GAME OVER: A PROPOSAL TO REFORM
FEDERAL RULE OF EVIDENCE 609

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I. INTRODUCTION

Federal Rule of Evidence 609 creates a dilemma for criminal defendants who have previously been convicted of other crimes. Should the defendant choose to take the stand and testify, Rule 609 subjects him to the strong possibility of impeachment with evidence of his previous convictions, ostensibly to taint the jury’s evaluation of the defendant’s testimonial credibility. Rule 609 thus creates a zero-sum game in which a criminal defendant must weigh his choice of whether to testify and tell his story against the likelihood that he may be impeached with evidence of his prior convictions. Knowledge of a defendant’s prior convictions exposes the jury to three distinct temptations to convict the defendant for a reason other than the jury’s belief beyond a reasonable doubt that the defendant committed the charged offense. First, a juror armed with knowledge of a defendant’s prior crimes could be tempted to punish the defendant again for his prior offenses and not for the charged crime. Second, a juror

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1 Specifically, the Rule provides that [f]or the purpose of attacking the character for truthfulness of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable 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 determines 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 regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

FED. R. EVID. 609(a).


3 See, e.g., United States v. Mitchell, 2 U.S. (2 Dall.) 357 (1795).
may also be tempted by the knowledge of the defendant’s prior convictions to convict the defendant simply because of the view that he is a “bad man” and should be removed from society.  

Third, a juror may use the prior conviction information to infer that the defendant possesses a propensity to commit a crime—an inference specifically prohibited by Rule 404. A criminal defendant who would otherwise testify may instead choose not to take the stand specifically to prevent the jury from being exposed to evidence of his prior crimes. Thus, the potential for impeachment can result in fewer criminal defendants taking the stand with the concomitant loss of their ability to tell the jury their story in their own words.

Although defendants impeached under Rule 609 are normally entitled to the issuance of a limiting instruction to the jury, empirical studies have called into question the actual value of these limiting jury instructions. Knowledge of prior convictions invites jurors to make inferences beyond the scope of those permitted by Rule 609, and this invitation is likely too often accepted. Practitioners have come to note that “if you throw a skunk into the jury box, you can’t instruct the jury not to smell it.” Defendants have also taken notice—defendants with records of prior convictions do not testify as often as defendants without them. By remaining off the stand, defendants substantially increase the probability that a jury will not hear of

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4 See, e.g., Note, Other Crimes Evidence at Trial: Of Balancing and Other Matters, 70 YALE L.J. 763, 763 (1961).
5 F ED. R. EVID. 404(b) (“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.”).
6 When evidence of prior convictions is admitted for impeachment purposes under Rule 609, the defendant may request, and usually receives, an instruction to the jury limiting the use of the information for credibility purposes only. 1 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 1.03 (rev. ed. 1998).
7 Empirical research has called into question the jury’s ability to substantively follow limiting instructions and illuminates the likely misuse of prior misconduct evidence for purposes other than credibility. Roselle L. Wissler & Michael J. Saks, On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt, 9 LAW & HUM. BEHAV. 57, 42 (1985).
8 F ED. R. EVID. 609(a) (allowing impeachment solely for the “purpose of attacking the character for truthfulness of a witness”).
9 Wissler & Saks, supra note 7, at 44.
10 See, e.g., Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962).
11 HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 146–47 (Little, Brown and Co., spec. ed. 1993) (1966). Defendants who do not have a criminal record elect not to testify in only nine percent of cases examined. Id. at 146. When the defendant does have a record, twenty-six percent elect not to testify. Id. When the case for acquittal is strong, defendants without records elect to testify ninety percent of the time, compared with fifty-three percent for defendants with criminal records. Id.
their prior criminal record. However, in criminal cases, the defendant tends to be one of the best sources of available information, thus compounding the moral conundrum Rule 609 imposes upon our system.

The American adversarial system depends on the parties to produce information. Thus, both parties view potential proffers of evidence through the prism of partisan self-interest. Absent necessity, a defendant’s belief that the fact-finder will utilize information in a manner not conducive to his self-interest could influence his decision to proffer the information. This partisan behavior directly impacts the information given to the ultimate fact-finder. When a criminal defendant with prior impeachable convictions decides to remain silent due to fear of impeachment, Rule 609 in effect deprives the jury of hearing the defendant’s story and thus directly leads to a decline of useful, admissible information about the event in controversy. There must be a reconciliation between the system’s desire for the defendant’s testimony and the reality that should the defendant provide such testimony, impeachment will likely follow shortly thereafter.

Our historic acknowledgement that criminal defendants should be able to testify, the actual epistemic value of such testimony, and Rule 609’s effect on defendants—their likelihood to choose silence—indicate that the Rule should be reformed. This Comment explores the strategies available to the adversarial parties through the

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12 Id. at 146–47. A jury does not hear of a defendant’s prior record eighty-seven percent of the time when the defendant elects not to testify. Id. at 147. Should the defendant take the stand, the percentage falls to twenty-eight percent. Id.


14 In contrast, the inquisitorial model used on the European continent concentrates the information gathering process in the hands of the investigating magistrate. See Mirjan R. Damška, Evidence Law ADRIFT 77 (1997).


16 See infra Part III.

17 See infra Part II.

18 See, e.g., Hornstein, supra note 13, at 17–18. Although Rule 609 provides that the impeachment evidence be subjected to a balancing test before being admitted, admissibility tends to be the norm. See id. at 20. But see United States v. Footman, 35 F. Supp. 2d 60, 61–63 (D. Mass. 1998) (holding that defendant’s prior rape conviction was inadmissible for impeachment purposes).

19 See infra Part II.

20 See infra Part II.

21 Kalven & Zeisel, supra note 11, at 146–47.
lens of the zero-sum paradigm of game theory and proposes that evidence of prior convictions be made inadmissible for the purposes of impeaching a criminal defendant’s credibility. Part II charts the historical growth of a criminal defendant’s right to testify and introduces the dilemma faced by criminal defendants with prior convictions. Part III further explores this dilemma with a focus on Rule 609. Part IV utilizes game theory to model the defendant’s dilemma of whether to testify under Rule 609. Part V proposes to eliminate the dilemma by amending the Rule to disallow prior crimes impeachment against criminal defendants.

II. THE HISTORY OF THE GAME

Evidentiary rules that governed what import the jury should grant to the impeachment of a defendant’s testimony did not exist at early common law because criminal defendants had no right to testify at all. The standard English punishment for the commission of a felony was death. Due to the prevalence of capital punishment, criminal defendants were deemed to have a strong incentive to lie under oath. This doctrine of interest held that “interested persons” were incompetent to testify. As all parties to an action were “interested,” the doctrine by definition prevented the testimony of criminal defendants. To compensate for the defendants’ incompetence

23 See infra Part V.
24 CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 65 (West Pub’g Co. 1954).
25 See 4 WILLIAM BLACKSTONE, COMMENTARIES *9.
26 See 1 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 350–55 (London, MacMillan 1883); see also 3 WILLIAM BLACKSTONE, COMMENTARIES *370.
27 MCCORMICK, supra note 24, § 65.
28 This included parties to civil actions. See, e.g., State v. Barrows, 76 Me. 401, 409 (1884).
29 At early common law, trials could be resolved through compurgation. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 24–26 (1898). Parties obtaining groups of “oath-swearers” would have these “witnesses” swear to the veracity of the party’s sworn oath. Id. at 25. Thus, for example, in an action in debt the party who had to prove his case was to bring in ten men; five were set on one side and five on the other, and a knife was tossed up in the space between them. The five towards whom the handle lay were then set aside; from the other five one was removed, and the remaining four took on the oath as compurgators. Id. at 26. Whether a party could obtain the requisite number of people as compurgators was the deciding factor. See id. at 27–28. The Norman Conquest brought with it the attempt of the Crown to consolidate its power; trial by compurgation was forbid-
to testify under oath, they were granted the right to make an unsworn statement before the jury.\textsuperscript{30} The American colonies also practiced this English doctrine,\textsuperscript{31} and it remained in place following the Revolution.\textsuperscript{32}

Although ostensibly designed to benefit the defendant, the unsworn statement had to be delivered without the aid of counsel and thus tended to be of little and uncertain value to the jury.\textsuperscript{33} It was uncommon for defendants, who had little understanding of the legal issues that confronted them, to give unsworn statements that would aid their legal case.\textsuperscript{34} Moreover, while the defendant could deliver the statement without fear of cross-examination, in some jurisdictions the prosecutor could present evidence in rebuttal, even otherwise impermissible evidence.\textsuperscript{35} Thus, the practical operation of the unsworn statement doctrine significantly impaired the defendant’s ability to tell his story to the fact-finder.

By the early nineteenth century, the doctrine of interest came under attack,\textsuperscript{36} with reformers arguing that it prevented too much in-


\textsuperscript{31} See The King v. Lukens, 1 U.S. (1 Dall.) 5 (1762) (in which defendant moved to have himself sworn, but court denied motion because matter “must be proved by indifferent Witnesses”).

\textsuperscript{32} See Note, \textit{The Adoption of the Common Law}, 16 Colum. L. Rev. 499, 499–500 (1916).

\textsuperscript{33} Unsworn statement testimony would be taken for any value the jury wished to grant such a statement and in some jurisdictions was not even considered evidence. See Ferguson, 365 U.S. at 589.

\textsuperscript{34} See id. at 592–93.

\textsuperscript{35} See, e.g., Jackson v. State, 48 S.E.2d 865, 866–71 (Ga. 1948).

\textsuperscript{36} Bentham led the way by advocating the abolition of all exclusionary rules of evidence and allowing a system of “free-proof” to stand in its stead. \textit{William Twining, Theories of Evidence: Bentham and Wigmore} 3 (1985).
formation from being put before the fact-finder. In the United States, the abrogation of the rules of interest for parties in civil trials came first, but, by the mid-nineteenth century, states also began to grant competency to criminal defendants. After witnessing these reforms in the United States, English commentator Sir James Stephen stated that he was

convinced by much experience that questioning, or the power of giving evidence, is a positive assistance, and a highly important one, to innocent men, and I do not see why in the case of the guilty there need be any hardship about it. . . .

. . . A poor and ill-advised man . . . is always liable to misapprehend the true nature of his defense, and might in many cases be saved from the consequences of his own ignorance or misfortune by being questioned as a witness.

The results impressed Stephen to such an extent that he changed his own position regarding the grant of competency to criminal defendants in the late nineteenth century after years of advocating otherwise. These British observations of the trend to grant competency in America led Britain to do the same.

By the mid-twentieth century, Georgia was the last common law jurisdiction on earth to deny competency to criminal defendants. The characteristics of the unsworn statement finally elicited action

37 The erosion took place first in England, followed by other common law jurisdictions, including the United States. James Bradley Thayer, A Chapter of Legal History in Massachusetts, 9 HARV. L. REV. 1, 10–12 (1895).
38 Ferguson, 365 U.S. at 576 n.5.
39 Individual states granted competency to criminal defendants to testify in the following years: Alabama, 1885; Alaska, 1899; Arizona, 1871; Arkansas, 1885; California, 1866; Colorado, 1872; Connecticut, 1867; Delaware, 1893; Florida, 1895; Hawaii, 1876; Idaho, 1875; Illinois, 1874; Indiana, 1873; Iowa, 1878; Kansas, 1871; Kentucky, 1886; Louisiana, 1886; Maine, 1864; Maryland, 1876; Massachusetts, 1866; Michigan, 1881; Minnesota, 1868; Mississippi, 1882; Missouri, 1877; Montana, 1872; Nebraska, 1873; Nevada, 1867; New Hampshire, 1869; New Jersey, 1871; New Mexico, 1880; New York, 1869; North Carolina, 1881; North Dakota, 1879; Ohio, 1867; Oklahoma, 1890; Oregon, 1880; Pennsylvania, 1885; Rhode Island, 1871; South Carolina, 1866; South Dakota, 1879; Tennessee, 1887; Texas, 1889; Utah, 1878; Vermont, 1866; Virginia, 1886; Washington, 1871; West Virginia, 1881; Wisconsin, 1869; and Wyoming, 1877. Id. at 577 n.6. In 1961, the Supreme Court of the United States mandated that Georgia also extend competency to criminal defendants. Id. at 596.
40 Stephen, supra note 26, at 442–44.
41 Prior to the grant of competency, Stephen had argued that a criminal defendant should not be extended competency to testify due to the pressure of being untruthful on the stand. JAMES F. STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 185–88, 199–202 (Fred B. Rothman & Co., 2d ed. 1985) (1890).
42 See Criminal Evidence Act, 1898, 61 & 62 Vict., c. 36, §§ 1–7 (Eng.).
43 Ferguson, 365 U.S. at 570.
from the United States Supreme Court, which examined it beneath the umbrella of the more general right to counsel.\textsuperscript{44} The Supreme Court relied on the right to counsel to find that jurisdictions in the United States must allow defendants to have their statements elicited through the questioning of their lawyers.\textsuperscript{45} For example, in \textit{Ferguson v. Georgia},\textsuperscript{46} the defense counsel attempted to call the defendant, Ferguson, to testify at trial, only to be rebuffed by the trial judge.\textsuperscript{47} On appeal to the Supreme Court, Ferguson successfully argued that a failure to allow him to testify deprived him of the right to have his counsel elicit his statement from him, rather than delivering a statement alone, without the aid of counsel.\textsuperscript{48}

The grant of competency to criminal defendants tended to be accompanied by the restriction and eventual abolition of the unsworn statement doctrine itself.\textsuperscript{49} Despite the obvious benefits, however, the demise of the unsworn statement doctrine also led to the dilemma faced by those with prior convictions. In all American jurisdictions, from \textit{Ferguson} onward, the defendant’s choice would be either to testify under oath or to remain silent. In either case, a defendant would suffer the consequences of any unintended inferences that the jury might thereby establish. The Supreme Court attempted to mitigate the potential harm caused by a defendant’s choice to remain silent by holding that, should a defendant choose silence, no comment by the court could work to create an inference of guilt.\textsuperscript{50} The Court further

\textsuperscript{44} Id. at 594–95.
\textsuperscript{45} Id. at 596.
\textsuperscript{46} 365 U.S. 570 (1961).
\textsuperscript{47} Id. at 571.
\textsuperscript{48} Id. at 596. Notably, the defendant argued for an extension of the Fourteenth Amendment not to cover the right to testify, but rather to have a right to counsel. \textit{Id.} at 601 (Clark, J., concurring). In concurrence, Justice Clark noted that by accepting the defendant’s argument, the Court left open the possibility of the defendant making an unsworn statement with the aid of counsel without being cross-examined. \textit{Id.} at 602.
\textsuperscript{49} Id. at 583–84, 587.
\textsuperscript{50} \textit{Griffin v. California}, 380 U.S. 609, 615 (1965). Interestingly, the Court cited to the opinion in \textit{People v. Modesto}, 398 P.2d 753 (Cal. 1965), which indicated that an inference of guilt may not be the only inference made by the jury should the defendant choose to stay silent. \textit{Griffin}, 380 U.S. at 614–15. According to the Court, the jury could also infer that the defendant chose to stay silent due to the pressure of prior conviction impeachment. \textit{Id.} The \textit{Modesto} court justified its ruling in part on the idea that there was no way to instruct the jury to disregard the prejudicial effect of a defendant’s refusal to testify. \textit{Modesto}, 398 P.2d at 761. The Court’s reasoning in \textit{Griffin} later found its way into the Federal Rules of Evidence, which states, for example, that “[u]pon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.” \textit{Fed. R. Evid.} 513.
reinforced the goal of having the defendant testify by removing other common law barriers\textsuperscript{51} and extending the right to a defendant whose testimony included recollections achieved through hypnosis.\textsuperscript{52} In both instances, the Court referred to its decisions as a matter of fairness to the defendant,\textsuperscript{53} and as a method of improving the epistemological value of the trial process.\textsuperscript{54}

The historical progression of the defendant’s ability to testify under oath illuminates several crucial aspects of the problem of Rule 609 and impeachment. There is an ever increasing desire to allow a defendant’s testimony into the trial arena. Indeed, the Supreme Court has come to accept that the defendant’s story is one of the most crucial pieces of information available to the fact-finder,\textsuperscript{55} and a need to provide a fair proceeding would seem to outweigh any lingering concerns about the nature of the oath itself. However, by enshrining the defendant’s constitutional ability to testify under oath with aid of counsel,\textsuperscript{56} the Supreme Court only reinforced the dilemma presented to defendants with prior convictions. The choice of whether to testify may be created and reinforced as a constitutionally

\textsuperscript{51} Brooks v. Tennessee, 406 U.S. 605, 612–13 (1972) (holding that the common-law restriction which forced the defendant to choose whether or not to testify before calling any other witnesses violated the right to counsel). The Court found that the restriction placed a “heavy burden on a defendant’s otherwise unconditional right to take the stand . . . . The rule, in other words, cuts down on the privilege (to remain silent) by making its assertion costly.” \textit{Id.} at 610–11 (footnote omitted).


\textsuperscript{53} \textit{Id.} at 51; see \textit{Brooks}, 406 U.S. at 612–13; see also Faretta v. California, 422 U.S. 806, 819 n.15 (1975) (calling the right of the accused to testify one of the rights that “are essential to due process of law in a fair adversary process”); In re Oliver, 333 U.S. 257, 273 (1948) (“A person’s right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.”).

\textsuperscript{54} Rock, 483 U.S. at 49–50; see Brooks, 406 U.S. at 609.

\textsuperscript{55} See Rock, 483 U.S. at 52.

\textsuperscript{56} Brooks, 406 U.S. at 611–12. The Supreme Court was well aware of the dilemma faced by defendants.

Pressuring the defendant to take the stand, by foreclosing later testimony if he refuses, is not a constitutionally permissible means of ensuring his honesty. It fails to take into account the very real and legitimate concerns that might motivate a defendant to exercise his right of silence. And it may compel even a wholly truthful defendant, who might otherwise decline to testify for legitimate reasons, to subject himself to impeachment and cross-examination at a time when the strength of his other evidence is not yet clear.

\textit{Id.}
protected trial tactic in our adversarial system. However, the overall value of each tactical choice—to testify or to remain silent—is questionable. Both of these choices provide admittedly negative consequences to the defendant. Thus, while the Supreme Court extended and protected criminal defendants’ right to testify, it did not resolve the tactical dilemma this right poses defendants with prior convictions.

Congress recognized the dilemma, at least in part. By passing Federal Rule 609, Congress sought to alleviate the burden placed upon defendants with prior convictions by imposing a balancing test. The current adoption of Federal Rule 609 is the result of a congressional compromise between the House, which promulgated a draft limiting the Rule’s application only to crimen falsi, and the Senate, which supported a version that expanded the use of the rule

57 See Rock, 483 U.S. at 52–55 (noting the criminal defendant’s constitutional right to testify in the Fifth, Sixth, and Fourteenth Amendments); see also Ferguson v. Georgia, 365 U.S. 570, 594 (1961) (establishing criminal defendant’s Sixth Amendment right to testify).

58 According to Justice Holmes, for example, [W]hen it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact. The evidence 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. Gertz v. Fitchburg R.R. Co., 137 Mass. 77, 78 (1884).


60 Rule 609(a) states that “evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.” Fed. R. Evid. 609(a).

61 The term “crimen falsi” refers to “crimes of falsehood,” such as perjury. See Fed. R. Evid. 609(a)(2) (allowing for all prior conviction evidence to be admitted “regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness”).
to any felony. The compromise resulted in the adoption of a balancing test: felonies may be used for impeachment purposes if “the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.” Substantively then, Rule 609 allows the prosecutor to use evidence of prior convictions to impeach a criminal defendant who chooses to testify, subject to the balancing test and the limitations of Rule 403.

Congress granted no guidance as to how to determine whether the probative value of a given piece of information outweighs its prejudicial effect; judges are instead left to apply the Rule individually, with all the variation judicial determinations entail. In general, trial judges applying this balancing test tend to find that the probative value of the prior conviction outweighs the prejudice that admitting the information imposes upon the defendant. Even in cases where the defendant’s prior conviction was for a similar crime—thus com-

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62 See Gainor, supra note 59, at 770–76 (offering detailed overview of history leading up to congressional compromise).

63 The balancing test is similar to that developed by the court in Luck v. United States, 348 F.2d 763, 768 (D.C. Cir. 1964).

64 Fed. R. Evid. 609(a)(1).

65 The conviction must be for a crime the penalty of which is either death or imprisonment for greater than one year. Fed. R. Evid. 609(a)(1).

66 Fed. R. Evid. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).


68 The position in which the balancing test places the judge demonstrates the American Adversary system’s trust in legal education and experience to provide the proper mental tools for differentiating bits and pieces of evidence, weighing them only according to the probative standard, and thereby producing a decision. See Damaška, supra note 14, at 30. In order to rule on a defendant’s motion in limine to exclude prejudicial impeachment information, the judge must first be told the prejudicial information and then—without it having a prejudicial effect on the judge—rule on the information’s admissibility. Id. at 50. Given the judge’s position as a “repeat player” in the trial process, whether it is possible for the judge to provide the atomistic thought process necessary to make the required determination seems unlikely. See id. at 30; A. Leo Levin & Harold K. Cohen, The Exclusionary Rules in Nonjury Criminal Cases, 119 U. Pa. L. Rev. 905, 907 (1971); Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding, 153 U. Pa. L. Rev. 1251, 1259 (2005); Note, Improper Evidence in Jury Trials: Basis for Reversal?, 79 Harv. L. Rev. 407, 409 (1965).

69 Gainor, supra note 59, at 780 (noting that “the federal circuits give such great weight to the probative value of prior felony convictions that appellate panels are likely to uphold nearly any trial court decision to admit a prior felony conviction for impeachment—no matter how great the prejudice to the defendant”).
pounding the prejudicial value of a conviction with the temptation to use the information for the forbidden propensity inference\(^{70}\)—courts have been willing to allow the information into the trial arena.\(^{71}\) To compensate for this admissibility of potentially prejudicial information, the defendant may request a charge to the jurors limiting their consideration of this evidence to credibility only.\(^{72}\) However, the remedy may not be as reliable as envisioned—the actual effectiveness of the jury instructions is doubtful.\(^{73}\)

Ironically, the defendant with prior convictions is still penalized for having an “interest” in the outcome of the case. Whereas previously the defendant was forced into silence,\(^{74}\) now the penalty is a choice between risks,\(^{75}\) with the possibility of a dangerous jury inference attached to either option.\(^{76}\) Since this choice is “voluntary,”\(^{77}\) provided that there is adequate assistance of counsel,\(^{78}\) our adversarial system regards the defendant’s choice in this matter as the appropriate framework for producing epistemically correct trial outcomes.\(^{79}\)

### III. THE CONTOURS OF THE GAME: APPLICATION OF RULE 609

Although proponents of our criminal trial process generally defend the system’s existence as a means of producing truthful outcomes,\(^{80}\) other systemic concerns alter the equation.\(^{81}\) Our system relies on two competing parties to bring information into the trial for

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\(70\) See id.

\(71\) See Blume, supra note 15, at 483–86; see also Gainor, supra note 59, at 780.

\(72\) Fed. R. Evid. 105 (“When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.”).

\(73\) See Wissler & Saks, supra note 7, at 43.

\(74\) See, e.g., State v. Barrows, 76 Me. 401, 409 (1884).

\(75\) See Griffin v. California, 380 U.S. 609, 615 (1965).

\(76\) Id. (noting that the jury may infer the criminal defendant’s guilt by his refusal to testify, or by the fact that he was convicted of prior crimes).


\(79\) DAMAŠKA, supra note 14, at 74.

\(80\) “Truthful,” especially in the criminal context, must mean the conviction of the guilty and the acquittal of the innocent.

\(81\) DAMAŠKA, supra note 14, at 123.

\(82\) Fed. R. Evid. 102 (“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.”).
evaluation by a judge\textsuperscript{85} and, due to this reliance, epistemic concerns often give way to questions of equity. Both parties must feel that the process was fair.\textsuperscript{84} Public confidence in the judiciary system relies upon the parties’ perception that the judiciary is “committed to observing notions of fairness, justice, and equality before the law.”\textsuperscript{85}

While the medieval trial by battle has been safely relegated to the halls of memory, the specter of two armed combatants sparring still lends itself as an analogy to our current trial process.\textsuperscript{86} This conflict between the parties, combined with the need for judges to play the role of neutral arbiter, leads to the development of exclusionary rules of evidence, such as Rule 609.\textsuperscript{87} Examined in this light, the exclusionary rules exist in part to provide acceptable contours to the game\textsuperscript{88} being played by the parties. The exclusionary rules, along with privileges and rights, form the sword and shield of one party, the net and trident of the other.

If an adversarial criminal trial can be viewed as a game played between two parties, what are the stakes? For the defendant, the avoidance of punishment provides a powerful incentive for making tactical choices which can enhance or dampen the “truth seeking” aspect of the trial. For example, the jury might expect an innocent defendant to testify. After all, if a criminal defendant maintains his innocence to the crime charged, what would there be to fear from

\textsuperscript{85} Damaška, supra note 14, at 122.
\textsuperscript{84} Id.
\textsuperscript{87} See Damaška, supra, at 84.
\textsuperscript{88} The Supreme Court has pointed out from time to time that criminal trials are not games. See, e.g., Michigan v. Lucas, 500 U.S. 145, 150 (1990). However, it is difficult to otherwise conceive of a system in which two adversaries employ “tactics,” or strategies, in order to counter or thwart each other’s actions and achieve goals that are at cross-purposes with each other. See Risinger, supra note 86, at 438–39. The use of these tactics can affect the probative weight that the jury attaches to information exposed because of a tactical decision or to prejudicial evidence revealed by one. See Risinger, supra note 86, at 438.
the addition of his side of the story. By testifying, the defendant increases the pool of information available to the jury—information that the jury might require in order to make a finding of innocence. On the other hand, the factually guilty defendant can either risk the process of testifying and endure the cross-examination or choose to seek refuge behind a constitutional shield and remain silent. Moreover, a factually guilty defendant who chooses silence likely does not add incorrect testimonial information for the jury to consider because he is not adding any testimonial evidence at all. In either event, the defendant’s ability to choose whether to testify aids the court’s determination of guilt or innocence.

For the prosecutor, the incentive is to see justice done by seeking the conviction of the guilty. A prosecutor who files frivolous charges against a defendant violates his ethical duty. Thus, in order to determine whether to bring criminal charges against a defendant, the prosecutor must first form a belief that the individual is guilty of the crime charged. Therefore, it is unlikely that a prosecutor would file criminal charges against a defendant in the first instance if the prosecutor was not already convinced that the defendant was likely guilty of the crime charged. From a perspective of omniscience, ethical prosecutors would bring charges against only factually guilty defendants. However, the common human constraint of finite knowledge ensures that, occasionally, prosecutors will make mistakes and bring charges against factually innocent defendants. Regardless, once armed with a good faith belief that the defendant is guilty of the charged crime, a prosecutor will attempt to see justice done—mostly through obtaining convictions. Like the defense, the prosecution’s role is not specifically to ensure an epistemically correct outcome from an omniscient perspective (the trial process itself creates this aura of rectitude), but rather to create the conditions through the adversary system to ensure what the prosecutor regards as the correct outcome.

From this perspective, cross-examination, the tool recognized for its supposed epistemic value, can also be seen as a partisan weapon in an adversarial battle. Impeachment of the defendant is one of the strongest aspects of cross-examination. If the “truth-seeking” value of cross-examination exposes a factually guilty defendant to conviction,

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90 E.g., U.S. CONST. amend. V.
92 See, e.g., Blume, supra note 15, at 490.
the system produces the correct outcome. However, once convinced of the defendant’s guilt, to the eyes of the prosecutor, “the truth” will always be a guilty verdict. In the case of a factually innocent defendant, negative inferences the fact-finder may make that arise from cross-examination do not help the fact-finder reach the correct outcome. In the case of an innocent defendant, the cross-examination is more akin to a combatant’s weapon in the trial arena. In light of this situation, systematic belief in the method of adversarial cross-examination as being the “greatest engine ever invented for the discovery of truth” should not be accepted without the qualification that the method is “almost equally powerful for the creation of false impressions.”

Thus, when presented with a choice of strategies, both sides have a strong incentive to ensure not that the best kinds of information enter the trial arena, but rather that whatever information or lack thereof promotes the achievement of the party’s desired partisan outcome. As previously noted, the defendant’s desire is to avoid punishment; the prosecution’s desire is to see punishment meted out. Both sides will use all of the tools at their disposal to realize these goals. The defendant will or will not testify based upon his subjective determination of the choice that benefits him more. If the defendant testifies, the prosecution will cross-examine. If the defendant has prior convictions, the prosecution will seek to impeach the defendant’s credibility. Whether these decisions result in a trial procedure that concludes with a “truthful” outcome is not necessarily as relevant to the parties as achieving their own goals. Both guilty and innocent defendants alike desire acquittal.

From the fact-finder’s perspective, only information which has positive epistemic value should be taken into consideration and, even then, considered only in regard to the methods that the system deems acceptable. Juries tend to infer several things from the de-

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94 Damaška links this incentive with the growth of exclusionary rules, in order to “pressure the parties and their lawyers to make available the best or most reliable sources of information to the court.” DAMAŠKA, supra note 14, at 84–85. But see Gordon Van Kessel, Adversary Excesses in the American Criminal Trial, 67 NOTRE DAME L. REV. 403, 465 (1992) (asserting that exclusionary rules are developed as “the result of an active judiciary seeking to control the activities of law enforcement officials at the expense of achieving a reliable result in the judicial proceeding”). However, if one counts the police and the prosecutor as the same “party,” exclusionary rules which developed through a desire to check the power of the police are also concerned with “equity” between the parties themselves and not the function of “truth-seeking.”
95 See, e.g., Fed. R. Evid. 401.
96 See, e.g., Fed. R. Evid. 403.
fendant’s choice of testimony or silence. First, although the prosecution cannot emphasize a negative inference from a defendant’s silence as proof of guilt, the jury is capable of making negative inferences on its own. Second, if the defendant chooses to testify, this testimony lies beneath a mantle of overall juror distrust, even under the best of circumstances. Impeachment with evidence of prior convictions should be a factor only in the juror’s evaluation of the epistemic value of the defendant’s testimony; the judicial system incorporates the belief that this is its ostensible purpose. However, in the context of prior crimes credibility impeachment, the dangers of impeachment’s prejudicial usage are twofold: first, there exists a fear that the fact-finder will be tempted to make a “bad person” propensity inference; second, there is a fear that the jury will overestimate its probative value.

The first concern speaks to the heart of whether an individual is capable of performing the kind of analysis that the law mandates. The law requires that jurors evaluate the information presented to them in an atomistic way. In light of this mandate, the argument of an individual juror’s capability to process impeachment information has traditionally centered on whether one regards a human being’s analytical powers as performing primarily in an atomistic or a holis-

97 See Griffin v. California, 380 U.S. 609, 615 (1965); Wissler & Saks, supra note 7, at 41–42.
98 Griffin, 380 U.S. at 615.
99 Id. at 614 (“What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another”).
100 Wissler & Saks, supra note 7, at 41 (finding that “the credibility rating of the defendant was significantly lower than that of the other witnesses in each case”).
102 IMWINKELRIED, supra note 6, § 1.03.
103 Fed. R. Evid. 404(b) (“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.”).
104 See IMWINKELRIED, supra note 6, § 1.03.
105 DAMASK, supra note 14, at 33–36.

When jurors are told to use a piece of evidence for a narrow inferential purpose, the successful completion of this task often calls for sophisticated mental operations. Preventing one’s inference from overflowing into legally forbidden territory can even be a real psychological feat—if it is psychologically possible at all. One of the most obvious examples is the demand that a defendant’s criminal record be used only as it affects the credibility of his in-court testimony. To prevent the ripple effects of this information from producing a broader probative impact on belief formation presupposes remarkable self-control and intellectual delicacy. Not much less sophistication is needed to consider an item of information only for the purpose of determining whether it was
matic manner. Both models provide a theory as to how human beings’ cognitive capacity weighs information.

The atomistic models may be divided into probabilistic and non-probabilistic models. Under the probabilistic version, a human being attaches probability values along a sliding scale to each individual piece of information under consideration. The non-probabilistic version proposes that human beings weigh information using a binary system. Under this version, human beings either believe a piece of information or not. Both of the atomistic models suppose that human beings have the capacity to consider individual pieces of information in isolation with broader themes. In contrast, the school of holistic thought supposes that people are unable to consider pieces of information in isolation of broader concepts and instead use narratives and stories to determine whether a piece of information is valid.

The remedy for the inclusion of prejudicial information into the trial arena in the Rule 609 context is a limiting instruction to the jury. We count on these jury instructions, which suppose that the atomistic models represent juror decision making, to ensure that the juror cognitive process proceeds according to the manner endorsed by the law. This limiting instruction makes it plain that the prior conviction evidence the jury just heard should not sully their thinking outside of the limited context of whether the defendant was telling the truth under oath. Thus, Rule 609 presupposes that an individual can grasp information of prior convictions and then apply this information in an atomistic manner if so directed by a limiting instruction.

Whenever a single individual is responsible for hearing prejudicial information, evaluating it, and then “excluding” it from the decision made (rather than also for its truth) or to employ a piece of information only with regard to one of several joint charges arising from a single event.

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106 See id. at 35.
107 See id. at 35.
108 See id.
109 See id.
110 See id.
111 See DAMAŠKA, supra note 14, at 35.
113 DAMAŠKA, supra note 14, at 33–36.
114 FED. R. EVID. 105.
sion-making process, as a judge must do in a bench trial,\textsuperscript{116} the sys-

tem’s assumption that human cognitive function corresponds to the atomistic model is on display. Legal training\textsuperscript{117} and the judge’s ex-

perience on the bench\textsuperscript{118} are both said to aid judges particularly in applying exclusionary rules correctly and not drawing prejudicial “bad man” inferences from prior conviction evidence.\textsuperscript{119} Although “presumptions of propriety”\textsuperscript{120} help insulate a judge’s evidentiary rul-

ings in a bench trial from searching appellate review,\textsuperscript{121} cases do oc-

cur in which a judge fails to live up to the atomistic ideal in a fashion that is egregious enough to merit censure.\textsuperscript{122} If the judge, possessing specialized training and experience, is not immune from misusing propensity evidence, it stands to reason that the problem “is more persuasively explained by human cognitive imperfections, tout court.”\textsuperscript{123} In other words, the misuse of propensity evidence is part of a human being’s holistic cognitive functions and a weakness for which Rule 609 does not adequately compensate. The propriety of evidentiary rules such as Rule 609 comes into doubt when we ac-

knowledge that some judges cannot perform the calculus required by law and that introduction of the information to a lay juror will likely invite a propensity inference.\textsuperscript{124} This criticism blends into the second “fear”: that the probative value of a prior conviction may be exagger-

ated by the fact-finder.\textsuperscript{125}

Empirical studies have shown that juries who become aware of a criminal defendant’s prior criminal convictions tend to use that information and convict the accused more often than when a defendant’s prior criminal convictions are not presented.\textsuperscript{126} One study, conducted by Professors Roselle Wissler and Michael Saks, involved

\begin{itemize}
  \item \textsuperscript{116} Levin & Cohen, \textit{supra} note 68, at 906.
  \item \textsuperscript{117} Id. at 905.
  \item \textsuperscript{118} DAMASKA, \textit{supra} note 14, at 30.
  \item \textsuperscript{119} Absent these traits, there would be little separating a judge from a lay-juror, who is not trusted to perform the required calculus without instructions.
  \item \textsuperscript{120} Levin & Cohen, \textit{supra} note 68, at 907.
  \item \textsuperscript{121} Id.
  \item \textsuperscript{122} See, \textit{e.g.}, State v. Hutchinson, 271 A.2d 641, 644 (Md. 1970) (noting that “judges, being flesh and blood, are subject to the same emotions and human frailties as affect other members of the specie”); State v. Eugene, 536 N.W.2d 692, 696 (N.D. 1995); Commonwealth v. Oglesby, 263 A.2d 419, 420 (Pa. 1970) (noting that trial judge’s finding in bench trial for guilt depended solely upon defendant’s prior criminal record).
  \item \textsuperscript{123} DAMASKA, \textit{supra} note 14, at 32.
  \item \textsuperscript{125} IMMINKERLIED, \textit{supra} note 6, § 1.03.
  \item \textsuperscript{126} Wissler & Saks, \textit{supra} note 7, at 39–43.
\end{itemize}
presenting hypothetical fact patterns to individuals. The study utilized two different fact patterns, one in which the crime charged involved auto theft, the other involving murder. The study’s participants agreed to read the materials and reach a verdict as if they were jurors. Each story was designed to have the defendant testify and leave the question of his guilt ambiguous. In the study, the fact pattern was presented in one of four conditions: (1) non-use of the prior record information, (2) previous conviction for the charged crime, (3) previous conviction for a different crime, or (4) previous conviction for perjury. In all instances where the fact pattern introduced information of the prior convictions, the individuals were given a limiting instruction that the information was to be used only for assessment of the witnesses’ credibility. Wissler and Saks theorized that if the prior conviction evidence was used correctly, the result would be most easily seen under the condition that provided for a prior conviction for perjury.

Surprisingly, the results of the study indicated that credibility for the defendants in each condition was uniformly low. From a commonsense point of view, one would expect a juror to be skeptical of any defendant’s testimony, given the pressures placed upon that person to have his story conform to his protestations of innocence. However, if jurors are not evaluating prior crimes evidence to assess credibility, what are they doing with it? While credibility did not vary from each condition (the defendant’s was always the lowest of any witness), the results also showed that the conviction rates would vary in accordance with the existence and kind of prior conviction. The mean percentage rate for conviction under both the auto theft and murder versions was markedly higher when the participant read of a previous prior conviction. Although the study cautions about its

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127 Id. at 40.
128 Id.
129 Id. at 40–41.
130 Id. at 40.
131 Id.
132 Id. at 40.
133 Id. at 43 (“Indeed, the defendant’s credibility rating was dramatically and unvaryingly the lowest of any of the witnesses . . . . Mock jurors do not appear to be using evidence of prior convictions to assess the defendant’s credibility.”).
134 Id. at 40.
135 Id.
136 Id.
potential value to real-world scenarios,\textsuperscript{137} evidence also indicates that the situation is not much different in the real world.\textsuperscript{138}

Another study, conducted by Professor John Blume, focused on individuals who were wrongfully convicted and later exonerated by DNA evidence.\textsuperscript{139} In the cases examined, ninety-one percent of this class of factually innocent defendants that failed to testify had a prior conviction and, “[i]n almost all instances, counsel for the wrongfully convicted . . . indicated that avoiding impeachment was the principal reason the defendant did not take the stand.”\textsuperscript{140} In jurisdictions which did not allow impeachment, all of the defendants in this class testified.\textsuperscript{141} Despite the fact that these defendants were all factually innocent, the real-world fear of the probative value of their prior convictions being overestimated by the jury was a key motivating factor in their decision to remain silent.\textsuperscript{142}

IV. HOW IT ALL PLAYS OUT:
WHITE, PAWN TO KING FOUR; BLACK, RESIGNS

The pressures which the adversarial trial model impose upon the prosecution and defense lead inexorably to situations in which each side seeks to maximize its individual outcome. If there are rational actors on both sides, each party will select a choice that it believes will lead to the highest possible partisan payoff, while exposing itself to the least possible risk. When the criminal defendant examines impeachment with prior crimes evidence under Rule 609, he subjects his decision regarding whether to testify to this risk/reward calculus.\textsuperscript{143} While the prosecutor cannot control whether the defendant takes the stand, should the defendant choose to testify, the prosecutor will decide whether to introduce evidence of the defendant’s prior convictions for impeachment purposes. The prosecutor will also examine this decision through the lens of partisan self-interest.\textsuperscript{144} Thus, if a rational prosecutor who was seeking the conviction of the defendant believed that impeaching the defendant with prior crimes evidence would be detrimental to the prosecution’s case, the prosecutor would choose not to impeach. Under that condition, im-

\textsuperscript{137} Id. at 46.
\textsuperscript{138} Blume, supra note 15, at 490–92.
\textsuperscript{139} Id.
\textsuperscript{140} Id. at 18–19.
\textsuperscript{141} Id. at 19.
\textsuperscript{142} Id.
\textsuperscript{143} See, e.g., Kalven & Zeisel, supra note 11 and accompanying text.
\textsuperscript{144} See supra Part III.
peachment would reduce the state’s likelihood of prevailing and thus would be irrational. The defendant’s choice of whether or not to testify, and the prosecution’s choice of whether or not to impeach should the defendant testify, creates a situation that may be reduced to a game theory model.\textsuperscript{145} The actions of both parties are completely predictable as a result of a two-player zero-sum “Minimax” game.\textsuperscript{146} This partisan wrangling, however, does not take into consideration the epistemic price to be paid by the trial process as a whole.\textsuperscript{147}

A “game,” in this context, refers to a conflict between rational parties who each distrust the other.\textsuperscript{148} If the resolution of the conflict must result in only one of the two players achieving a fixed-sum goal,\textsuperscript{149} the “game” can be further described as “zero-sum.”\textsuperscript{150} A two-player, zero-sum game will always result in one player’s gain and the other player’s proportionate loss.\textsuperscript{151} In the parlance of the game itself, the actual “points” which one gains or loses is referred to as “utility.”\textsuperscript{152} Utility is the numerical representation of the actual, subjective preferences of each player.\textsuperscript{153} To illustrate this concept, suppose two people are playing a game of chess with a wager of one dollar bet upon the outcome. Further suppose that each player’s motivation to play the game is simply the desire to win the dollar. In this context, each player’s utility would be the subjective value that each player attaches to winning the game of chess. Here, this value may be fairly characterized as the monetary amount due the winner of the game, or one dollar.\textsuperscript{154} In any two-player, zero-sum game, each player will attempt to maximize his or her subjective utility.\textsuperscript{155}

\textsuperscript{145} The creation of game theory is generally attributed to John von Neumann. The theory itself is a method of approaching interest conflict between parties or “players.” R. Duncan Luce & Howard Raiffa, Games and Decisions 2 (1957).

\textsuperscript{146} Poundstone, supra note 22, at 7.

\textsuperscript{147} See infra Part V.

\textsuperscript{148} Poundstone, supra note 22, at 39.

\textsuperscript{149} Id. at 51 (“The best example is a game like poker, where players put money in the pot, and someone wins it. . . . It is in this restricted but quite diverse category of games that game theory has enjoyed its greatest success.”).

\textsuperscript{150} Id.

\textsuperscript{151} Id.

\textsuperscript{152} Id.

\textsuperscript{153} Luce & Raiffa, supra note 145, at 4.

\textsuperscript{154} Poundstone, supra note 22, at 51 (“In a game played for money, money is utility or nearly so. When a game is played just to win, the mere fact of winning confers utility.”).

\textsuperscript{155} See id. at 51.
As another example, suppose a conflict situation arises in which two siblings, Elizabeth and Harry, argue over a bar of candy. Their mother approaches and mandates that Elizabeth break the bar into two portions. However, the mother allows Harry to choose which of the two pieces to take for his own once the bar is split. Each child defines his or her subjective utility as possession of the largest piece of candy possible. Elizabeth would thus appear to have an incentive to divide the bar into unequal portions. However, the fact that Harry would have the first choice of piece limits that option; Harry would also prefer to have a larger share, and thus would be certain to use his choice to obtain the larger piece. To achieve her maximum amount of individual utility, Elizabeth must break the bar into portions that are as equal as possible. The results of this game can also be represented in tabular format:

<table>
<thead>
<tr>
<th>Harry’s Strategies</th>
<th>Pick larger</th>
<th>Pick Smaller</th>
</tr>
</thead>
<tbody>
<tr>
<td>Elizabeth's Strategies</td>
<td>Receive Smaller Piece</td>
<td>Receive Larger Piece</td>
</tr>
<tr>
<td>Make unequal pieces</td>
<td>(Elizabeth chooses first whether to break the candy bar into relatively equal or unequal portions.)</td>
<td>(Harry then chooses to pick either the larger or smaller piece.)</td>
</tr>
<tr>
<td>Make equal pieces</td>
<td>Receive Equal Piece</td>
<td>Receive Equal Piece</td>
</tr>
</tbody>
</table>

Elizabeth chooses first whether to break the candy bar into relatively equal or unequal portions. Harry then chooses to pick either the larger or smaller piece. The Minimax theorem stipulates that, when given a situation such as in this example, Elizabeth will always choose to break the bar equally, as Harry will always pick what he believes to be the larger piece. Thus, the bottom left hand quadrant will always be the expected outcome of this particular game. Although there was an apparent sequence in each player’s turn (Elizabeth chooses first followed by Harry), because Elizabeth can figure out with certainty what Harry’s strategy would be, it is possible to conceive of this game as having simultaneous turns.

Much as the initial brandishment of the candy bar sparked the strategic considerations of the children in the above hypothetical, the possibility of impeachment with prior-crimes evidence in a criminal trial compels opposing parties to consider their strategic options. Their analyses can likewise find expression as a two-person Minimax game. Here, both the prosecution and the defendant are players in this trial arena. The defendant’s tactical decision is to choose be-

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156 For a similar example, see id. at 52; see also LUCE & RAIFFA, supra note 145, at 71.
157 See POUNDSTONE, supra note 22, at 54.
tween taking the stand and testifying or remaining silent. The prosecutor’s decision is whether to impeach the defendant’s credibility with evidence of the defendant’s prior crimes. In this game, each party would define its individual utility as adding information for the fact-finder’s consideration that, in the aggregate, best serves its side of the case. Only one of the parties may ultimately prevail at trial; the fact-finder will either convict or acquit the defendant. Thus, this game also falls under the zero-sum paradigm.

The defendant first chooses whether or not to testify. If the defendant chooses to testify, the prosecution chooses whether or not to impeach the defendant’s credibility through the introduction of prior crimes evidence under Rule 609. The choices of both players will result in different kinds and amounts of information presented to the jury. Should the defendant choose to testify, his testimonial information will be admitted for the fact-finder’s consideration. This information will include any information which comes out in cross-examination and any information learned because of impeachment. Should the defendant choose not to testify, no new information is added to the arena. However, the jurors are likely left wondering why the “innocent” defendant chose not to testify. Much like Elizabeth in the hypothetical example above, who understood that Harry would seek to obtain as big a piece of candy as possible, rational criminal defense counsel knows that the impeachment mechanism and the introduction of evidence of the defendant’s prior crimes maximizes the prosecution’s utility. Thus, the players of this impeachment game can likewise be conceived as choosing their strategies simultaneously. Similar to the candy-bar hypothetical, this prior crimes impeachment game may be represented graphically:

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158 See supra Part III.

159 Plea bargains and other settlement agreements are beyond the scope of this Comment.

160 Although the prosecution may no longer ask the jury to draw a negative inference from the defendant’s failure to testify, the jury may nevertheless come to a similar conclusion on their own. See Griffin v. California, 380 U.S. 609, 615 (1965).

161 See Kalven & Zeisel, supra note 11, at 146–47.
Prosecution’s Strategies

<table>
<thead>
<tr>
<th>Defense Strategies</th>
<th>Impeach</th>
<th>Do Not Impeach</th>
</tr>
</thead>
<tbody>
<tr>
<td>Testify</td>
<td>Testimony &amp; prior conviction information</td>
<td>Testimony information only</td>
</tr>
<tr>
<td>Remains Silent</td>
<td>Jury presented with a silent defendant</td>
<td>Jury presented with a silent defendant</td>
</tr>
</tbody>
</table>

The Minimax “solution” for the defense will be the choice which offers the highest amount of utility to the defendant while granting the least possible amount of utility to the prosecution. Empirically, the solution to the game is again the bottom left quadrant because the addition of impeachment information provides greater utility to the prosecution than the introduction of the defendant’s testimony provides to the defendant. While the defendant’s direct testimony will expose the jury to information favorable to his side of the argument, the risk of cross-examination and impeachment with evidence of prior crimes obviates any advantage gained thereby. Therefore, even the factually innocent criminal defendant whose prior record includes impeachable offenses should always refrain from testifying if at all possible.

V. CHANGING THE GAME

Although the Federal Rules of Evidence aim to achieve several purposes, the current Rule 609(a) is remarkable for not satisfying any of these goals when the defendant has a record of felony or crimes falsi convictions. While the defendant possesses a choice of whether to testify, the rational outcome of that choice is silence. This outcome reduces—does not add to—the information available to the trier of fact. Juries, and in some cases judges, are likely to

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162 Id.; see Blume, supra note 15, at 483–85.
163 Greater utility here means the negative inferences juries draw from the impeachment. See, e.g., Blume, supra note 15, at 487–88.
164 See Kalven & Zeisel, supra note 11, at 146–47 (noting that defendants with prior convictions chose to testify less often than defendants without a prior criminal record); see also Blume, supra note 15, at 490–91.
165 See, e.g., Fed. R. Evid. 102 (“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.”).
166 See supra Part IV.
give substantial probative weight to the prior conviction evidence. They are likely to hold prior conviction evidence admissible on the one hand, and a valid indicator of a propensity to commit crimes on the other. Fearing the fact-finder’s likely drawing of these inferences from the introduction of the prior conviction information, defense counsel’s tactical response is to prevent the information from reaching the fact-finder by keeping his client from testifying at all. Despite the fact that our system purports to value the defendant’s testimony, the actions of the opposing parties control the information available to the trial court. Rule 609 works to undo the right to testify accorded to the defendant since the unsworn statement doctrine was swept away in Ferguson. As the Court then stated, in justifying a criminal defendant’s right to testify, any other outcome would result in "the right to be heard by counsel [to be] of little worth." Thus, the availability of prior crimes impeachment under Rule 609 does not result in the optimum epistemic outcome when applied to a criminal defendant’s choice of whether to testify. Jury instructions cannot wash away the harm the defendant incurs by testifying and being subject to the impeachment. Worse, the roots of this harm rest in the jury’s likely adoption of inferences that the law expressly seeks to prevent, such as an inference that the defendant possesses a propensity to commit crime. As an accused should not be convicted simply because of prior bad acts, reform of Rule 609 is urgently needed. Specifically, the Rule should be changed to disallow the use of prior conviction evidence for the purpose of attacking the credibility of a testifying party.

Whether in cases of prior felony or crimen falsi, prior conviction evidence should not be admissible for credibility impeachment. Some states have taken the lead in recognizing the disproportionate impact that their state versions of Rule 609 had upon the defendant’s right to testify. Montana has excluded prior conviction evidence

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169 See supra Part II.
170 See supra Part III.
171 See generally Ferguson v. Georgia, 365 U.S. 570 (1961) (establishing the defendant’s right to testify—as opposed to an unsworn statement—as a constitutional right that the states must provide).
172 Id. at 595 (citing Chandler v. Fretag, 348 U.S. 3, 10 (1954)).
174 See, e.g., Wissler & Saks, supra note 7, at 38.
175 See Fed. R. Evid. 404.
from its state version of Rule 609.\textsuperscript{177} The Supreme Court of Hawaii has likewise found that impeachment with prior felony convictions violates the due process clause of the Hawaii Constitution.\textsuperscript{178} The Kansas version of Rule 609 follows the Hawaiian model, denying the use of prior felony conviction evidence for a felony, but allowing its use in crimen falsi cases.\textsuperscript{179} Thus, the Rule 609 game faced by the two adversaries in these states differs greatly from the impeachment game of Federal Rule 609.

Indeed, evidentiary rules which exclude evidence of the defendant’s prior convictions for impeachment purposes allow the parties to play a much different game than what Federal Rule 609 currently allows.\textsuperscript{180} A rebalancing of the risks and rewards of testifying by excluding prior conviction evidence for the impeachment of criminal defendants would provide an increased incentive for criminal defendants to testify during their criminal trial. Modifying Federal Rule 609 to comport with the Montana model\textsuperscript{181} would result in a completely different Minimax game:

\textsuperscript{177} See, e.g., MONT. CODE ANN. § 26-10-609 (stating that “[f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible”).

\textsuperscript{178} State v. Santiago, 492 P.2d 657, 661 (Haw. 1971) (“[T]o convict a criminal defendant where prior crimes have been introduced to impeach his credibility as a witness violates the accused’s constitutional right to testify in his own defense.”); see also Asato v. Furtado, 474 P.2d 288, 294–95 (Haw. 1970).

We think that there are a great many criminal offenses the conviction of which has no bearing whatsoever upon the witness’ propensity for lying or truth-telling, and that such convictions ought not to be admitted for purposes of impeachment. . . . This is true not only of minor offenses like parking tickets or . . . running red lights, but also of some major offenses like murder or assault and battery. It is hard to see any rational connection between, say, a crime of violence and the likelihood that the witness will tell the truth.

\textit{Id.} at 294–95. Note, however, that impeachment for prior convictions for crimen falsi is still acceptable in Hawaii. HAW. REV. STAT § 626-1.

\textsuperscript{179} KAN. STAT. ANN. § 60-421.

\textsuperscript{180} See supra Part IV.

\textsuperscript{181} See, e.g., MONT. CODE ANN. § 26-10-609.
Prosecution’s Strategies

<table>
<thead>
<tr>
<th>Cross-Examination of Defendant’s Story</th>
<th>No Cross Examination of Defendant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defendant testifies and endures cross-examination</td>
<td>Testimony information only</td>
</tr>
<tr>
<td>Jury presented with a silent defendant</td>
<td>Jury presented with a silent defendant</td>
</tr>
</tbody>
</table>

Under this game model, the criminal defendant need not consider the effect of his prior convictions when deciding whether to testify. Restricting the prosecutor from impeaching the defendant with prior conviction evidence refocuses the choices of both parties. The defense would first make a determination of whether the defendant’s recounting of his story provides greater benefit, in light of a prosecution’s cross-examination, than remaining silent. The choice that best maximizes the prosecutor’s utility is to cross-examine the defendant, even without prior crimes impeachment. If the defense concludes that the defendant’s case would benefit from testimony and cross-examination, this game’s solution is the upper-left quadrant. The prosecutor—restricted by a reformed Rule 609—would instead focus solely upon cross-examination of the defendant’s testimony at trial.

Rebalancing this decision provides several epistemic benefits to the trial process. First, stimulating the criminal defendant to testify with this proposed change would, on balance, bring more relevant information under the examination lens of the fact-finder. This added information would come from the defendant, a witness acknowledged to be in the possession of information with special significance to the proceeding. Under the current Rule 609, defendants may refuse to testify merely due to fears of prior conviction impeachment. In the case of factually innocent defendants, this justified fear only serves to hinder the truth-seeking function of the trial process. A survey of factually innocent defendants, who have later been exonerated through the introduction of DNA evidence, indicates that they would have testified at their trial were it not for

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182 See Blume, supra note 15, at 496–97.
185 Blume, supra note 15, at 491–92.
fear of impeachment with their prior crimes.\textsuperscript{186} Having these defendants recount their version of the events at issue in their respective criminal trials could have increased the likelihood of an epistemologically correct “not-guilty” trial verdict. Moreover, the eventual exoneration of these factually innocent criminal defendants indicates that any probative value the fact-finder may have ascribed to their prior convictions would have been illusory. As the Supreme Court explicitly illuminated forty-seven years ago, the criminal defendant has a constitutional right to tell his story to the jury through the aid of his counsel.\textsuperscript{187} Reforming Rule 609 to exclude prior conviction impeachment would bolster this right to testify by allowing a broad class of defendants to consider only the risk of cross-examination when deciding whether or not to testify.

Second, a prior conviction that meets the Rule 609 requirements for impeachment purposes is not necessarily probative for the purposes of evaluating the defendant’s credibility.\textsuperscript{188} It is possible that an individual’s commission of certain offenses could work to enhance—not reduce—his credibility under oath. For example, consider the situation of an individual placed on trial for resisting conscription into the armed forces. In this example, the defendant morally objects to compulsory service in the military. Rather than fleeing to a safe haven, he turns himself in, choosing instead to be tried and convicted for the offense of resisting the draft. If he is arrested several years later and charged with a different crime, impeachment of his credibility based upon that prior conviction would be illogical—the defendant was so committed to telling the truth of his beliefs that he was willing to accept punishment for them. Yet, under the current Rule 609, evidence of his prior conviction could nevertheless be used to taint his credibility in the eyes of the fact-finder.\textsuperscript{189} Reforming Rule

\textsuperscript{186} \textit{Id.}


\textsuperscript{188} Blume, \textit{supra} note 15, at 494–95. The study performed by Wissler and Saks also indicates that the probative value of prior convictions on the defendant’s credibility is low in general. Wissler & Saks, \textit{supra} note 7, at 42.

\textsuperscript{189} Jeremy Bentham gave another example of this phenomenon. \textit{2 John Henry Wigmore, Evidence § 519 (Chadbourn rev. 1979) (1940) (citing 7 Jeremy Bentham, Rationale of Judicial Evidence 406 (Bowring ed. 1827)).}

Take homicide in the way of duelling [sic]. Two men quarrel; one of them calls the other a liar. So highly does he prize the reputation of veracity, that, rather than suffer a stain to remain upon it, he determines to risk his life, challenges his adversary to fight, and kills him. Jurisprudence, in its sapience, knowing no difference between homicide by consent, by which no other human being is put in fear—and homicide in pursuit of a scheme of highway robbery, of nocturnal housebreaking, by which every man who has a life is put in fear of it,—
609 to forbid the use of prior conviction impeachment would avoid this epistemic pitfall.

Third, it is difficult to analytically separate any probative value of a defendant’s prior conviction related to his credibility on the stand from a forbidden propensity inference. The likelihood that the fact-finder properly considers prior crimes impeachment evidence and applies it only toward evaluation of the defendant’s testimonial credibility is low. The criminal defendant’s credibility is already the lowest of any witness, due to the fact that he is a criminal defendant in the first place. Thus, although presumptively innocent, his status as a person charged with a crime likely taints the fact-finder’s initial approach to evaluating his testimony. When fact-finders become aware of a defendant’s prior record, they may use the information for an inappropriate purpose, either because of a belief that the information is probative as to guilt or through a lowering of the standard of proof. For example, jurors who believe that the defendant is a “bad” person due to prior criminal behavior may be more easily convinced as to the defendant’s guilt, or feel less of a need to carefully evaluate the case. Moreover, when the defendant’s prior convictions are for crimes similar to the offense for which he is currently on trial, the chance that the fact-finder will make these types of forbidden propensity inferences is even higher.

In the case of prior convictions of crimen falsi, such as perjury, it is practically impossible to separate the proper impeachment use of prior crimen falsi conviction evidence from an improper propensity usage. For example, a fact-finder could be expected to evaluate the testimonial credibility of a defendant with a prior conviction for perjury. The proper consideration of this prior conviction according to Rule 609 requires the fact-

\[\text{Id. at 44–45.}\]

See, e.g., United States v. Beahm, 664 F.2d 414, 418–19 (4th Cir. 1981) (stating that “[a]dmission of evidence of a similar offense often does little to impeach the credibility of a testifying defendant while undoubtedly prejudicing him”); Wissler & Saks, supra note 7, at 41–42 (“[D]efendants previously convicted of the same crime had a significantly higher conviction rate than defendants previously convicted of perjury or a dissimilar crime . . . .”).
finder to take into account that the prior conviction could affect the defendant’s testimony without making the forbidden inference that the defendant possesses a propensity to lie under oath. Such atomistic\textsuperscript{195} mental gymnastics do not likely take place in the minds of factfinders.\textsuperscript{196}

VI. CONCLUSION

As long as prior-crimes impeachment under Rule 609 is in place, criminal prosecutors operate under a system that allows them to decide both how to break the candy bar in two and which piece to take.\textsuperscript{197} The best method of rebalancing the risk and reward ratio between the defendant’s testimony and silence is to remove from consideration the impediment that impeachment becomes and to modify Rule 609 accordingly. Reforming Rule 609 in this manner would bring several epistemic benefits to the criminal trial process. As players in the trial arena, each adversary currently understands that if prior crimes impeachment is available, the rational strategy for each party results in the withholding of particularly relevant information from the fact-finder’s consideration: the defendant’s story itself. Removing prior crimes impeachment would stimulate defendants to testify—particularly factually innocent defendants—while working to eliminate the possibility that the fact-finder misuses propensity inferences.

\textsuperscript{195}See supra Part III.

\textsuperscript{196}DAMASKA, supra note 14, at 32.

\textsuperscript{197}Or, as Shakespeare’s Hermione said,
Since what I am to say must be but that
Which contradicts my accusation, and
The testimony on my part no other
But what comes from myself, it shall scare boot me
To say ’not guilty;’ mine integrity,
Being counted falsehood, shall, as I express it,
Be so received.

WILLIAM SHAKESPEARE, THE WINTER’S TALE act 3, sc. 2.