of the most hotly contested provisions in the Federal Rules of Evidence," and its "labyrinthine history" has been thoroughly documented by many courts and commentators. For purposes of this Article, it is sufficient to note that the Rule as originally enacted was a "political compromise" between the discretionary approach embodied in *Luck* and the mandatory admissibility prevalent in the federal and state courts.

The Rule, as originally enacted in 1975, mandated the admissibility of prior convictions "involv[ing] dishonesty or false statement, regardless of the punishment," but gave courts discretion to exclude any prior felony conviction, other than those involving dishonesty or false statement, if the court determined that the probative value of the conviction was outweighed by its prejudicial effect to the defendant. The Rule

37. See D.C. CODE ANN. § 14-305(b)(1) (1980) (providing that "for the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a criminal offense shall be admitted . . . if the criminal offense (A) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or (B) involved dishonesty or false statement [regardless of punishment]" (emphasis added)).

38. See 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE, ¶ 609[04] (1988) (stating that Rule 609 has its genesis in *Luck* doctrine and therefore courts still look to cases construing *Luck* for guidance).


40. Surratt, supra note 36, at 917 (quoting Irving Younger, *Three Essays on Character and Credibility Under the Federal Rules of Evidence*, 5 HOFSTRA L. REV. 7, 11 (1976)). Surratt suggests that the rule may also "be viewed as a 'compromise' between the traditional approach, i.e., no limitation on prior-conviction impeachment of the criminal defendant, and the 'Hawaii approach,' i.e., an absolute prohibition of prior-conviction impeachment of the criminal defendant." Id. (footnote omitted). Surratt noted that only two states, Hawaii and Kansas, had embraced the "Hawaii approach." Id. at 912, 914 & n.21.

41. Fed. R. Evid. 609(a), 28 U.S.C. Rule 609(a) (1988). The rule provided: For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited
also set forth time limits on the admissibility of prior convictions, stating that prior convictions more than ten years old were not admissible unless the court determined that the probative value of the convictions substantially outweighed their prejudicial effect. In addition, the proponent of the evidence was required to give written notice of his or her intent to use a conviction more than ten years old.

In 1990, Rule 609(a) was amended to provide all witnesses, not just criminal defendants, with some degree of protection from the admission of felony convictions that did not involve dishonesty or false statement. The Rule still distinguishes, however, between the use of prior felony convictions to impeach a criminal defendant and the use of such convictions to impeach other witnesses. Specifically, the amended Rule prohibits the impeachment of a criminal defendant with a felony conviction that does not involve dishonesty or false statement, unless the probative value of the conviction outweighs its prejudicial effect. All other witnesses can be impeached with such convictions as long as the prejudice resulting from the impeachment does not substantially outweigh its probative value.

Therefore, as Rule 609(a) currently stands, the credibility of a crim-

\[\text{Id.}\]

43. Id.
44. See Fed. R. Evid. 609(a). The 1990 amended rule was drafted by the Judicial Conference of the United States and was forwarded by the Supreme Court to Congress on January 26, 1990. See Amendments to Federal Rules of Evidence—Rule 609, 110 S. Ct. 774, 776, 778-79 (setting forth proposed amendment to Rule 609; showing new and deleted material). The amendments went into effect on December 1, 1990 after Congress did not act to disapprove the amendments or delay their effective date. Fed. R. Evid. 609(a); see also 28 U.S.C. § 2074(a) (1988) (stating that "such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law").

The rule was amended in 1990, at least in part, to overrule the Supreme Court's decision in Green v. Bock Laundry Machine Co., 490 U.S. 504, 527 (1989), holding that the balancing test set forth in Rule 609(a) only protected criminal defendants, and that evidence of prior felony convictions was automatically admissible against all other witnesses. See Fed. R. Evid. 609 advisory committee's note (stating that danger of unfair prejudice is not confined to criminal defendants). For the text of Rule 609(a), see supra note 9.

46. Id. Rule 609(a)(1) permits the admissibility of evidence that "a witness other than an accused has been convicted of" a felony, but such evidence is also subject to Rule 403. Id. Rule 403 excludes otherwise relevant, admissible evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403.
inal defendant can automatically be impeached with any conviction involving dishonesty or false statement, but can be impeached with felony convictions that do not involve dishonesty or false statement only if these convictions satisfy a balancing test similar to the test first spelled out in Luck and Gordon. Thus, Rule 609(a) places greater limits on the use of prior convictions than the federal courts generally imposed prior to the adoption of the Federal Rules of Evidence. Nonetheless, Rule 609’s standard of admissibility is still more permissive than the standard set forth in Rule 608—the rule governing the admissibility of specific instances of conduct that can be used to attack a witness’ character for truthfulness.

III. USE OF SPECIFIC INSTANCES OF MISCONDUCT UNDER FEDERAL RULE OF EVIDENCE 608

A. Historical Background

Prior to the adoption of the Federal Rules of Evidence, specific instances of misconduct, other than convictions, were rarely admissible in federal court to impeach a witness’ credibility. Undue delay and prejudice to the witness were the most commonly cited reasons underlying this prohibition. The exceptions to this prohibition were usually limited to specific acts of misconduct that were relevant to veracity or honesty.

Furthermore, in the limited situations where a cross-examiner was not [held to be] the proper subject of cross-examination for impeachment purposes’); SALTZBURG & REDDEN, supra note 39, at 603 (stating that prior to Federal Rules of Evidence, “most Federal Circuits held that a witness could not be asked whether or not he committed prior bad acts not the subject of criminal convictions, while most states permitted some form of impeachment by prior bad acts”); John R. Schmertz, Jr., The First Decade Under Article VI of the Federal Rules of Evidence: Some Suggested Amendments to Fill Gaps and Cure Confusion, 30 VILL. L. REV. 1367, 1425 & nn.223-25 (1985) (stating that “[p]rior misconduct impeachment . . . was disfavored in the federal courts prior to the enactment of the Federal Rules”).

48. See S WEINSTEIN & BERGER, supra note 38, ¶ 608[05] (stating that “[w]hen the bad conduct is the subject of a conviction, the need to prove the underlying behavior is absent and the ensuing possibility of confusing the jury and protracting the trial . . . is eliminated”). Another possible reason for this limitation stems from the fact that certain courts misinterpreted Michelson v. United States, 335 U.S. 469 (1948), where the Court stated: “Only a conviction . . . may be used to undermine the trustworthiness of a witness.” Id. ¶ 608[05] & n.38 (quoting Michelson, 335 U.S. at 482). According to Weinstein, “[t]he Court was not considering whether a witness could be questioned as to a bad act not the subject of conviction”; rather, the Court believed that a mere arrest, as opposed to a bad act independent of the arrest, could not be used to impeach credibility. Id. ¶ 608[05].

49. See WEINSTEIN & BERGER, supra note 38, ¶ 608[05] & nn.40-42 (examining exceptions to general rule of inadmissibility of bad acts).
allowed to question a witness about specific instances of misconduct, the cross-examiner could not introduce extrinsic evidence to prove the particular acts—even if the witness denied committing the acts on cross-examination. The prohibition against extrinsic evidence, like the prohibition against cross-examination about such instances, was based on considerations of undue delay, confusion of the issues, and the prejudice to the defendant that would result from having to defend against misdeeds not contained in the formal charges.

B. Federal Rule of Evidence 608(b)

Rule 608(b) was the subject of much less debate than Rule 609. For the most part, Rule 608(b) codified existing federal court practices concerning impeachment by specific acts of misconduct. As enacted, the Rule allows impeachment with specific instances of misconduct, in the discretion of the trial court, if these instances of misconduct are probative of the witness’ character for truthfulness. Rule 608(b) does not distinguish between the criminal defendant and other witnesses. Nor

50. See id. (stating that cross-examiner could not call other witnesses to prove misconduct after denial by witness); Kenneth S. Brown et al., McCormick on Evidence § 42 (Edward W. Cleary ed., 3d ed. 1984) [hereinafter McCormick] (stating that “if the witness stands his ground and denies the alleged misconduct, the examiner must ‘take his answer,’ not that he may not further cross-examine to extract an admission, but in the sense that he may not call other witnesses to prove the discrediting act”).

51. See Mason Ladd, Techniques and Theory of Character Testimony, 24 Iowa L. Rev. 498, 508-09 (1939) (viewing objection to use of specific acts to prove character of person as based on time and confusion which would result from going into collateral issues and policy consideration against requiring defendant to defend against all events of his or her life rather than particular charge in case).

52. See, e.g., Saltzburg & Redden, supra note 39, at 603 (stating that “[p]rior bad act impeachment [was] the product of little debate and may have escaped the attention of many members of Congress who had a fixation on Rule 609”).

53. Fed. R. Evid. 608(b). The Rule states:
Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the character for truthfulness or untruthfulness of another witness, or (2) concerning the witness’ character for truthfulness or untruthfulness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused’s or the witness’ privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Id. An earlier draft of the Rule required that the instances of misconduct be “clearly” probative of truthfulness or untruthfulness; the word “clearly” was deleted before the final enactment of the Rule. See 3 Weinstein & Berger, supra note 38, ¶ 608(02).

54. See Fed. R. Evid. 608(b).
does it establish time limits for the admissibility of the prior acts evidence.\textsuperscript{55} In addition, the Rule prohibits the introduction of extrinsic evidence to prove the existence of any of the specific instances of misconduct used to impeach a witness’ character for truthfulness.\textsuperscript{56}

Thus, Rule 608(b) limits impeachment by specific instances of misconduct to instances that are directly relevant to the witness’ character for truthfulness, and strictly limits the use of extrinsic evidence to prove such misconduct. By contrast, Rule 609(a) allows impeachment with convictions for crimes that bear only a marginal relationship to the witness’ veracity. Although numerous courts have allowed such impeachment under Rule 609 under the theory that most felony convictions do have a bearing on a witness’ credibility, a considerable body of psychological and social science literature casts serious doubt on that assumption.\textsuperscript{57}

\section{IV. The Scientific Research on Impeachment With Prior Convictions and Bad Acts}

The rationale underlying the impeachment of a criminal defendant with prior convictions and bad acts is that these instances of misconduct have a direct bearing on the defendant’s credibility as a witness. As Judge Weinstein has noted, this rationale is based upon a two-part assumption: “(1) that a person with a criminal past has a bad general character and (2) that a person with a bad general character is the sort of person who would disregard the obligation to testify truthfully.”\textsuperscript{58}

This assumption—that a person’s general character is directly tied

\textsuperscript{55}. \textit{See id.} An earlier draft of Rule 608 required that the prior acts not be “remote in time”; this requirement was deleted from the final language of the Rule. \textit{See id.} historical note (citing notes of Committee on the Judiciary, H.R. Rep. No. 650, 93d Cong., 1st Sess. (1973)) (noting that Rule was amended to emphasize discretionary power of court in permitting such testimony and that reference to remoteness in time was deleted as “unnecessary and confusing”).

\textsuperscript{56}. \textit{See Fed. R. Evid.} 608(b).

\textsuperscript{57}. \textit{See} Gainor, Note, \textit{supra} note 11, at 780-81 (citing recent federal cases which have held it proper to impeach defendant with past conviction of same crime); \textit{see also} United States v. Browne, 829 F.2d 760, 764 (9th Cir. 1987) (upholding admission of evidence of prior bank robbery conviction in trial for armed bank robbery), \textit{cert. denied}, 485 U.S. 991 (1988); United States v. Fountain, 642 F.2d 1083, 1092 (7th Cir.) (upholding admission of evidence of prior murder conviction in trial for killing prisoner in U.S. prison), \textit{cert. denied}, 451 U.S. 993 (1981).

\textsuperscript{58}. \textit{3 Weinstein & Berger, supra} note 38, \S 609[02]. Justice Holmes also agreed:

\begin{quote}
[\textit{W}hen it is proved that a witness has been convicted of a crime, the only ground for disbelieving him \ldots is the general readiness to do evil which the conviction may be supposed to show. \ldots The evidence has no tendency to prove that he was mistaken, but only that he has perjured himself, and it reaches that conclusion solely through the general proposition that he is of bad character and unworthy of credit.]
\end{quote}

to his or her credibility—is an assumption with considerable intuitive
appeal.\textsuperscript{59} For example, our common sense tells us that a convicted mur-
derer would be more likely to lie on the witness stand than Mother The-
resa.\textsuperscript{60} Likewise, to the extent that trials are a search for the truth, it
seems intuitively obvious that the triers of fact should know whether a
witness (whose credibility they are necessarily evaluating) has eight prior
felony convictions or an unblemished criminal record. Indeed, as one
court has noted, "[n]o sufficient reason appears why the jury should not
be informed what sort of person is asking them to take his word. In
transactions of everyday life this is probably the first thing that they
would wish to know."\textsuperscript{61}

Nonetheless, a large body of scientific research has been developed
over the last thirty years that calls into question this common sense no-
tion that a person’s general character is closely tied to his or her honesty
on the witness stand. Furthermore, this research shows that a defendant
who is impeached with prior convictions or bad acts is likely to be se-
verely prejudiced by this impeachment because the jury, despite limiting
instructions to the contrary, will conclude that the defendant is the type
of person who commits crimes, regardless of the evidence in the particu-
lar case. Finally, there is considerable research demonstrating that a de-
fendant who faces the possibility of impeachment is less likely to testify
on his or her own behalf. This decision not to testify reduces the chance
of acquittal because the jury is likely to infer guilt from silence, again
despite limiting instructions to the contrary. Thus, the assumptions un-
derlying the practice of impeachment with prior convictions and bad
acts, though they may be intuitive, simply are not supported by the sci-
entific research on the issue.

\textbf{A. Probative Value}

Psychological theory in the first half of this century supported the
notion that prior convictions and bad acts were predictive of a person’s
credibility. Indeed, the prevalent psychological theory during that time

\textsuperscript{59} See Foster, supra note 11, at 27 n.117 (stating that "[t]he intuitive appeal
of character traits as the source of human behavior traces its roots at least as far
back as Aristotle").

\textsuperscript{60} Courts also have relied on this "common sense" notion. See, e.g.,
Campbell v. Greer, 831 F.2d 700, 707 (7th Cir. 1987) (stating that "Rule 609
and the common law tradition out of which it evolved rest on the common-sense
proposition that a person who has flouted society’s most fundamental norms... is less likely than other members of society to be deterred from lying under oath
in a trial"); United States v. Lipscomb, 702 F.2d 1049, 1077 (D.C. Cir. 1983)
(McKinnon, J., concurring) (stating that "convicted felons are not generally per-
mitted to stand pristine before a jury with the same credibility as that of a
Mother Superior").

\textsuperscript{61} State v. Duke, 123 A.2d 745, 746 (N.H. 1956); see also United States v.
Garber, 471 F.2d 212, 215 (5th Cir. 1972) (stating that "the jury should be in-
formed about the character of a witness who asks the jury to believe his
testimony").
period postulated that personality was determined by "character traits," and that these traits produced generally consistent behavior in divergent situations. Under this theory, a person who has a "trait" for unlawful behavior (as evidenced by prior convictions and bad acts) is more likely than a person without such a trait to engage in unlawful behavior in the future. As one commentator described this theory, "a person who lies in one situation is not only likely to lie in other situations, but is also highly likely to cheat, steal, not feel guilty, and so on." 

Subsequent psychological research, however, has generally discredited this "trait theory" of personality, and has replaced it with theories that view behavior as a "learned response to specific contextual factors" (situationism) or as the interaction between specific character traits and specific contextual factors (interactionism). In fact, numerous studies have cast substantial doubt on the proposition that personality is determined by "traits" that produce consistent behavior in different situations.

In a study by Hugh Hartshorne and Mark May, more than 11,000 children were monitored over a five-year period to see if they exhibited the trait of honesty in more than 100 different situations. The study, which has been described as "a landmark which has not been surpassed by later work," showed that thousands of subjects exhibited no unified behavior.
character trait for honesty.68 Some subjects, for example, cheated only in classroom contexts; other subjects cheated only in extracurricular contexts.69

The authors of the study concluded: "[N]either deceit nor its opposite, 'honesty,' are unified character traits, but rather specific functions of life situations. . . . Lying, cheating, and stealing as measured by the test situations used in these studies are only very loosely related."70 Even Gordon Allport, the pioneer of trait theory, later reconsidered his reliance on character traits as an exclusive predictor of behavior. Allport noted that his "earlier views seemed to neglect the variability induced by ecological, social, and situational factors. This oversight needs to be repaired through an adequate theory that will relate the inside [the psychic structure] and outside [situational factors] systems more accurately."71

These findings are mirrored by the observations of many courts and commentators who also have questioned the connection between testimonial credibility and crimes that do not involve dishonesty or false statement. Indeed, the United States Supreme Court recently noted that there is "[p]rodigious scholarship highlighting the irrationality and unfairness of impeaching credibility with evidence of felonies unrelated to veracity."72 Numerous commentators have echoed these sentiments.73

The courts and commentators have stressed two major shortcomings in the theory that all prior convictions and bad acts are probative of a witness' credibility. The first shortcoming is that many convictions and bad acts, particularly those involving violent crimes, bear little relation

68. Foster, supra note 11, at 29 n.132 (describing results of Hartshorne & May study).
69. Id. (stating that researchers could find no consistent pattern concerning whether students would cheat, or under what circumstances students would cheat).
70. Hugh Hartshorne & Mark A. May, Studies in the Nature of Character—Studies in Deceit 411 (1928). Other scientists agree with this conclusion. According to one scientist: "Individuals show far less cross-situational consistency in their behavior than has been assumed by trait-state theories. The more dissimilar the evoking situations, the less likely they are to lead to similar or consistent responses from the same individual. Even seemingly trivial situational differences may reduce correlations to zero." Walter Mischel, Personality and Assessment 177 (1968).
71. Lawson, supra note 64, at 783 (quoting Gordon Allport, Traits Revisited, 21 Am. Psychologist 1, 2 (1966)).
73. See, e.g., 3 Weinstein & Berger, supra note 38, ¶ 609[02] (stating that "[m]any crimes . . . do not upon analysis support the inference that the person who committed them has a specific proclivity for lying on the witness stand"); Beaver & Marques, supra note 11, at 611 (arguing that evidence of prior conviction often does not show "lack of veracity"); Garren, Note, supra note 36, at 433-34 (arguing for per se exclusion of "[r]emote non-crimen falsi evidence" and evidence of prior convictions for like crimes).
to a person's propensity to lie. An example is the case of the husband who is convicted of killing his wife when he discovers that she has been sleeping with another man, and who then openly admits that he killed his wife because she betrayed him. Under the current Rules, this conviction will become evidence of his dishonesty in all future proceedings, even though the crime he committed did not involve dishonesty, and even though he never tried to hide his commission of the crime.

The second shortcoming of the theory linking convictions and credibility is that most convictions are the result of guilty pleas, where the defendant admits in open court that he or she committed the crime to which he or she is pleading guilty. While there may be numerous considerations other than honesty which impel a defendant to plead guilty (such as the availability of a favorable plea bargain), the fact remains that most defendants who plead guilty are honestly and openly admitting their involvement in the commission of a crime rather than lying on the witness stand in an attempt to avoid punishment.

Thus, there are significant questions about the probative value of prior convictions and bad acts on a witness' credibility, particularly when those convictions and bad acts do not involve dishonesty or false statement. These questions are exacerbated by the fact that a criminal defendant can be substantially prejudiced by the use of these convictions and bad acts, especially when the prior instances of misconduct are the same or similar to the offenses for which the defendant is being tried.

74. For example, in United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976), the United States Court of Appeals for the District of Columbia Circuit stated:

There is no deceit in armed robbery. You take a gun, walk out, and put it in a man's face and say, "Give me your money," or walk up to a cashier and say, "This is a holdup; give me your money." There is no deceit in that. They are not lying. They mean business.

Id. at 363 (quoting statements of Senator McClellan, 120 Cong. Rec. 37,081 (1974)); see also Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967) (stating that "[a]cts of violence . . . which may result from a short temper, a combative nature, extreme provocation or other causes, generally have little or no direct bearing on honesty or veracity"); 3 Weinstein & Berger, supra note 38, § 609[02] (stating that "[t]he relationship between crimes of violence and truth-telling is particularly tenuous").

75. In State v. McAboy, 236 S.E.2d 431, 435 n.6 (W.Va. 1977), the West Virginia Supreme Court noted a similar paradox of "a man so proud of his truthfulness that he challenges a person who called him a liar to a duel. He wins the duel but is subsequently convicted of murder . . . . If he elects to testify, he knows that his propensity to lie will be evidenced by his prior conviction."

76. See Wayne R. LaFave & Jerold H. Israel, Criminal Procedure 767 (1985) (noting that approximately 90% of all convictions result from guilty pleas). This factor does not affect the connection between credibility and non-conviction bad acts. As two commentators have recognized: "One must keep in mind that the state obtains over ninety percent of all convictions by guilty pleas entered by the accused. Therefore, a defendant's past conviction in many instances represents a prior admission of guilt—probably a truthful act." Beaver & Marques, supra note 11, at 611 (footnotes omitted).
B. Prejudice to the Defendant

Psychological theorists have long postulated that people construct integrated images of other people's personalities even when they have little information about most aspects of those personalities. 77 Under this theory, when people receive information about one characteristic of a person, they attribute other characteristics to that person that they believe are consistent with the first characteristic. 78 This attributional tendency is particularly powerful when people receive noteworthy or unusual information about an individual. 79 Furthermore, many psychologists have noted that negative information is likely to be more important than positive information when people form perceptions about people they do not otherwise know. 80

Attribution theory, therefore, is quite relevant in the setting of a criminal trial when a defendant is impeached with prior convictions or

77. See, e.g., PHILIP E. VERNON, PERSONALITY ASSESSMENT: A CRITICAL SURVEY 32-33 (1964) (stating that people tend to view other people as a “unitary whole, however fragmentary the clues”); S.E. Asch, Forming Impressions of Personality, 41 J. ABNORMAL & SOC. PSYCHOL. 258 (1946) (analyzing formation of personality impression based on perceived characteristics); Gustav Ichheiser, Misunderstandings in Human Relations: A Study in False Social Perceptions, 55 AM. J. SOC. 1, 28 (1949) (stating that “we have the tendency to consider a partial structure of personality which happens to be visible to us as if this partial structure were the total personality ‘itself’”). This theory, referred to as the “theory of unified impressions,” has been tested and validated in numerous clinical settings. Lawson, supra note 64, at 774.

78. See Robert G. Spector, Rule 609: A Last Plea for Withdrawal, 32 OKLA. L. REV. 334, 352 (1979). This theory also is referred to as the “attribution theory.” Id. In addressing this subject, Spector stated: “What happens when a person receives one specific piece of information about another person? Does the receiver simply record the data and reserve judgment, or will the receiver generalize from the specific piece of information to postulate a whole personality? Research shows that it is quite clearly the latter.” Id.

79. See ALLPORT, supra note 62, at 521. Allport explains that “[o]ne outstanding ‘good’ or ‘bad’ quality in a person casts its reflection upon all judgments passing to him.” Id. This tendency to extrapolate characteristics from a particular piece of noteworthy information has been referred to as the “halo effect.” Id.; see also Foster, supra note 11, at 34 (stating that “[i]f one dominant character trait is found—often inferred from a specific act—the observer extrapolates other, similar characteristics, and assumes that these characteristics are part of the observed person’s character”).

80. See, e.g., Barbara Black Koltuv, Some Characteristics of Intrajudge Trait Intercorrelations, PSYCHOL. MONOGRAPHS, May 1963, at 1, 3 (stating that “a single negative trait is more prepotent than its opposite positive”); Irwin P. Levin et al., Differential Weighting of Positive and Negative Traits in Impression Formation as a Function of Prior Exposure, 97 J. EXPERIMENTAL PSYCHOL. 114, 114 (1973) (stating that “[a] number of studies of personality impression formation have shown that negative traits have more influence on an impression response than do positive traits”). But see Eugene A. Weinstein & Susan E. Crowdus, The Effects of Positive and Negative Information on Person Perception, 21 HUM. REL. 383, 389 (1963) (stating that the “basic hypothesis that negative information has greater saliency than positive information for person perception was generally not supported” by their experiment).
bad acts. Indeed, the "halo effect" of prior convictions and bad acts would seem to be at its zenith in such a setting—i.e., a group of people, who do not know the defendant but must decide whether he or she has engaged in criminal activity, will infer negative characteristics about the defendant when they receive the noteworthy and negative information that he or she has previously engaged in criminal activity. According to attribution theory, the jury that hears about a defendant's prior convictions or bad acts will not consider that evidence solely in terms of the defendant's credibility, but also will form unfavorable impressions about the defendant's overall personality and believe that he or she is more likely to have committed the alleged crime, regardless of the evidence or lack of evidence presented. Thus, attribution theory indicates that a defendant who is impeached with prior convictions or bad acts is likely to be severely prejudiced.

The relevance of attribution theory in the context of a criminal trial has been buttressed by numerous studies which demonstrate that, all else being equal, jurors are more likely to convict a defendant who has been impeached with prior convictions or bad acts. In one study, researchers at the University of Chicago examined the results of 3,576 actual jury trials and divided those trials into two categories: (1) trials in which the jury was told that the defendant had no prior convictions; and (2) trials in which the jury either was told that the defendant had prior convictions or was told nothing about the defendant's prior convictions. Overall, the defendant was acquitted in forty-two percent of the

81. See Foster, supra note 11, at 35 (explaining likelihood that jurors will "attribute overall bad character" to defendant upon learning of defendant's past bad acts or convictions). This tendency is magnified by the setting in which the judgments are being made. See Lawson, supra note 64, at 775 (stating that "[t]he specific setting in which judgment about a person is made bears significantly upon the evaluation of information about that person"). Indeed, as Professor Lawson has noted:

[j]urors undertake their task already possessing certain general knowledge about the defendant. They know that he was arrested by a police officer who believed him guilty of a crime, that preliminary proceedings were held in which grounds were discovered for pursuing a formal charge, and that an independent body of citizens acting as a grand jury handed down an indictment. . . . In this 'setting' they are informed that . . . [the defendant] has previously engaged in behavior of a similar kind [to the behavior for which he has been charged]. . . . In other words, they are sensitized to respond to information about a defendant's criminal behavior.

Id. at 775-76.

82. Harry Kalven, Jr. & Hans Zeisel, The American Jury 159-60 (1986). This study has been called the "seminal study of actual jurors." People v. Allen, 420 N.W.2d 499, 558 (Mich. 1988) (Riley, C.J., dissenting). It is the only study on the issue of impeachment which involved actual jurors. Id. at 556 (Riley, C.J., dissenting). The first group of trials studied were trials where the defendant took the stand and had no record or his record was suppressed, and trials where the defendant did not take the stand but the jury learned he had no record. Kalven & Zeisel, supra, at 147. The second group included all other trials—
cases where the jury was told that the defendant had no prior convictions, but was acquitted in only twenty-five percent of the cases where the jury did not receive such information. In addition, in cases where the evidence of guilt was weakest, the defendant was acquitted in sixty-five percent of the cases where the jury was told that the defendant had no prior convictions, but was acquitted in only thirty-eight percent of the cases where the jury did not receive such information. Based on the results of this study, one of the researchers involved in the study concluded that "[t]he jurors almost universally used defendant's record to conclude he was a bad man and hence was more likely than not guilty of the crime for which he was then standing trial." The results of the Chicago study have been replicated, to varying degrees, in numerous subsequent studies. For example, in two studies conducted by researchers at the University of Toronto, mock jurors who learned that a defendant had prior convictions for the same or similar crimes were more likely to convict the defendant than those jurors who did not receive such information. Similar results were obtained in a

83. Kalven & Zeisel, supra note 82, at 161.
84. Id. at 160. The study first divided the trials into nine different categories based on the seriousness of the charge and the strength of the evidence, and then compared conviction rates within these nine categories. Id. Because these two factors were relatively constant, impeachment with prior convictions was meant to be the only variable factor in the study. Id. at 159 n.17.
85. Note, Other Crimes Evidence at Trial: Of Balancing and Other Matters, 70 Yale L.J. 763, 777 n.89 (1961) (quoting Letter from Dale W. Broeder, Associate Professor, University of Nebraska College of Law, to The Yale Law Journal (Mar. 14, 1960) (on file with the Yale Law Library)). Of course, Professor Broeder's analysis is not necessarily a correct interpretation of the results of the study. Indeed, because the study did not differentiate between defendants who were impeached with prior convictions and defendants who refused to take the stand, it can be argued that the study tells us relatively little about the degree of prejudice resulting from impeachment with prior convictions (as opposed to the degree of prejudice resulting from a defendant's failure to testify). See Allen, 420 N.W.2d at 559 n.23 (Riley, C.J., dissenting) (stating that "[t]his grouping blunts the effectiveness of drawing conclusions on the basis of impeachment alone"). Subsequent studies have suggested, however, that juries use evidence of prior convictions as substantive proof of guilt rather than as evidence relating only to the defendant's credibility. For a discussion of these studies, see infra notes 86-93 and accompanying text.
86. See Anthony N. Doob & Hershi M. Kirshenbaum, Some Empirical Evidence on the Effect of § 12 of the Canada Evidence Act Upon an Accused, 15 Crim. L.Q. 88 (1972-1973); Valerie P. Hans & Anthony N. Doob, Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries, 18 Crim. L.Q. 235 (1975-1976). The Doob and Kirshenbaum study involved 48 mock jurors who read a fact pattern for a breaking and entering case. Doob & Kirshenbaum, supra, at 91-92. The jurors were divided into the following four groups: (1) jurors who neither learned about the defendant's prior convictions nor received information about whether the defendant took the stand; (2) jurors who learned that the defendant did not testify, but did not learn about the prior convictions; (3) jurors who
study conducted by researchers at Boston College. The Boston College study found that mock jurors were generally more likely to convict a defendant when the jurors learned that the defendant had prior convictions, particularly if the convictions were for the same crime as the crime for which the defendant was being tried. Similar results also were obtained in studies conducted by researchers at the London School of Economics and at the University of Georgia.

The Hans and Doob study involved two different sets of mock jurors: 40 individual mock jurors and 30 four-person groups of mock jurors who read a fact pattern of a burglary case. Hans & Doob, supra, at 239. In this study, each set of jurors was divided into two groups. Id. at 240. One group learned that the defendant had a prior burglary conviction and was given a limiting instruction; the other group was not informed that the defendant had a prior conviction. Id. Although both sets of jurors who learned of the prior conviction were more likely to convict the defendant, this was particularly true in the group setting. Id. at 243.

In the auto theft case, the jurors were more likely to convict the defendant if they learned that the defendant had any prior conviction, particularly if the conviction was for auto theft. Id. at 43. In the murder case, the jurors were more likely to convict the defendant if they learned he had a murder conviction, but were only equally likely to convict if they learned the defendant had a perjury conviction, and were less likely to convict if they learned the defendant had an auto theft conviction. Id. Thus, this study highlights the fact that the prejudice resulting from impeachment with a prior conviction is most pronounced when the conviction is for a similar crime, and may be negligible for certain dissimilar convictions, particularly those for crimes that are considered less serious than the charged offense.


Id. at 43. In this study, 80 mock jurors read an auto theft fact pattern; 80 additional mock jurors read a murder fact pattern. Id. at 39-40. Each fact pattern was further divided into the following four categories: (1) the defendant had no criminal record; (2) the defendant had a conviction for the same crime; (3) the defendant had a conviction for a dissimilar crime (i.e., the murder defendant had an auto theft conviction and the auto theft defendant had a murder conviction); and (4) the defendant had a perjury conviction. Id.

In the auto theft case, the jurors were more likely to convict the defendant if they learned that the defendant had any prior conviction, particularly if the conviction was for auto theft. Id. at 43. In the murder case, the jurors were more likely to convict the defendant if they learned he had a murder conviction, but were only equally likely to convict if they learned the defendant had a perjury conviction, and were less likely to convict if they learned the defendant had an auto theft conviction. Id. Thus, this study highlights the fact that the prejudice resulting from impeachment with a prior conviction is most pronounced when the conviction is for a similar crime, and may be negligible for certain dissimilar convictions, particularly those for crimes that are considered less serious than the charged offense.

See E. Gil Clary & David R. Shaffer, Effects of Evidence Withholding and a Defendant's Prior Record on Juridic Decisions, 112 J. Soc. Psychol. 237, 239 (1980) (stating that "[t]he result of this investigation [at the University of Georgia] revealed that defendants with a prior record received significantly more votes for conviction compared to defendants who had no previous convictions"); W.R. Cornish & A.P. Sealy, Juries and the Rules of Evidence, 1973 Crim. L. Rev. 208, 216-17. Cornish and Sealy used theft and rape cases for their study. Cornish & Sealy, supra, at 208. With the theft case, 73% of the mock jurors voted to acquit when they did not know of the prior conviction; only 43% would have acquitted when they knew of the prior conviction for a similar crime and were not given a
Thus, the scientific research has generally shown that criminal defendants who are impeached with prior convictions are more likely to be convicted, particularly if they are impeached with convictions for crimes that are the same or similar to the crime for which they are being tried. The defendant who tries to avoid this prejudice by refusing to testify, however, may be prejudiced in a different manner. Many studies have shown that defendants can be substantially prejudiced if they do not testify for fear of being impeached. In one study, researchers from the University of Georgia found that the defendant's decision not to testify increased the jurors' confidence that the defendant should be convicted.90 Likewise, surveys of both judges and criminal defense attorneys show that those involved in the criminal justice system believe that defendants who do not testify are more likely to be convicted.91 This perception appears to be prevalent among the general public as well.92 Indeed, as one commentator has noted: "[A] juror's natural tendency [is] to consider what indeed he or she would do if wrongfully charged with a crime. Silence in the face of a criminal accusation is too far removed from the expected conduct of an innocent person . . . ."93

Thus, the scientific research indicates that a defendant with prior convictions or bad acts faces a considerable dilemma. The defendant will be prejudiced if he or she testifies because the jury will improperly infer guilt from his or her prior conduct, and the defendant will be prejudiced if he or she does not testify because the jury will improperly

limiting instruction. *Id.* at 216-17. With the rape case, 36% of the mock jurors voted to acquit when they did not know of the prior conviction compared to only 20% who voted to acquit when they knew of the prior conviction for a similar crime and were not given a limiting instruction. *Id.*

90. David R. Shaffer & Cyril Sadowsky, *Effects of Withheld Evidence on Juridical Decisions II: Locus of Withholding Strategy*, 5 PERSONALITY & SOC. PSYCHOL. BULL. 40, 42 (1979). Researchers, in monitoring the deliberations of mock jurors, found that the jurors had greater confidence in convicting the defendant when the defendant did not testify. *Id.* at 42. But see Doob & Kirshenbaum, *supra* note 86, at 93. In the Doob & Kirshenbaum study, mock jurors gave the defendant a lower guilt rating in cases where the defendant did not testify. *Id.* This result, however, is not representative of an actual trial in which the defendant does not testify because the mock jurors in the study were told that the defendant did not testify because his defense attorney thought that it was not necessary for him to do so. *Id.*

91. See, e.g., Note, *To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant with a Criminal Record*, 4 COL. J. L. & SOC. PROBS. 215 (1968). Questionnaires were distributed nationally to 99 trial judges and 200 defense attorneys. *Id.* at 218 n.29. Of those who responded to the survey, 88% of the defense attorneys and 89% of the judges believed that a defendant has a better chance of acquittal if he testifies on his own behalf. *Id.* at 221. In addition, 94% of the defense attorneys who responded thought that jurors notice and infer guilt from a defendant's silence. *Id.*

92. See Lewis Mayers, *Shall We Amend the Fifth Amendment?* 21 (1959) (noting that 71% of those questioned in Gallop poll believed that silence demonstrated guilt).

infer guilt from his or her silence. The supposed solution to this dilemma rests in the use of limiting instructions—instructions that require the jury to consider prior bad acts or convictions only in determining the defendant's credibility. The scientific research, however, also demonstrates that limiting instructions do little, if anything, to ameliorate prejudice to a defendant who is impeached with prior convictions or bad acts.

C. The Inefficacy of Limiting Instructions

The scientific research uniformly demonstrates that juries have difficulty following limiting instructions. In fact, some studies have demonstrated that limiting instructions not only fail to reduce the prejudice resulting from prior convictions and bad acts, but instead increase the prejudice, possibly by calling the jury's attention to the prior convictions and bad acts.

94. Indeed, one student writer noted that the "primary reason for the continued use of prior conviction evidence for impeachment is that courts adhere to the proposition that any potential prejudice can be remedied through limiting instructions." Irwin R. Miller, Note, Constitutional Problems Inherent in the Admissibility of Prior Record Conviction Evidence for the Purpose of Impeaching the Credibility of the Defendant Witness, 37 U. Cin. L. REV. 168, 171 (1968).

95. See Cheryl J. Oros & Donald Elman, Impact of Judge's Instructions Upon Jurors' Decisions: The "Cautionary Charge" in Rape Trials, 10 REPRESENTATIVE RES. SOC. PSYCHOL. 28, 32 (1979) (noting that mock jurors did not follow instruction to disregard unfavorable character evidence). This phenomenon is true, not only in the context of impeachment with convictions or bad acts, but also in a variety of other settings. See, e.g., Dale W. Broeder, The University of Chicago Jury Project, 38 Neb. L. REV. 744, 754 (1959) (noting that mock jurors did not follow instruction to disregard evidence of defendant's liability insurance; average damages awarded to defendant increased by approximately 35% when jurors received such an instruction); Stanley Sue et al., Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma, 3 J. APPLIED SOC. PSYCHOL. 345, 350-51 (1973) (noting that mock jurors did not follow instruction to disregard illegally obtained evidence; introducing such evidence without comment increased conviction rate by 26% while instructing jurors to disregard the evidence increased conviction rate by 35%). According to Dale Broeder, at least in terms of limiting instructions for damages, "[t]he objection and instruction to disregard . . . sensitize the jurors" to facts that are pertinent and influential to their determination. Broeder, supra, at 754.

96. See, e.g., Doob & Kirshenbaum, supra note 86, at 93 (noting that mock jurors who were given limiting instruction about defendant's prior convictions gave defendant higher guilt rating than jurors who learned of convictions but were not given limiting instruction); Geoffrey P. Kramer & Dorean M. Koenig, Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project, 23 U. Mich. J.L. REF. 401, 419 (1990) (noting that instructed jurors are more likely than uninstructed jurors to assume defendant's guilt based on prior convictions). But see Cornish & Sealy, supra note 89, at 217 (stating that limiting instructions generally reduced percentage of mock jurors voting to convict defendant). According to Cornish and Sealy, jurors "do take account of a judicial instruction to disregard similar convictions." Id.

It should be noted that more than 75% of the jurors surveyed in the Michigan Juror Comprehension Project correctly stated that they should not assume...
Moreover, the scientific research also demonstrates that the defendant who is impeached by prior convictions and bad acts is not prejudiced because his or her credibility as a witness is impaired (the rationale underlying the rule), but because the jury considers such information as evidence of the defendant's propensity to commit the crime in question. In the most revealing study on this issue, mock jurors were more likely to convict a defendant who had a prior conviction for a crime that was the same as the crime at issue than to convict a defendant who had a prior perjury conviction, even though a perjury conviction would seem to be the strongest indicator of the defendant's lack of credibility as a witness.97 Furthermore, the researchers found that the introduction of a prior conviction produced no significant change in the mock jurors' ratings of a defendant's credibility.98 Thus, the researchers concluded that "[t]he credibility ratings of the defendant did not vary as a function of prior conviction," but "[c]onviction rates [did vary] . . . as a function of prior conviction."99

The results of this psychological and social science research should come as no surprise to many of the participants in the criminal justice system. Courts and commentators have long questioned the effectiveness of limiting instructions, referring to such instructions as a "judicial

97. See Wissler & Saks, supra note 87, at 43. Using a murder case for the study, the conviction rate was 70% when the mock jurors learned of a prior murder conviction and only 50% when the jurors learned of a perjury conviction. Id. Using an auto theft case, the conviction rate was 80% when the mock jurors learned of a prior auto theft conviction and only 70% when the jurors learned of a perjury conviction. Id.; see also Cornish & Sealy, supra note 89, at 216-17 (stating that jurors are more likely to convict rape defendant who had prior convictions for indecent assaults on girls than to convict rape defendant who had prior convictions involving dishonesty).

98. Wissler & Saks, supra note 87, at 41; see also Hans & Doob, supra note 86, at 247 (stating that introduction of prior conviction produced no significant difference in amount of time defendant's credibility was discussed by mock juries in their deliberations). The reason for this, according to Hans and Doob, is that "jurors use [the] record only minimally in considering the issue of credibility."

lie," and a "placebo," and a device that forces jurors to engage in a "mental gymnastic which is beyond . . . their powers." As Justice Jackson noted in *Krulewitch v. United States,* the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be an unmitigated fiction.

Limiting instructions, nonetheless, are firmly embedded in our jury trial system. Courts have upheld the use of such instructions in a wide variety of situations. Limiting instructions have been prohibited only in the rare situation where "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." However, in light of the research demonstrating that a defendant can be substantially prejudiced by the use of prior convictions and bad acts and that limiting instructions do not cure, and may even exacerbate this prejudice, reliance on limiting instructions

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100. United States v. Grunewald, 233 F.2d 556, 574 (2d Cir. 1956) (Frank, J., dissenting) (stating that limiting instruction "undermines a moral relationship between the courts, the jurors, and the public; it damages the decent judicial administration of justice"), rev'd, 353 U.S. 391 (1957).

101. United States v. Delli Paoli, 229 F.2d 319, 321 (2d Cir. 1956) (stating that determination of whether limiting instructions for admitted hearsay evidence are sufficient is "a matter for the exercise of discretion by the trial judge"), aff'd, 352 U.S. 232 (1957).

102. Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932); see also Lisa Eichhorn, Note, Social Science Findings and the Jury's Ability to Disregard Evidence Under the Federal Rules of Evidence, 52 LAW & CONTEMP. PROBS. 341, 342 (1989) (stating that "[p]olicies underlying exclusionary rules may be masterfully devised and socially valuable, but they become worthless if juries are unable to follow the instructions that the policies generate"); Note, The Limiting Instruction—Its Effectiveness and Effect, 51 MINN. L. REV. 264 (1966) (questioning effectiveness of limiting instructions).


104. Id. at 453 (Jackson, J., concurring).

105. See, e.g., Parker v. Randolph, 442 U.S. 62, 73 (1979) (noting "crucial assumption . . . is that juries will follow [limiting] instructions given by the trial judge."); Delli Paoli, 352 U.S. at 242 (stating that "[u]nless we proceed on the basis that the jury will follow the court's [limiting] instructions . . . the jury system makes little sense"); see also Richardson v. Marsh, 481 U.S. 200, 211 (1987) (stating that "[t]he rule that juries are presumed to follow [limiting] . . . instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process").


seems especially inappropriate in the context of impeachment with prior convictions and bad acts.

In sum, the scientific research to date casts serious doubt on the validity of the practice of impeachment with prior convictions and bad acts. The results of this research have undermined the probative value of these prior instances of misconduct, have demonstrated the prejudice to the defendant that results from their use, and have shown that limiting instructions do not properly cure this prejudice. Nonetheless, the rules permitting such impeachment remain firmly entrenched in the federal courts and most state courts.\(^\text{108}\) The continued vitality of these rules, therefore, can only be understood by examining some of the countervailing reasons that underlie impeachment with prior convictions and bad acts.

V. COUNTERVAILING REASONS UNDERLYING IMPEACHMENT WITH PRIOR CONVICTIONS AND BAD ACTS

Courts and commentators offer several reasons to disregard the scientific research and to instead maintain the practice of impeachment with prior convictions and bad acts. First, there is considerable skepticism concerning the scientific research itself. Some critics, for example, point to methodological shortcomings and internal contradictions inherent in this research. Second, regardless of the validity of the research, the practice of impeachment with prior convictions and bad acts has considerable intuitive appeal. Because our system of justice is based, at least in part, on notions of community support and legitimacy, this intuitive appeal is a factor that must be considered. Finally, there are certain situations where impeachment with prior convictions or bad acts seems likely to further the search for the truth (presumably the paramount goal of our system of justice). Indeed, a blanket prohibition

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\(^{108}\) Only one state prohibits impeachment with prior convictions in all situations. See Mont. R. Evid. 609. The Montana rule states: "For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible." Id. Moreover, only a few states place significantly greater restrictions on such impeachment than those contained in the Federal Rules of Evidence. See, e.g., Ga. Code Ann. § 24-9-20 (Michie 1982) (providing that evidence of bad character or prior conviction is inadmissible "unless and until the defendant shall have first put his character in issue"); Kan. Stat. Ann. § 60-421 (1983) (prohibiting impeachment of criminal defendant unless defendant has introduced evidence solely to support credibility); State v. Santiago, 492 P.2d 657 (Haw. 1971) (stating that impeachment of criminal defendant with evidence of prior conviction denies defendant due process under state and federal constitutions); People v. Allen, 420 N.W.2d 449 (Mich. 1988) (limiting impeachment to crimes involving dishonesty, false statements and certain thefts); Commonwealth v. Randall, 528 A.2d 1326 (Pa. 1987) (limiting impeachment to convictions within last 10 years involving dishonesty or false statement); State v. McAboy, 236 S.E.2d 431 (W. Va. 1977) (limiting impeachment to crimes involving dishonesty, false statement or to situations where witness places credibility in issue).
against the use of prior convictions or bad acts to impeach a defendant could seriously hinder the truth-seeking process in cases where a defendant has offered evidence to show that he or she is a truthful or law-abiding person.

A. Skepticism about the Scientific Research

Numerous critics have questioned the reliability of the findings contained in many, if not most, of the studies concerning impeachment with prior convictions and bad acts. Indeed, even proponents of psychological research have noted that simulations of the jury process are "imperfect tools for answering empirical questions." As these commentators have suggested, there are several reasons to be skeptical about the findings contained in the psychological and social science literature to date. First, most of the studies were performed under situations that are dramatically different from actual jury deliberations. Indeed, only one of the major studies concerning prejudice from impeachment involved actual jury trials. In most of the other studies, individuals were simply asked to read a short fact pattern about a hypothetical case and reach a verdict. Indeed, in one study, individuals were randomly approached at laundromats, supermarkets, airports, bus terminals and private homes in the metropolitan Boston area, and were simply asked to read a two-page fact pattern and decide whether the defendant was guilty.

Without question, the deliberations conducted in such a situation differ dramatically from the jury deliberations that occur in an actual trial. First, the setting is different. Reading a fact pattern about a hypothetical case and a hypothetical defendant while standing in a laundromat is vastly different from the setting of an actual trial where jurors take an oath before being sworn, are instructed by a judge, hear testimony

\footnote{109. See, e.g., Robert M. Bray & Norbert L. Kerr, Methodological Considerations in the Study of the Psychology of the Courtroom, in THE PSYCHOLOGY OF THE COURTROOM 287, 318 (Norbert L. Kerr & Robert M. Bray eds., 1982); see also Cornish & Sealy, supra note 89, at 221 (noting limitations of technique used to study how variations in rules of evidence may affect jurors' verdicts); Wissler & Saks, supra note 87, at 46 (noting that caution should be used in generalizing from results of study which used mock jurors).

110. See Allen, 420 N.W.2d at 557 (stating that jury study by Kalven & Zeisel is only major study involving verdicts in actual jury trials). For a discussion of this study, see supra notes 82-85 and accompanying text.

111. See, e.g., Doob & Kirshenbaum, supra note 86, at 92 (utilizing 48 men and women who agreed, after being approached in public place by experimenter, to read 400-word hypothetical breaking and entering case); Wissler & Saks, supra note 87, at 39-41 (utilizing people from general public as mock jurors; individuals in study read hypothetical murder and auto theft cases).


113. Id. The mock jurors read one of two possible fact patterns. Id. at 40-41. One fact pattern described a hypothetical murder case; the other described a hypothetical auto theft case. Id.
from actual witnesses, and are then asked, after reaching a group consensus, to pronounce a judgment that will affect the life of a real person. Clearly, the gravity of the situation and the stakes involved in an actual trial are much greater than those found in the studies. The results from the studies, therefore, may not accurately reflect the results that would be found in actual trials.\footnote{114}

Likewise, the fact patterns used in the studies are much simpler and contain far less information than the factual situations considered by juries in actual trials.\footnote{115} Thus, any information about a defendant’s prior convictions takes on greater prominence in the studies than such information would have in an actual trial where the jury would receive much more information about the facts of the case, would likely hear more about the defendant’s explanation of the event in question, and would have alternative means of weighing the credibility of the witnesses (e.g., the jurors also would be able to observe the witnesses’ demeanor in determining their credibility). Finally, because most of the research focuses only on individual mock jurors, these studies lack the element of group decision-making that is necessarily part of actual jury deliberations.\footnote{116}

In addition to the methodological shortcomings of the scientific research, some critics contend that this research does not provide a basis for revising the rules of evidence because there is no consensus within the scientific community about the probative value of, or prejudice resulting from, the use of prior convictions and bad acts.\footnote{117} For example, although many researchers have criticized “trait theory” as an explanation of human personality, textbooks continue to include this theory in their discussion of human personality.\footnote{118} In the same vein, while most

\footnote{114. See generally John Baldwin & Michael McConville, Criminal Juries, in 2 Crime and Justice: An Annual Review of Research 277, 277-86 (Norvall Morris & Michael Tonry eds., 1980) (questioning accuracy of jury simulations); Bray & Kerr, supra note 109, at 287 (describing use of mock jurors for jury research by social psychologist and examining criticisms of such use).

\footnote{115. For instance, the fact pattern in the Doob and Kirshenbaum study was 400 words long. Doob & Kirshenbaum, supra note 86, at 92. The fact pattern in the Hans and Doob study was one page. Hans & Doob, supra note 86, at 239-40. The fact pattern in the Wissler and Saks study was two pages. Wissler & Saks, supra note 87, at 39-41. By contrast, in the experience of the author, a transcript of a criminal trial routinely exceeds 100 pages and occasionally exceeds 1,000 pages.

\footnote{116. See, e.g., David A. Sonenshein, Circuit Roulette: The Use of Prior Convictions to Impeach Credibility in Civil Cases Under the Federal Rules of Evidence, 57 Geo. Wash. L. Rev. 279, 298 n.93 (1988) (noting that some studies did not involve decision-making in group deliberation, which is manner in which jurors perform their task).

\footnote{117. See, e.g., David Crump, How Should We Treat Character Evidence Offered to Prove Conduct?, 58 U. Colo. L. Rev. 279, 283 (1986) (stating that social science “is by no means monolithic in condemning trait theory” and noting that modern textbooks teach this theory without categorically rejecting it).

\footnote{118. See, e.g., Robert A. Baron & Donn Byrne, Social Psychology: Un-}
researchers have concluded that a criminal defendant is prejudiced when he or she is impeached with prior convictions or bad acts or when he or she does not testify for fear of impeachment, the studies are not completely consistent on the scope or magnitude of this prejudice. Indeed, in one study, a defendant in a murder case who was impeached with an auto theft conviction was less likely to be convicted than a defendant who was not impeached. Similarly, in another study, a defendant who did not testify was less likely to be convicted than a defendant who testified and was not impeached with any conviction.

Notwithstanding these criticisms, members of the psychological and social science communities are in general agreement about a number of issues concerning impeachment with prior convictions and bad acts. First, although there are differences of opinion among psychologists about the measurement of human behavior, most agree that prior convictions and bad acts bear little, if any, relation to testimonial credibility. Second, most researchers concur that a defendant is prejudiced, at least to some extent, by the introduction of prior convictions and bad acts or by the defendant's refusal to testify for fear of impeachment. Finally, researchers almost universally believe that limiting instructions fail to cure the prejudice that results from impeachment of the defendant with prior acts of misconduct or from the defendant's failure to testify. Thus, while critics can point out methodological shortcomings...
in some of the scientific research and can also note that there are differences of opinion concerning the results of this research, the scientific research considered in its entirety does undermine the validity of impeachment with prior convictions and bad acts.

Moreover, even if the scientific research does not “prove” that prior convictions and bad acts lack probative value, this research certainly should inform the debate about the validity of impeachment with such acts. As they now stand, some of our rules of evidence appear to be grounded on unstudied assumptions of human nature that generally have been rejected by those who have tested the actual effects of the rules of evidence on human behavior and decision-making. Thus, while skepticism towards the scientific research may be justified to some degree, it does not provide a sufficient basis to reject the findings contained in this research or to continue impeachment practices in their current configuration under the Federal Rules of Evidence.

B. Legitimacy and Catharsis

Although the search for truth is presumed to be a paramount function of any trial, trials cannot be understood solely as a scientific search for an objective “truth.” Rather, trials also function as a means of

supra notes 95-107 and accompanying text. But see Cornish & Scaly, supra note 89, at 216-17 (stating that mock jurors less likely to convict defendant when given limiting instructions).

124. Concern about the validity of this evidence has been recognized by some courts. One court has stated:

The proposition that felons perjure themselves more than other, similarly situated witnesses . . . is one of many important empirical assertions about law that [has] never been tested, and may be false. It is undermined, though not disproved, by psychological studies which show that moral conduct in one situation is not highly correlated with moral conduct in another. Campbell v. Greer, 831 F.2d 700, 707 (7th Cir. 1987); see also Beaver & Marques, supra note 11, at 614 (proposing that, “[b]ecause the legal system has not developed its own experimental system,” it should turn to “psychologists and sociologists [who] have developed an impressive research against which the legal system can test its assumptions”).

125. See People v. Allen, 420 N.W.2d 499, 510 (Mich. 1988) (stating that rule allowing impeachment of defendants with evidence of any prior felony conviction was “the result of assumptions about jury behavior and the effectiveness of limiting instructions that were accompanied by relatively little analysis or study”).

126. Even if trials were designed solely to determine the “truth” about some past event and to make judgments based on this objectively discovered truth, the discovery of such a truth would often be an elusive, and illusory, goal. Indeed, as one commentator has noted:

The factual events . . . happened in the past. They do not walk into court. The court usually learns about these real, objective, past facts only through the oral testimony of fallible witnesses. Accordingly, the court, from hearing the testimony, must guess at the actual, past facts. . . . There can be no assurance that . . . that guess[] will coincide with those actual, past facts.
peacefully resolving disputes, of giving people with grievances their "day in court," of assigning blame to people who have transgressed society's norms, and of vindicating those people who have been charged with crimes that they did not commit. Thus, trials also "serve to satisfy the community that order prevails and that justice is being done." 127 Indeed, one commentator has referred to the dispute-resolution function of a trial as a means of providing the community with a non-violent form of "catharsis." 128

This cathartic role of the legal system would be greatly reduced, however, if people believed that trials produced unfair or unjust results. Indeed, if people believed the system to be unfair, they might be less willing to resolve their disputes through the court process and might instead resolve their disputes through other, perhaps less peaceful, means. 129 The legitimacy of, and trust in, the trial process, therefore, must be maintained at a high level if trials are to serve the cathartic functions that they were designed, at least in part, to serve. 130 Furthermore,
it is the perception that trials produce equitable results, rather than scientific proof of such results, that is the critical factor in fostering community support and systemic legitimacy.131 Thus, considerations of legitimacy and catharsis would not be served by a system of rules that had support in the scientific community but lacked support in the community at large.132

In the context of impeachment practices, there is considerable intuitive support for the proposition that a jury should be allowed to know the criminal background of a witness whose testimony they are being asked to believe.133 Therefore, a rule that prohibited such impeachment in all situations, even if scientifically valid, might lessen the perception that the judicial process is legitimate and thereby diminish the cathartic role that the process currently serves.

On the other hand, the cathartic value of impeachment with prior convictions and bad acts, or at least the magnitude of this cathartic value, should be questioned. It is not at all certain that a ban on impeachment practices would have a widespread effect on either community support or systemic legitimacy because it is unlikely that most jurors know and understand current impeachment practices.134 Furthermore,

Guidelines for Ensuring Fair and Effective Processes, 103 HARV. L. REV. 1086, 1087 (1990) (noting that courts and legislatures have begun to mandate methods of alternative dispute resolution to alleviate time consuming and expensive courtroom adjudication).

Society needs to have confidence in the outcomes produced by its system of adjudication. Criminal law most clearly dramatizes this need; when we contemplate punishment that deprives one of liberty, property, or even life, the perception of fairness is essential to quiet our collective conscience. Social acceptance is a function of how the system is perceived, and not of how it actually performs.

Id. Other commentators also emphasize the importance of community perception. See Charles R. Nesson, Reasonable Doubt and Permissive Inferences: The Value of Complexity, 92 HARV. L. REV. 1187, 1194 (1979).

In an earlier time, trial by ordeal may have functioned effectively as a means of adjudication, not because it produced true results, but because the populace thought it did, and therefore respected its results. . . . [A]uthoritative resolution [of disputes] might even today seem to be the real goal, with ascertainment of the truth but a useful means to that end.

Id.

Catharsis, then, is not achieved solely through the operation of rationality. It is an emotional response, hinging on our sense of satisfaction with the processes of the court. . . . Were the courts to reverse the rules on the basis of [scientific] opinion, we might not be sufficiently satisfied with the trial process to maintain our belief in its legitimacy.

Id.

133. For a discussion of this support, see supra notes 59-61 and accompanying text.

134. See Kramer & Koenig, supra note 96, at 419. In this study, only slightly
there has been no evidence of widespread public disapproval in those jurisdictions where impeachment with prior convictions and bad acts has been banned or sharply limited.\(^{135}\)

Thus, while impeachment with prior convictions and bad acts may foster legitimacy and catharsis, this practice might not do so to any meaningful degree. Accordingly, these considerations do not provide a sufficient basis for maintaining our current impeachment practices in light of the limited probative value and considerable prejudice that stem from impeachment with most prior convictions and bad acts.

C. Advancement of the Truth-Seeking Process

Impeachment with prior convictions or bad acts can have significant probative value in certain cases. There are two situations in which impeachment with prior convictions or bad acts arguably advances the truth-seeking process without creating an excessive risk of improper propensity inferences. The first situation involves impeachment with prior convictions or bad acts that include dishonesty as an element of the crime (e.g., convictions for perjury or false statements). Indeed, most courts and commentators have argued that crimes involving dishonesty are the best predictors of testimonial veracity and have the lowest risk of undue prejudice.\(^{136}\) As one court has explained:

Most crimes can...be seen as evidence of a lack of veracity only when mediated through the belief that the individual has a bad general character. This results in both a low probative value and a strong potential for prejudice, as it will be difficult for jurors to put out of their minds the very step which allowed them to reach their conclusion as to veracity. On the other hand, crimes having an element of dishonesty or false statement are directly probative of a witness' truthfulness and at the same time present little possibility for prejudice since they can be understood as such, absent the mediation of the conclusion that the witness-accused is of bad general character.\(^{137}\)

There are, however, many reasons to limit impeachment with...
crimes involving dishonesty or false statement. First, as noted earlier, considerable research indicates that lying is not a consistent character trait.\textsuperscript{138} Thus, a person who has been convicted of a crime involving dishonesty may be no more likely to lie on the witness stand than a person who has not previously been convicted of such a crime.\textsuperscript{139} Indeed, someone who has been convicted for perjury might be less likely to lie again on the witness stand than a person who has not been convicted of such a crime, because he or she is more acutely aware of the consequences that flow from committing perjury.

Second, there are reasons other than a predisposition for dishonesty that may cause a person to lie on the witness stand. As one commentator noted:

Most people lie occasionally. They lie on important matters and under oath in direct proportion to their interests and inverse proportion to their belief that the truth can be objectively demonstrated. . . . [I]t seems quite likely that a guilty person without prior convictions will lie on the stand as readily as will a guilty veteran, while innocent people with extensive criminal histories will testify as truthfully as the innocent novice.\textsuperscript{140}

Thus, the likelihood that a defendant is lying in court may well be determined more by the facts of the particular case than by the defendant’s alleged propensity for dishonesty.

Third, in most cases, introduction of evidence of prior convictions and bad acts is not necessary to effectively impeach the testimony of a criminal defendant. To the contrary, a cross-examiner can utilize a wide variety of techniques to attack the credibility of the defendant’s testimony. For example, a prosecutor may introduce a defendant’s prior inconsistent statements, may point out defects in a defendant’s memory or capacity to observe, or may demonstrate the implausibility of a defendant’s alibi.\textsuperscript{141} In addition, a prosecutor can highlight a fact that the jury

\textsuperscript{138}. See, e.g., Foster, supra note 11, at 29 n.32 (stating that character traits cannot predict reactions to different situations). For a further discussion of the relevance or irrelevance of character traits to behavior prediction, see supra notes 62-76 and accompanying text.

\textsuperscript{139}. See, e.g., Hartshorne & May, supra note 70, at 411 (refuting theory that deceit and honesty are “unified character traits”); see also Beaver & Marques, supra note 11, at 611 (stating that “[c]rimes of dishonesty are not much higher in probative value than crimes of violence”); Miguel A. Mendez, California’s New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies, 31 U.C.L.A. L. Rev. 1003, 1052 (1984) (stating that “evidence that a witness has been convicted of a felony involving dishonesty or has cheated on his taxes may or may not tell us anything about whether he was truthful on the stand”).

\textsuperscript{140}. Uviller, supra note 2, at 867-68 (footnotes omitted).

\textsuperscript{141}. For a discussion of other methods of possible cross-examination and alternative impeachment methods, see Beaver & Marques, supra note 11, at 614-15; Foster, supra note 11, at 26.
most assuredly already knows—the defendant's interest in the outcome of the case—to undermine the defendant's credibility.\(^{142}\) Thus, there are many methods of cross-examination, other than impeachment with prior convictions and bad acts, that can undermine a defendant's credibility without causing the trier of fact to engage in improper propensity inferences.\(^{143}\)

Finally, impeachment with prior acts involving dishonesty or false statement carries a substantial risk of undue prejudice when a defendant is on trial for a crime involving dishonesty or false statement.\(^{144}\) Thus, even though prior convictions and bad acts involving dishonesty might shed the most light on a defendant's credibility as a witness, these prior instances of misconduct still are likely to have limited probative value, are not necessary to undermine the defendant's credibility as a witness, and can lead the trier of fact to engage in improper propensity inferences. Accordingly, impeachment of criminal defendants with such prior instances of misconduct is not warranted.

There is, however, one situation in which impeachment with prior convictions and bad acts does appear to significantly further the truth-seeking process—where a defendant affirmatively introduces evidence showing that he or she is a law-abiding person or has a character for truthfulness. For example, it would seriously skew the truth-seeking process to prohibit impeachment with prior convictions in a situation where a defendant denies that he or she has ever used drugs, even though the defendant has prior convictions for drug possession.\(^{145}\)

142. In fact, jury instructions typically inform jurors that they may consider the defendant's interest in the outcome of the case in weighing the defendant's credibility. See, e.g., COMM. ON MODEL JURY INSTRUCTIONS NINTH CIRCUIT, MANUAL OF MODEL JURY INSTRUCTIONS FOR THE NINTH CIRCUIT § 3.08 (1985) (stating that, in determining credibility of witness, "you may take into account . . . [whether] the witness [had] an interest in the outcome of this case or any bias or prejudice concerning any party or any matter involved in the case); CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, Instruction 2.11 (3d ed. 1978) (stating that, "[i]n reaching a conclusion as to the credibility of any witness, and in weighing the testimony of any witness, you may consider . . . whether the witness has any motive for not telling the truth . . . [and] whether the witness has any interest in the outcome of this case").

143. Indeed, the psychological research indicates that a defendant's credibility is low even if he or she is not impeached with a prior conviction. In the most revealing study on this issue, mock jurors rated a defendant's credibility as being significantly lower than the credibility of all other witnesses, even where the defendant was not impeached with a prior conviction. Wissler & Saks, supra note 87, at 40-41 (credibility of non-defendant witnesses rated twice as high as credibility of defendant who was not impeached with prior convictions).

144. See, e.g., Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967) (recognizing that convictions for crime that is same or similar to charged crime should be admitted "sparingly" because of risk of undue prejudice).

145. See, e.g., United States v. Cardenas, 895 F.2d 1338, 1345 (11th Cir. 1990). In Cardenas, the court upheld the impeachment of a defendant with evidence of prior drug dealings where the defendant had denied that he had ever sold drugs. Id. The court noted: "Rule 608(b) should not stand as a bar to the
Likewise, a prohibition against impeachment with prior convictions would thwart the truth-seeking process where a defendant introduces evidence showing that he or she has never lied, even though the defendant has a prior perjury conviction. In these situations, the probative value of the prior convictions or bad acts is unmistakable, because the defendant has explicitly put into evidence a proposition that is directly contradicted by the prior conviction or bad act.146

VI. A PROPOSED SOLUTION

As set forth above, serious criticisms have been directed toward the practice of impeachment with prior convictions and bad acts. These criticisms have focused on the practice's lack of probative value, its potential for impermissible propensity inferences, and the inefficacy of limiting instructions to cure resulting prejudice. There are, however, countervailing reasons supporting the use of this type of impeachment evidence. These reasons include the intuitive appeal of impeachment practices, the skepticism toward the findings of the scientific community, and considerations of legitimacy and catharsis served by impeachment with those prior convictions that are most widely believed to advance the truth-seeking process. To reconcile the criticisms of these impeachment practices with the countervailing reasons supporting their usage, this author recommends that Rules 608 and 609 be realigned to allow impeachment with prior convictions or bad acts only when a witness affirmatively introduces evidence supporting his or her credibility as a witness.147
The proposed rule would allow a witness to be impeached with evidence of any prior conviction or bad act that directly contradicts evidence that a witness affirmatively and explicitly introduces to show that he or she has a law-abiding or truthful character. Under this formulation, the government would be able to impeach a criminal defendant who testifies that he or she has never used drugs with evidence of a prior drug conviction, but would not be able to introduce a prior perjury conviction if the defendant has not explicitly introduced evidence concerning his or her character for truthfulness. Likewise, the government would be able to impeach a defendant who claims that he or she has never killed a person with a prior murder conviction, and would be able to impeach a defendant who testifies that he or she has never lied with a prior perjury conviction. The government would not, however, be able to introduce evidence of other convictions that did not directly refute the defendant's claims.

In addition, a court would no longer have to balance the probative value and the prejudicial impact of the convictions and bad acts admissible under this rule. Rather, the test would be simple and straightforward—such acts would be admissible whenever a witness affirmatively introduces evidence to show that he or she has a law-abiding or truthful character. This provision is justified because impeachment under the proposed rule would not automatically deter a criminal defendant from testifying; it only would deter the defendant from affirmatively introducing evidence that could be directly contradicted through impeachment with prior convictions and bad acts. Because no witness has a right to present false evidence without challenge, and because the inability to challenge such false evidence would seriously skew the truth-seeking function paramount in our trial structure, a per se policy allowing impeachment in these situation is warranted.

matically impeach government witness, yet conceal defendant's conviction and possibly those of defense witnesses); see also United States v. Jackson, 405 F. Supp. 938 (E.D.N.Y. 1975) (prohibiting impeachment of defendant with assault conviction, but only if defendant did not put on evidence concerning his unblemished past and sought prior approval from court before impeaching government witnesses with prior assault convictions).

148. See Nix v. Whiteside, 475 U.S. 157, 173 (1986) (holding that defendant does not have right to introduce false testimony; counsel could withdraw where defendant wished to introduce such testimony); United States v. Havens, 446 U.S. 620, 629 (1980) (holding that defendant can be impeached with improperly obtained confession when he introduces evidence that is directly contradicted by improperly obtained confession; stating that proper functioning of adversary system mandates that "when a defendant takes the stand, the government be permitted proper and effective cross-examination in an attempt to elicit the truth"); Harris v. New York, 401 U.S. 222, 225 (1971) (upholding use of inconsistent non-Mirandized statements for impeachment purposes; stating that while criminal defendants are privileged to testify in their defense, "that privilege cannot be construed to include the right to commit perjury").
Finally, the proposed rule would not contain any time limitation on the prior convictions and bad acts that could be used to contradict evidence introduced by a witness to support his or her credibility. This provision is needed to prevent a witness from being able to introduce, without fear of contradiction, false evidence supporting his or her credibility simply because a prior act falls outside a particular time limit for admissibility. For example, a defendant might testify that he or she has never lied. A twelve-year old perjury conviction, although not likely to be admissible under the current rules,\textsuperscript{149} would be admissible under the proposed rule because it would directly contradict evidence that the defendant has explicitly and affirmatively put into issue.\textsuperscript{150}

B. Possible Criticisms of the Proposed Rule

One possible criticism of this proposed rule is that it treats convictions and non-conviction bad acts in an equivalent manner. Critics might argue that non-conviction wrongs should be admitted into evidence more sparingly than convictions because non-conviction wrongs have not been proved beyond a reasonable doubt. Otherwise, according to this argument, a jury might hear evidence of bad acts for which there is little proof and might thereby use unreliable evidence to determine that a defendant's testimony is not credible.

A second criticism might urge greater restrictions on the use of non-conviction wrongs because these acts cannot be proved as easily as convictions, and the admission of such acts could therefore lead to undue delay and confusion of the issues. In contrast to a conviction which can be proved quickly through resort to an official record,\textsuperscript{151} a non-conviction wrong would have to be proved through the testimony of witnesses if the defendant did not admit the commission of the bad act, a process that could both greatly extend the length of the trial and divert the jury's attention from the issue of guilt in the case at hand.

Neither of these criticisms, however, mandate separate provisions for convictions and non-conviction wrongs because these problems can effectively be handled under the current rules. For example, a prior

\textsuperscript{149} For a discussion of time restrictions in the current Rule, see \textit{supra} notes 42-43 and accompanying text.

\textsuperscript{150} Some might argue that time limitations are warranted because very old convictions and bad acts are less directly tied to a witness's present credibility than a recent act of misconduct. For example, a 20-year-old conviction has less probative value than a conviction rendered one month before a witness testifies. While time limits are warranted under the current Rules because these Rules allow impeachment with prior acts regardless of the nature of the defendant's testimony, such limits would not be warranted under the proposed rule because prior acts would not be admissible unless a defendant chose to make these acts relevant by introducing evidence that could be directly contradicted by these prior acts.

\textsuperscript{151} \textit{See Fed. R. Evid. 803 (22)} (creating exception to hearsay rule for judgments of prior convictions).
non-conviction wrong is not unreliable simply because it is not the subject of a conviction. Rather, such acts, like prior bad acts admitted under Rule 404(b), must still be supported by a preponderance of the evidence in order to be admissible at trial.152

Likewise, considerations of delay and confusion of the issues do not dictate a more stringent standard of admissibility for non-conviction wrongs. To the contrary, Rule 608(b) already prohibits extrinsic evidence of a non-conviction wrong to impeach a witness' general character for truthfulness.153 In addition, under the collateral evidence rule, extrinsic evidence cannot be introduced to impeach a witness who affirmatively introduces evidence supporting his or her credibility unless the evidence concerns a non-collateral, material issue in the trial.154 Finally, Rule 403 currently allows a court to exclude evidence "if its probative value is substantially outweighed by the danger . . . of confusion of the issues, . . . or by considerations of undue delay."155

Thus, the possible criticisms against consolidating Rules 608 and 609 can be met by existing prohibitions against extrinsic evidence to impeach a witness on collateral issues and by existing provisions requiring a threshold level of proof before evidence of a non-conviction wrong is admissible. Conversely, the truth-seeking process would be enhanced by the creation of a single rule that would limit the admissibility of prior convictions under Rule 609 and prior bad acts under Rule 608 to those situations where the prior instances of misconduct directly contradict evidence supporting the witness' credibility.


153. For a discussion of Rule 608(b), see supra notes 52-57 and accompanying text.

154. Under the collateral evidence rule, extrinsic evidence cannot be introduced to impeach a witness on a collateral matter. See, e.g., United States v. Herzberg, 558 F.2d 1219, 1223 (5th Cir. 1977) (holding that prohibition of extrinsic evidence under 608(b) is consistent with "long-standing doctrine that a witness may not be impeached with extrinsic evidence as to a collateral matter"), cert. denied, 434 U.S. 930 (1978); see also McCormick, supra note 50, § 47 (stating that "prohibition against contradiction as to collateral matters is one of the concepts gathered together in Rule 403").

VII. CONCLUSION

Our trial system, as embodied in the Federal Rules of Evidence, tries to accomplish two often contradictory goals. On the one hand, the rules are designed to ensure that we try cases rather than people. On the other hand, the rules also are designed to further the truth-seeking process by maximizing the amount of relevant information we provide to our triers of fact. In the context of impeachment with prior convictions and bad acts, the Rules of Evidence attempt to accommodate these competing principles by limiting the use of prior convictions and bad acts so that the jury can consider them only in terms of the defendant’s credibility, and not as proof of his or her underlying guilt.

The problem with the rules as they are currently constituted, however, is that they allow impeachment of the criminal defendant with a whole host of prior convictions and bad acts that are only marginally related to the defendant’s credibility, or that are too likely to cause a jury to find the defendant guilty because he or she is the sort of person who commits crime. Therefore, this Article recommends that the rules be revised so that the admissibility of prior convictions and bad acts is limited to those situations where they most measurably advance the truth-seeking process—where they directly contradict evidence that a witness has affirmatively put into issue. Limiting impeachment to such situations would most fully protect a defendant from improper propensity inferences and, at the same time, would maximize a jury’s ability to determine what actually occurred in a given case, “to the end that the truth may be ascertained and proceedings justly determined.”

156. FED. R. EVID. 102.