Models and Limits of Federal Rule of Evidence 609 Reform

*Anna Roberts**

* Thanks to Jenny Carroll, Erin Collins, Caroline Davidson, Deborah Denno, Russell Gold, Lauryn Gouldin, Paul Heaton, Julie Jonas, Alma Magaña, Aviva Orenstein, Dan Richman, Julia Simon-Kerr, and the organizers of and participants in the *Vanderbilt Law Review* Symposium on *Reimagining the Rules of Evidence at 50*, especially Ed Cheng. Thanks also to Karena Rahall, Sam Rahall, Candis Roberts, Dean Olsher, and my editors at the *Vanderbilt Law Review*.

INTRODUCTION

A Symposium focusing on *Reimagining the Rules of Evidence at 50* makes one turn to the federal rule that governs one's designated topic—prior conviction impeachment—and think about how that rule could be altered. Part I of this Article does just that, drawing inspiration from state models to propose ways in which the multiple criticisms of the existing federal rule might be addressed.

But recent scholarship by Alice Ristroph, focusing on ways in which criminal law scholars talk to their students about "the rules," gives one pause.[1] Ristroph identifies a pedagogical tendency to erase the many humans who turn rules into actions—and indeed life-changing or life-ending actions.[2] With a narrow focus on the rules, as opposed to their enablers and enforcers, we not only miss potential reform opportunities but also potentially obscure behaviors that we may want to scrutinize.[3] Thus, Part II develops proposals for how the behavior of relevant decisionmakers, such as prosecutors and judges, might usefully change—whether or not the language of the rule does.

Abolitionists have highlighted the complications of offering criminal or evidentiary reform proposals.[4] Some reforms, they point out, may sanitize and entrench the broader system.[5] Abolitionism has started to enter the evidentiary law review landscape,[6] and this Article embarks upon the project of looking afresh at a critical evidentiary agenda with the aid of abolitionist insights. Accordingly, Part III considers the implications that reforms in this area of evidence law might have for the broader criminal system. It does so by drawing on four insights from abolitionist literature and exploring their implications in the prior conviction impeachment context.

---

1. Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1642, 1671 (2020).

2. *See id.* at 1671 ("The very conception of 'substantive' law that underlies the course obscures from view the fact that law always requires human agents to operate, interpret, and enforce it.").

3. *See id.* ("Racial bias is a property of humans—and an unmistakable property of the criminal law that humans have implemented and operated in the United States—but the curricular model of substantive criminal law is color-blind.").

4. As described in one recent account, abolitionists "work toward eliminating prisons and police, and building an alternate and varied set of political, economic, and social arrangements or institutions to respond to many of the social ills to which prison and police now respond." Amna Akbar, *Teaching Penal Abolition*, LAW & POL. ECON. PROJECT (July 15, 2019), https://lpeblog.org/2019/07/15/teaching-abolition/ [https://perma.cc/Y4VQ-S4XY].

5. *See* Marina Bell, *Abolition: A New Paradigm for Reform*, 46 LAW & SOC. INQUIRY 32, 45–46 (2021) (explaining the difference between reformist and non-reformist reforms).

6. The most notable example thus far is Maneka Sinha, *Radically Reimagining Forensic Evidence*, 73 ALA. L. REV. 879 (2022).

The upshot of all of this is not just a raft of possible changes, but also an initial exploration of ways in which they might be framed and tailored. As we seize an exciting moment of potential change in the prior conviction impeachment regime,[7] our framing must account for the fact that this regime's manifold flaws are duplicated one thousand times over in the broader criminal system.

I. IMPROVING ON RULE 609

Rule 609 of the Federal Rules of Evidence ("FRE") is much-maligned,[8] and thus one might try to improve it. As a starting point, one can usefully consider the rules adopted in Montana, Hawai'i, and Kansas on this topic. There are at least three reasons to weigh these state rules as possible models. First, the Advisory Committee cares about what the states do on issues such as character evidence.[9] Second, these states' rules offer the most protection against the form of prior conviction impeachment that is widely seen as most troubling: the use or threatened use of this tool against those who might testify in their own defense at a criminal trial.[10] Third, these states all moved away from regimes that offered less protection to such witnesses and did so decades ago.[11] They thus show that this kind of change can happen and can prove enduring.[12]

These three models will be briefly discussed below.[13] Each approach would be an improvement on the existing federal regime. But

---

7. The author, along with Julia Simon-Kerr, is leading the Prior Conviction Impeachment Reform Coalition, with reform efforts underway in a couple of states. *See* Anna Roberts & Julia Simon-Kerr, *Reforming Prior Conviction Impeachment*, 50 FORDHAM URB. L.J. 377, 382–83 (2023).

8. Ric Simmons, *An Empirical Study of Rule 609 and Suggestions for Practical Reform*, 59 B.C. L. REV. 993, 995 & n.1 (2018) ("The scholarly critiques of Rule 609 are too numerous to list in full here.").

9. *See, e.g.*, ADVISORY COMM. ON EVIDENCE RULES, DRAFT MINUTES OF THE MEETING OF NOVEMBER 12, 1996, *reprinted in* ADVISORY COMMITTEE ON EVIDENCE RULES: WASHINGTON, D.C. APRIL 14-15, 1997, at 19 (Apr. 14–15 1997), https://www.uscourts.gov/sites/default/files/fr_import/EV1997-04.pdf [https://perma.cc/SA7J-KJWP] (stating that in connection with 404(b) and 609 issues the Reporter "was instructed to review how other jurisdictions are dealing with these matters").

10. *See* Anna Roberts, *Defense Counsel's Cross Purposes: Prior Conviction Impeachment of Prosecution Witnesses*, 87 BROOK. L. REV. 1225, 1226, 1236–39 (2022) (noting that "critiques have been leveled with most intensity at the ability (and tendency) of prosecutors to engage in this form of attack on testifying defendants" and the passage of laws to combat the practice in Montana, Hawai'i, and Kansas).

11. *See* Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 2019–30 (2016) (examining the history and application of the prior conviction impeachment schemas in Montana, Hawai'i, and Kansas).

12. *But cf. infra* Section III.B for the question of when endurance is a positive.

13. A fuller discussion of aspects of these rules can be found elsewhere. *See* Roberts, *supra* note 11, at 2018–36.

each has its vulnerabilities. A discussion of those vulnerabilities leads to a new type of proposal, which will also be laid out below.

A. Hawai'i and Kansas

In two major ways, Hawai'i and Kansas restrict the use of prior convictions to impeach more tightly than does Rule 609.[14] The first is by prohibiting the impeachment by prior conviction of those testifying in their own defense at a criminal trial—as long as such witnesses are not found to have opened the door to this kind of impeachment.[15] The second is by restricting the kind of conviction that can be used to impeach. The two states differ slightly in what type of conviction is admissible, with Hawai'i referring to "crime[s] . . . involving dishonesty" and Kansas referring to "crime[s] . . . involving dishonesty or false statement."[16]

Hawai'i was propelled to this kind of rule by a decision from its Supreme Court, *State v. Santiago*, in 1971.[17] *Santiago* held that insofar as the state's rules allowed the introduction of prior convictions in a criminal case to impeach the person on trial,[18] "those provisions are at odds with the Due Process Clauses of [the Hawaiian Constitution] and the Fourteenth Amendment of the United States Constitution."[19]

Kansas adopted its prior conviction impeachment statute in 1963[20] as part of an adoption of Rule 21 of the Uniform Rules of Evidence.[21] Its earlier rule had permitted prosecutors to cross-examine

14. *See* HAW. REV. STAT. § 626-1, r. 609(a) (1984); KAN. STAT. ANN. § 60-421 (1963).

15. § 626-1, r. 609(a); § 60-421.

16. § 626-1, r. 609(a); § 60-421.

17. 492 P.2d 657 (Haw. 1971).

18. The plain language of the statute in effect at the time appeared to "allow proof of conviction of 'any indictable or other offense' [of a witness] without any limitation whatsoever." Asato v. Furtado, 474 P.2d 288, 293–94 (Haw. 1970); *see also* Act of Sept. 19, 1876, ch. 32, § 57, 1876 Haw. Sess. Laws 59 ("A witness may be questioned as to whether he has been convicted of any indictable or other offence; and upon being so questioned if he either denies the fact or refuses to answer, it shall be lawful for the party so questioning to prove such conviction.").

19. *Santiago*, 492 P.2d at 661.

20. Act of Feb. 27, 1963, ch. 303, 1963 Kan. Sess. Laws 675 (codified at KAN. STAT. ANN. § 60-421).

21. *See* UNIF. R. EVID. 21 (UNIF. L. COMM'N 1953):

> 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.

defendants about any prior conviction,[22] resulting in "scathing"[23] and "promiscuous"[24] inquiries.

B. Montana

Broadly speaking, Montana prohibits the admission of any convictions to impeach any witness.[25] One learns from the case law, however, that just as in Hawai'i and Kansas, under certain circumstances witnesses can be found to have "opened the door" to the use of their convictions to impeach them.[26] The Montana rule originated in 1976 and abandoned an earlier rule that had provided that a witness could be impeached with felony convictions.[27]

C. Drawing a New Model from an Evaluation of These States

The core that these models share—the potential of sparing those facing criminal charges from impeachment by prior conviction—is a strength.[28] These states take divergent paths from there—two permitting a limited form of impeachment of other witnesses, and one extending the ban across the board—and each path has its costs and benefits. Those costs and benefits will be discussed below, with an eye to drawing out a model that might strike a better balance.

1. Evaluating Kansas and Hawai'i

Kansas and Hawai'i focused their reforms on protecting witnesses who are facing criminal charges. But even while the major criticisms of this practice apply with most vigor to that group of witnesses, they do not disappear with other types of witnesses.[29] The

22. *See* M.C. Slough, *Other Vices, Other Crimes: An Evidentiary Dilemma*, 20 U. KAN. L. REV. 411, 414 (1972).

23. *Id.* at 415.

24. State v. Roth, 438 P.2d 58, 62 (Kan. 1968), *disapproved of by* State v. Gunby, 144 P.3d 647, 650 (Kan. 2006).

25. *See* MONT. R. EVID. 609 ("For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible.").

26. *See* State v. Bingman, 61 P.3d 153, 161 (Mont. 2002) ("[Defendant] provided the jury with self-serving statements that he knew to be untrue, which were intended to place him in a better light with the jury. As such, the testimony at issue in the instant case is not the sort of evidence contemplated by Rule 609 . . . .").

27. *See* State v. Gafford, 563 P.2d 1129, 1133 (Mont. 1977).

28. *See, e.g.*, Roberts, *supra* note 11, at 2036; Montré D. Carodine, *"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 582 (2009).

29. *See* Roberts, *supra* note 10, at 1236–38.

probative value of these convictions is low as to witnesses of all sorts.[30] The way in which their use compounds the race- and class-based injustice of the distribution of convictions is problematic as regards witnesses of all sorts,[31] as is the way in which this form of impeachment treats a conviction as a lasting brand on character.[32] So, for example, one might be troubled that Kansas and Hawai'i permit the use of this form of impeachment against civil plaintiffs, such as plaintiffs alleging police abuse.[33] We might wonder whether we want the jury's attention focused on those plaintiffs' prior convictions (perhaps themselves nursed by various forms of individual and structural bias) rather than on the plaintiffs' accounts. One might also be troubled that both states permit the prosecution to impeach defense witnesses in criminal trials—particularly if one fears that in some instances those witnesses might be viewed as indistinguishable from the person on trial.[34]

One might also be concerned about the fact that both Kansas and Hawai'i permit the impeachment of witnesses facing criminal charges if they are found to have introduced evidence to support or establish their credibility. "Credibility" is a word of various meanings,[35] and this creates a variety of ways in which one can be found to have opened the door[36]—and a chilling effect for litigants who are uncertain about when they might be found to have done so.[37] Again, if one has doubts about the capacity of a conviction to speak to one's lack of credibility, this door-opening concept is unpalatable. In addition, research suggests that those subjected to criminal charges—particularly if they are members of demographic groups that are disproportionately subjected to criminal charges—are likely to face jury

30. *See id.* (citing United States v. Walker, 315 F.R.D. 154, 156 (E.D.N.Y. 2016), *as amended* (Aug. 2, 2016), *opinion amended and superseded*, 15-CR-388, 2016 WL 4091250 (E.D.N.Y. Aug. 2, 2016), in which defense counsel sought to impeach a prosecution witness on the basis of two prior assault convictions).

31. *See id.* ("If [prior conviction impeachment] does indeed compound racial bias, rest on and endorse stereotyped thinking, and rely on junk science, why keep it around?" (footnote omitted)).

32. *See id.*

33. *See* Tamara F. Lawson, *Powerless Against Police Brutality: A Felon's Story*, 25 ST. THOMAS L. REV. 218 (2013) (examining the story of Mr. Theodore Dukes, who was impeached with his felony record when testifying in his suit alleging police brutality).

34. *See* Mills v. Estelle, 552 F.2d 119, 120 (5th Cir. 1977) (acknowledging this risk); Robert F. Holland, *It's About Time: The Need for a Uniform Approach to Using a Prior Conviction to Impeach a Witness*, 40 ST. MARY'S L.J. 455, 477 n.92 (2008) (giving an example of this type of risk).

35. *See* Julia Simon-Kerr, *Law's Credibility Problem*, 98 WASH. L. REV. 179, 180 (2023).

36. *See* Roberts, *supra* note 11, at 2020 (giving examples).

37. *See id.* at 2034 ("This carve-out has, at the least, created an area of uncertainty, so that defendants cannot feel confident that the choice of whether or not they will be impeached with their criminal convictions lies within their control.").

assumptions regarding their guilt and lack of credibility.[38] Thus, it seems deeply problematic to disincentivize them from offering relevant testimony that might counter those assumptions.

Finally, Hawai'i and Kansas leave courts and litigants with some difficult line-drawing questions in terms of admissible convictions. The question of the scope of a dishonesty or false statement provision is a vexed one.[39] The two states offer a hint of this in their slightly different formulations, with Kansas referring to a "crime . . . involving dishonesty or false statement" and Hawai'i referring to a crime "involving dishonesty."[40]

2. Evaluating Montana

Montana, through its announcement of a ban on prior conviction impeachment, has the advantage of simplicity. It offers a symmetrical solution. No apparent favoritism towards anyone. No difficult line-drawing as to witnesses or convictions. Recognition of the fact that, as mentioned above, the major critiques of this practice apply to witnesses of all sorts.

But our criminal system is not symmetrical. As of course it cannot be, given the differences between the parties on each side of the "v." and their relative stakes, as well as the existence of constitutional protections for those on trial.[41] By making no mention of the Constitution, Montana's rule risks obscuring an important asymmetry.[42] Because, as some courts have recognized, there may be situations where to deprive people on trial of the ability to impeach the witnesses against them—even if all they have by way of impeachment material is a prior conviction—is to violate the right to confront.[43]

Constitutional arguments advanced against Montana's limitation on the defense have not triumphed;[44] perhaps those arguments are less potent in Montana than they would be elsewhere

---

38. *See id.* at 2000 & n.166 ("Those who are poor, or people of color, or criminally accused are all the targets of assumptions of guilt . . . .").

39. *See* Julia Simon-Kerr, *Credibility by Proxy*, 85 GEO. WASH. L. REV. 152, 201–02 (2017) (noting jurisdictions' differing classifications of drug convictions).

40. KAN. STAT. ANN. § 60-421 (1963); HAW. REV. STAT. § 626-1, r. 609(a) (1984).

41. *See* Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503, 1506 (2015).

42. *See* MONT. R. EVID. 609.

43. *See, e.g.*, People v. Redmon, 315 N.W.2d 909, 914 (Mich. Ct. App. 1982); Vasquez v. Jones, 496 F.3d 564, 574 (6th Cir. 2007); State v. Conroy, 642 P.2d 873, 876 (Ariz. Ct. App. 1982).

44. *See, e.g.*, State v. Doyle, 160 P.3d 516, 526–27 (Mont. 2007) (concluding that "the [trial] court did not violate Doyle's right to confrontation by limiting his cross examination of [a prosecution witness] based on M.R. Evid. 609"), *overruled in part on other grounds by* State v. Ariegwe, 167 P.3d 815 (Mont. 2007).

because the defense has less impeachment material to lose. Montana starkly limits the lasting effect of a conviction, so that after one's sentence, one is no longer supposed to suffer legal disabilities such as conviction-based impeachment.[45] Indeed, this was one reason Montana declined to adopt a version of Federal Rule 609—it would simply have very little scope in that state.[46]

One might point out that every rule of evidence must be read in the shadow of constitutional guarantees, including the right to confront. While that is true, courts tend to assume that compliance with the relevant prior conviction impeachment rule ensures compliance with the constitution. There is therefore a danger that adopting a rule such as Montana's would obscure, and ultimately weaken, the defense's constitutional protections—at a time when it has become relatively uncontroversial to point out that the defense is disadvantaged at every turn.[47]

3. Drawing a New Model from this Evaluation

As mentioned above, any of these existing state regimes could improve upon the federal system. Yet, it is also possible to draw together lessons from these regimes—what is desirable, possible, sustainable, and improvable—to try out another model.

From Hawai'i and Kansas, one can note that a rule that reflects the criminal system's unmistakable asymmetry can be sustainable.[48] From Montana, one can see that a rule that reflects the fact that impeachment by prior conviction is problematic across the board can also be sustainable, and one can see a model of a rule that therefore prohibits it to the furthest extent that is constitutionally permissible.[49] And from the Montana case law, one can observe that, at least in that state, leaving those constitutional protections unspoken has not been sufficient to prompt robust development of constitutional doctrine. From all three states, one can learn that it is problematic that efforts by those on trial to establish their credibility can fling open the door to an otherwise-prohibited impeachment method.

---

45. Roberts, *supra* note 11, at 2027–28.

46. *Id.*

47. *See* Eva S. Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice,* 8 GEO. J. LEGAL ETHICS 1, 19–20 (1994) ("[T]here is a nearly universal view that the adversary system places one accused of a crime in such a weak position vis-a-vis the state that he deserves every protection possible against governmental overreaching.").

48. *But cf. infra* Section III.B for the question of whether sustainability within the current system is a positive.

49. Though note the carveout, mentioned *supra* Section I.B, for those found to have "opened the door."

One might then want to explore a model that extends the prohibition on this form of impeachment to its constitutional limits and does so explicitly—both as a reminder that asymmetrical protection exists and to prompt the development of litigation and doctrine exploring those limits. Federal Rule 412, which restricts the admissibility of evidence relating to complainants in cases alleging sexual misconduct, provides a potential model because it carves out evidence "whose exclusion would violate the defendant's constitutional rights."[50] Although not technically *needed*, the provision reminds courts and litigants that the Constitution exists, even where a form of cross-examination might prompt concern.[51]

Thus, the proposed rule might declare that impeachment by prior conviction is prohibited, except where the exclusion of such evidence would violate the constitutional rights of the person on trial.[52] An accompanying note could clarify that there is no "opening the door" to otherwise-prohibited conviction evidence unless the witness denies having any convictions or having the conviction in question. In that situation, the conviction may come in as contradiction evidence, rather than through Rule 609.

II. IMPROVING THE BROADER REGIME

There are dangers in focusing solely on the language of a rule whose implementation is problematic. One might miss valuable opportunities to make change. One might also erase the responsibility of those who have played a part in bringing about the status quo. This Part, therefore, will look at some of the relevant actors and explore ways in which their behavior might usefully change—whether or not a rule change occurs.

A. Prosecutors

Prosecutors bear a huge responsibility for the prior conviction impeachment status quo, and a narrow focus on the rule's language may obscure this. After all, the rule lays out only what is permitted, and

50. FED. R. EVID. 412(a)-(b) (despite the general inadmissibility of the kinds of "sexual" evidence encompassed by Rule 412, in a criminal case the court may admit "evidence whose exclusion would violate the defendant's constitutional rights").

51. *See* Daniel J. Capra & Liesa L. Richter, *Poetry in Motion: The Federal Rules of Evidence and Forward Motion as an Imperative*, 99 B.U. L. REV. 1873, 1880 (2019) ("[T]he amended language is useful for two reasons: (1) it avoids damage to the credibility of the Rules caused when a rule is subject to unconstitutional application; and (2) it operates as a red flag for unwary litigants, directing them to a source of law beyond the rule itself.").

52. Roberts & Simon-Kerr, *supra* note 7, at 411.

never requires prosecutors to proffer any convictions—or to threaten their use in hopes of bringing about a guilty plea.[53] Indeed, it lays out only what is permitted *by the rule*: it might be that prosecutors' compliance with their ethical duties further constrains what can and should be done.[54]

Prosecutorial responsibility is particularly intense in the context of Rule 609(a)(2),[55] a provision that leaves no room for judicial exclusion of prior convictions as long as they are found to satisfy the provision's requirements. If anyone is to make a judgment about the appropriateness of a prior conviction coming in under this provision, it is the prosecutor.

While scholars (including at least one former federal prosecutor) have claimed that prosecutors offer convictions while aware of the risk of—and perhaps hoping for—juror misuse of that evidence,[56] that idea tends to be left uninterrogated. There is more room for investigation of this risk and its apparent tension with the prosecutorial duty to "do justice," as opposed to maximizing conviction rates. Scholars sometimes seem to forget about this duty, merely noting that this kind of impeachment "makes a prosecutor's job easier"[57] and offers them a "windfall"[58] because of the inevitability of juror misuse. Steve Zeidman is an exception, with his suggestion that refusing to engage in prior conviction impeachment could form a useful part of prosecution that seeks the label "progressive."[59] After all, where a trial tool brings the risk of misuse and race- and class-bias, there seem to be grounds to

53. *See* Roberts, *supra* note 11, at 2011.

54. *See id.*

55. This provision states that when a conviction is offered to attack a witness's credibility "for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement."

56. *See* Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 296 (2008) (asserting that prosecutors intend that the evidence be used for propensity purposes).

57. *See* Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1, 44 (1999) ("There is little doubt that admission of prior conviction evidence makes a prosecutor's job easier.").

58. *See* Gene R. Nichol, Jr., *Prior Crime Impeachment of Criminal Defendants: A Constitutional Analysis of Rule 609*, 82 W. VA. L. REV. 391, 421 (1980) ("The procedure effectively allows the government 'the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.'").

59. Steven Zeidman, *Some Modest Proposals for a Progressive Prosecutor*, 5 UCLA CRIM. JUST. L. REV. 23, 43 (2021).

refrain from using it, as some prosecutors have done in analogous contexts.[60]

Prosecutors play another key role in this area, and one that has received even less scholarly attention. They ward off reform efforts. No detailed scholarly accounts exist of the Department of Justice's role in thwarting efforts to change Rule 609, but one can get a sense of its power and influence by reading the Advisory Committee's records.[61] Scholars have written in other contexts about the difficulties in making sense of the prosecutor's dual role of both player and umpire.[62] They could usefully draw on this case study to explore how much harder it is to comprehend the "game" when the prosecution is not just a player and the umpire, but also deeply involved with, and influential in, shaping the rules. A scholarly model exists in a recent article by Maneka Sinha, who posits that to evaluate the extent to which forensic reform is or could be successful, one needs to grapple with prosecutors' profound and multifaceted involvement in impeding that reform.[63]

B. Judges

Even absent a rule change, there is more that judges could consider doing to ameliorate the status quo. This section will suggest some options regarding 609(a)(1), then 609(a)(2), and finally the administration of the rule generally.

Rule 609(a)(1)(B) calls on judges to balance probative value and prejudicial effect in order to determine the admissibility of felony

---

60. *See, e.g.*, Parisa Dehghani-Tafti (@parisa4justice), TWITTER (Aug. 19, 2021, 7:08 PM), https://twitter.com/parisa4justice/status/1428509214327164934 [https://perma.cc/S2WQ-LCYT] ("Prosecutors, wishing to strike someone from a jury pool, should be able to articulate a reason for believing the person is biased or can't be impartial. Naked peremptory strikes tend to produce juries that are not representative of a fair cross section of the community.").

61. *See, e.g.*, ADVISORY COMM. ON RULES OF EVIDENCE 117 (2017) https://www.uscourts.gov/sites/default/files/advisory_committee_on_rules_of_evidence_-_spring_2017_meeting_materials.pdf [https://perma.cc/AS52-DZYP]:

> The proposal to amend Rule 609, in 2006, was originally designed to limit automatic admissibility of prior convictions for impeachment purposes to those convictions in which false statement was an element of the crime. But eventually (because of DOJ objections) the proposal was narrowed to allow automatic impeachment if it could be "readily determined" that a finding was made that the witness had lied in committing the crime.

62. *See, e.g.*, Eric S. Fish, *Prosecutorial Constitutionalism*, 90 S. CAL. L. REV. 237, 239 (2017) (arguing that prosecutors must balance their roles as "partisan advocates embedded in an adversary system of criminal justice" with "special professional obligations to ensure that the system of criminal adjudication is just and procedurally fair").

63. *See* Sinha, *supra* note 6, at 916–27 ("[P]rosecutors have acted collectively as a powerful body to fend off efforts to improve forensic disciplines and disentangle them from law enforcement.").

convictions being offered to impeach those facing criminal charges.[64] Jeffrey Bellin has pointed out that judicial interpretations have wandered away from this core task, abandoning Congress's intent to keep this avenue of admissibility narrow.[65] In Bellin's view, were judges to interpret the rule faithfully, the result would usually be exclusion.[66] The multifactor test that developed to "help" judges interpret this provision is full of confusions, which often tend toward increased admissibility.[67] In one particularly striking example, the "importance of the defendant's testimony" factor, originally intended to point to exclusion where admission might chill constitutionally protected testimony, is frequently interpreted in the opposite way.[68] In other words, the "importance of the defendant's testimony" is now often cited by prosecutors, defense attorneys, and judges as a reason to err on the side of *permitting* this form of impeachment.[69] Thus, judges (like litigators) could usefully devote themselves to understanding congressional intent and the fact that this provision—if faithfully interpreted—would tend to favor exclusion.

Rule 609(a)(2) appears to require admission where a conviction is found to satisfy the provision's definition.[70] All is not lost, however, for the judge who may fear that outcome—perhaps, for example, because the conviction resembles the charge at trial. Such a judge could perhaps consider whether the conviction clears the relevance hurdle.[71] If the judge were well-versed in the social science literature and believed there to be no probative value in convictions on the issue of likelihood of lying on the stand, then presumably the judge could

64. FED. R. EVID. 609(a)(1)(B) (stating that a conviction offered to attack a witness's character for truthfulness "must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant").

65. *See* Bellin, *supra* note 56, at 293 ("The now-prevailing practice is patently inconsistent with the controlling legal standard—Federal Rule of Evidence 609.").

66. *See id.* (stating that the Federal Rule of Evidence 609(a)(1)(B) balancing of probative value and prejudice "should favor the defense in the overwhelming majority of cases").

67. *See* Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563, 569–70 (2014) (mentioning various confusions that "trend[] toward admissibility").

68. *See* Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 838 (2016) ("[W]hereas originally the importance of the defendant's testimony militated against permitting impeachment—under the theory that important testimony must be heard—now it often justifies impeachment, under the theory that important testimony must not go unchallenged.").

69. *See id.* at 850–51 (noting that briefs submitted by both prosecutors and defense attorneys, as well as judicial opinions, often invert the meaning of the factor).

70. FED. R. EVID. 609(a)(2) (providing that "for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement").

71. *See id.* at 401 (defining relevant evidence as that which "has any tendency to make a fact more or less probable than it would be without the evidence" where "the fact is of consequence in determining the action").

exclude the evidence on Rule 402 grounds before a Rule 609 analysis even occurs.[72] And perhaps some of the values in Rule 102—truth, for example, or justice[73]—could bolster a judge attempting relevance-based exclusion or other ways of guarding against the dangers of prior conviction impeachment evidence.

Even if judges find that convictions of either sort must come in, there may be more that they could usefully do to guard against some of the resultant dangers. Research suggests that the kind of jury instruction routinely given on this issue—telling jurors they can use these convictions to determine the credibility of a witness but must not use them on any other issue, such as the guilt of a defendant[74]—do not work.[75] Surveys suggest that judges are aware of this.[76] Judges could choose to press on regardless, perhaps writing about the injustices of the system after they retire. Or they could try something different. They could, for example, try different jury instructions. A few jurisdictions have tried something a little novel here,[77] which might provide a starting point.

The context of eyewitness identification, another area where social science findings suggested that jury instructions were inadequate, might inspire judges (or the drafters of model jury

72. *See id.* at 402 (stating that "[i]rrelevant evidence is not admissible").

73. *Id.* at 102 ("These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.").

74. *See, e.g.*, *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit*, NINTH CIR. JURY INSTRUCTION COMM. 3.6 (2023), https://www.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal_Instructions_2023_05.pdf [https://perma.cc/8M8D-TGXA] ("You have heard evidence that the defendant has previously been convicted of a crime. You may consider that evidence only as it may affect the defendant's believability as a witness. You may not consider a prior conviction as evidence of guilt of the crime for which the defendant is now on trial.").

75. *See* Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37, 47 (1985) ("On the basis of the available data, we conclude that the presentation of the defendant's criminal record does not affect the defendant's credibility, but does increase the likelihood of conviction, and that the judge's limiting instructions do not appear to correct that error.").

76. Note, *To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant with a Criminal Record*, 4 COLUM. J.L. & SOC. PROBS. 215, 218 (1968) (finding that ninety-eight percent of criminal attorneys and forty-three percent of trial judges responding to a national survey believed that juries were unable to follow an instruction to use conviction evidence on the issue of credibility evaluation rather than on the issue of guilt).

77. *See, e.g.*, *Pattern Criminal Jury Instructions*, SUPERIOR CT. OF THE STATE OF DEL. 4.7 (2010), https://courts.delaware.gov/superior/pattern/pdfs/pattern_criminal_jury_rev5_2022a.pdf [https://perma.cc/67KE-J5D8] ("Witness's Conviction of a Crime: You may consider evidence that a witness was previously convicted of [a felony or a crime involving dishonesty] for the sole purpose of judging that witness's credibility or believability. Evidence of a prior conviction does not necessarily destroy or damage the witness's credibility, and it does not mean that the witness has testified falsely. It is simply one of the circumstances that you may consider in weighing the testimony of the witness.").

instructions) to go bigger.[78] The concerns about reliability of eyewitness identification were so severe as to inspire instructions that gave jurors detailed guidance on how to avoid the risks and, in particular, how to get past the assumptions that they might harbor about the value of eyewitness testimony in general and its specific component parts.[79] Perhaps similar guidance could be offered in the prior conviction impeachment context, where assumptions about the meaning of convictions might be potent.

As an additional or alternative protection in the eyewitness context, expert evidence has proved popular[80]—again, helping jurors understand the pitfalls of this kind of evidence.[81] Perhaps judges could consider permitting or appointing experts who could help jurors understand what, if anything, one can take a prior conviction to mean, and how assumptions about the meaning of convictions might prove to be traps.[82]

III. CONSIDERING THE BROADER SYSTEM

While Part II argued that a focus on Rule 609's language not only is incomplete but also risks sanitizing and obscuring the roles of those who contribute to the status quo, Part III argues that even a broader focus on the Rule 609 regime risks sanitizing and obscuring the systems of which it is a part, depending on the framing of any reform proposals.

This Part is inspired by the work of abolitionists, who emphasize the importance of this kind of broader context. They raise provocative questions about the risks of certain reform efforts—questions that are important to consider in what might otherwise appear to be fertile ground for addressing the problems laid out above.[83]

78. *See* Thomas D. Albright & Brandon L. Garrett, *The Law and Science of Eyewitness Evidence*, 102 B.U. L. REV. 511, 554 (2022) ("In recent years, more states have revised their jury instructions, departing from that traditional model.").

79. *See id.* at 554–56 (giving examples).

80. *See id.* at 519 ("The majority of state courts now permit expert evidence on eyewitness perception and memory.").

81. *See, e.g.*, State v. Buell, 489 N.E.2d 795, 803 (Ohio 1986) (holding that "the expert testimony of an experimental psychologist concerning the variables or factors that may impair the accuracy of a *typical* eyewitness identification is admissible").

82. *See* FED. R. EVID. 706 (providing for court-appointed expert witnesses).

83. *See* Roberts & Simon-Kerr, *supra* note 7, at 382–83 (describing the formation of the Prior Conviction Impeachment Reform Coalition).

While abolitionist thinking is tearing through scholarly analyses of criminal law and procedure,[84] it has barely made an impact on scholarship addressing evidentiary reform. One notable exception is Maneka Sinha's article laying out an abolitionist approach to forensic evidence reform.[85] To build on her research, this Part will lay out four approaches that emerge from abolitionist work and thoughts on how each of them might impact responses to the prior conviction impeachment regime.

A. Unearthing the Root of the Problem

Abolitionists urge that any push for change should be informed by a radical analysis of the troubling phenomenon—in other words, an analysis of what lies at its root.[86] Lopping off prior conviction impeachment may have limited effect if the impulses that feed it will be left with more energy to feed other troubling phenomena.

Scholars have identified a variety of impulses that feed the practice of prior conviction impeachment. Robert Dodson, for example, argues that the "true intention" behind Rule 609 is clear: it is to "get convictions and get criminals off the street."[87] Montré Carodine suggests that Rule 609 was enacted because of associations between criminality and Blackness and between Blackness and dishonesty.[88] One can also see the regime as furthering the goals of controlling, silencing, and otherwise dehumanizing those charged with or convicted of crimes.[89]

It is worth noting that these intentions, associations, and desires have not gone away. Perhaps they would merely take other evidentiary routes if Rule 609 was blocked off. (Here we can compare the way in which prior conviction impeachment came into being in the wake of categorical disqualifications from testimony.[90]) Those routes could

84. *See* Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013, 2014–16 (2022) (analyzing the increase in legal abolitionist scholarship).

85. Sinha, *supra* note 6, at 892; *see also* Roberts, *supra* note 10, at 1248–51 (asking abolitionist questions in this context).

86. *See, e.g.*, Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544, 1548 (2022) (asserting that "a radical reform attempts to get to the root of the issues we face").

87. Dodson, *supra* note 57, at 45.

88. Carodine, *supra* note 28, at 548–50.

89. *See* Roberts, *supra* note 11, at 2014–18 (arguing that evidentiary rules that chill testimony by a defendant dehumanize those accused of crimes).

90. *See* Bellin, *supra* note 56, at 296–97 (tracing the history of rules of prior conviction impeachment to progressive reforms aimed at ending the testimonial disqualification of witness groups, such as those with felony convictions).

include, for example, impeachment under Rule 608, admission of more material under Rule 404, or findings that the defense has opened the door to otherwise inadmissible Rule 609 material. The three outlier states mentioned above offer some support for these concerns.[91] Montana, for example, ostensibly prohibits prior conviction impeachment, but is unusually expansive in what it admits under its Rule 608.[92] In addition, it has read into its Rule 609 an "opening the door" provision and joins Hawai'i and Kansas in finding that the door has been opened in a variety of contexts.[93]

Indeed, it may be that doing away with Rule 609 would make things worse for at least some witnesses who would otherwise have had their convictions revealed through this route. Given what we know about jurors' implicit and explicit assumptions, if we imagine a witness with a relatively minor conviction whose impeachment is prohibited, it is possible that some jurors might assume a criminal record more serious than the one actually possessed by that witness.[94]

B. Avoiding Reform Arguments that Reinforce or Sanitize

At first look, there is a compelling case to be made for reform of the prior conviction impeachment regime. After all, one can point to deep concerns along many of the regime's important dimensions. So, one might think that outlining the numerosity and gravity of these concerns could generate powerful momentum for positive change. And numerous and grave they are. Scholars have given us the tools to argue, for example, that the prior conviction impeachment regime leads to wrongful convictions;[95] silences people charged with crimes;[96] relies on

91. *See* Roberts, *supra* note 11, at 2018–30 (discussing various ways in which implementation of these rules has provided less protection than their plain language would seem to offer).

92. *See* Roger C. Park, *Impeachment with Evidence of Prior Convictions*, 36 SW. U. L. REV. 793, 795 (2008) ("[T]he Montana Supreme Court has allowed use of Montana Rule 608(b) to permit inquiry into a witness's past criminal activity when the crime bears on a witness's veracity.").

93. *See* Roberts, *supra* note 11, at 2019–28 (analyzing circumstances in which convictions have been admitted in these three states).

94. Thank you to Paul Heaton for this suggestion.

95. *See* John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 493 (2008) (contending that prior conviction impeachment rules contribute to wrongful convictions both directly and indirectly).

96. *See id.* at 491 (saying of his study data that "[i]n almost all instances in which a defendant with a prior record did not testify, counsel for the wrongfully convicted defendant indicated that avoiding impeachment was the principal reason the defendant did not take the stand").

propensity thinking;[97] humiliates people on trial;[98] makes certain constitutional rights laughable;[99] shows willful ignorance of the fact that jury instructions do not work;[100] shows judges and lawyers misapplying legal tests in ways that favor the prosecution;[101] compounds and endorses racial disparity and stereotypes;[102] involves both a predictable misuse of evidence[103] and a *permitted* use that is inconsistent with social science findings;[104] treats a conviction as a permanent brand on character;[105] and serves as a "strong ally" of the plea-bargaining system.[106]

Abolitionists caution us that the framing of reform initiatives—and the measures that they may inspire—may reinforce or sanitize aspects of the broader system.[107] This caution should inspire care in the framing of the kinds of arguments mentioned in the previous

97. *See* Bellin, *supra* note 56, at 299–303 (arguing that even though "[t]rial courts instruct juries to disregard any inference regarding the defendant's criminal propensities and to instead limit their consideration of the defendant's prior record to the narrow issue of credibility," jurors are unlikely to avoid forbidden inferences).

98. *See* Roberts, *supra* note 10, at 1251 (noting that the "humiliation" of "stripping one down to one's record" is "sometimes found to be a necessary part of effective representation").

99. *See* Alan D. Hornstein, *Between* Rock *and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 VILL. L. REV. 1, 61 (1997) (asserting that for a defendant with prior convictions the right to testify "may amount to little more than a paper guarantee").

100. *See, e.g.*, Note, *supra* note 76, at 218 (presenting data that indicated that ninety-eight percent of defense attorney respondents and forty-three percent of trial judge respondents gave negative answers to the question of whether juries "were able to follow an instruction to consider prior-convictions evidence only for the purpose of evaluating the defendant's credibility rather than as evidence of his guilt").

101. *See* Roberts, *supra* note 68, at 846–52 ("Numerous courts have inverted the meaning of this factor by treating the 'importance of the defendant's testimony' as a reason to permit, rather than prohibit, the impeachment of that testimony.").

102. *See* Carodine, *supra* note 28, at 536 (maintaining that rules of evidence "operate in a manner that perpetuates and increases the probative value and prejudicial effect of race"); Jasmine Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2287 (2017) (explaining that the chilling effects of prior conviction rules prevent defendants of color from "explain[ing] their racialized reality by taking the stand").

103. *See* Bellin, *supra* note 56, at 299–303 ("Unfortunately, empirical studies and common sense suggest that a limiting instruction offers little protection against the prejudice inherent in prior conviction impeachment.").

104. *See* Roberts & Simon-Kerr, *supra* note 7, at 384–89 (explaining that "the notion that we can learn something about a witness's propensity for lying from the existence of a previous criminal conviction is unproved").

105. *See id.* at 395–97 (highlighting the assumption in Rule 609 that a prior conviction is a reliable indicator of a "long-lasting" character of dishonesty or willful unlawfulness).

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

107. *See* Sinha, *supra* note 6, at 951 ("Like calls for increased training, funding, standards, technology, accountability measures, and other traditional reforms, forensic techniques are themselves reforms to policing that help legitimize a system of law enforcement that decimates Black and Brown lives and communities.").

paragraph, lest they appear to suggest that these phenomena are not hallmarks[108]—perhaps even essential components[109]—of the criminal system.

Arguments, such as those suggested above, that invoke the Rule 102 values of "justice" and "fairness" are at least complicated when made by those who harbor concerns about whether fairness and justice are available within our system of federal prosecution at all.[110] Arguments that call on prosecutors to act differently because of their "duty to do justice" are at least complicated by Paul Butler's assertion that this duty is just "words on paper."[111] Arguments that Hawai'i, Kansas, and Montana are appropriate reform models because they have sustained their evidence rules for decades raise the question of why sustainability within our criminal system is a positive.[112] At whose cost have these regimes been sustained? And if we argue, as scholars sometimes do, that we do not need prior conviction impeachment because there are so many other ways to attack the credibility of people charged with crimes (many of which may be thinly disguised proxies for societal disadvantage) or because jurors already assume that their credibility is nil, we may need to be careful about seeming to endorse these aspects of our system.[113]

If we push for judges to consider appointing experts who might inform jurors about some of the vulnerabilities of convictions as indicators of witness credibility, there may be a risk of sanitizing funding arrangements that restrict public defenders from retaining experts of their own.[114] If we endorse the importance of defendant

---

108. *See, e.g.*, Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867 (2018) (exploring the influence on juries of phenomena other than admissible evidence).

109. The assumption that those with arrests or convictions have a "bad character," for example, may be foundational. *See also* Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules that Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851, 894 (2008) ("Courts and practitioners have grown increasingly callous to the value of hearing from defendants . . . ."); Lafler v. Cooper, 566 U.S. 156, 170 (2012) (mentioning "the reality that criminal justice today is for the most part a system of pleas, not a system of trials" and "the central role plea bargaining plays in securing convictions").

110. *See, e.g.*, Capers, *supra* note 108, at 887–88 (mentioning implicit bias as an example of influences on jurors other than admissible evidence); Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis*, 120 MICH. L. REV. 1199, 1219 (2022) (stating that abolitionism offers "an analysis that moves away from reaffirming legal rules and abstract values—equality, fairness, justice—without recognition of the implementation of these values in the real world").

111. Paul Butler, *Gideon's Muted Trumpet*, N.Y. TIMES (Mar. 17, 2013), https://www.nytimes.com/2013/03/18/opinion/gideons-muted-trumpet.html [https://perma.cc/ CKT2-P63R].

112. *See* Roberts, *supra* note 11, at 1981–82 (discussing the long-standing practices of Hawai'i, Kansas, and Montana).

113. *See* Roberts, *supra* note 67, at 576–77 (discussing such arguments).

114. *See, e.g.*, Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031, 1096 (2006).

testimony in part because of its relative affordability as a trial tool,[115] we may risk engaging in a similar sanitization of the impoverishment of public defense.

If we push for training of judges and prosecutors on things like the juror misuse and racially disparate impact of this evidence—the kind of work contemplated by contemporary reformers[116]—we may be obscuring the fact that judges and prosecutors are already on notice of these phenomena. By suggesting that things would change *if they only knew*, we may be sanitizing or obscuring reality. If we assume that judges and prosecutors have other employment options, even as they keep sending disproportionate numbers of people of color to prison, and even as they keep proffering or admitting evidence that is so obviously vulnerable to propensity use, then presumably they have found meaning in their work.[117] Perhaps by adopting notions of racialized propensity to commit crimes. And perhaps they have had to find value in a system even if it predictably involves jurors doing something other than applying comprehensible legal standards to admissible evidence. If that is the case, then suggesting that these legal decisionmakers be given information about racial disparities and the risks of propensity reasoning may be nothing more than a distraction.

C. Considering One's Own Implication in What One is Critiquing

Abolitionism imparts the message that in ways large and small, each of us can pursue or impede abolitionist goals.[118] It also encourages reflection and introspection regarding institutions with which we are allied, such as legal academic institutions.[119] Examining my own prior works reveals ways in which I have made claims, and issued caveats,

---

115. *See* Roberts, *supra* note 67, at 575 (describing the defendant's testimony as potentially the most affordable line of defense).

116. As co-leaders of the Prior Conviction Impeachment Reform Coalition, Julia Simon-Kerr and I hope to offer trainings to judges and prosecutors on this kind of issue.

117. *See* H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 826 (1993):

> I am forced to conclude that judges, well situated as they may be, are frequently drawn into the system over which they preside. Their pride depends in some measure on the faith that their efforts propel this cumbersome system toward a creditable result. In their role, I am sure I would be inclined in the same direction; it would be extremely difficult to live with skepticism concerning the important process in which one is so directly involved.

118. *See* MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 4 (Tamara K. Nopper ed. 2021) ("[W]hen we set about trying to transform society, we must remember that we ourselves will also need to transform. Our imagination of what a different world can be is limited. We are deeply entangled in the very systems we are organizing to change.").

119. *See id.* ("We are deeply entangled in the very systems we are organizing to change.").

that served to advance goals endorsed by the legal academy—carving out apparently discrete problems, showing their importance, and showing the workability of one's proposed solutions. Those works can now be read as unwittingly bolstering the broader system, even while diligently arguing for reform of prior conviction impeachment.

So, for example, I argued for a doctrinal adjustment designed to remedy the fact that courts had come to view "the importance of the defendant's testimony" as a reason to *permit* rather than (as was originally intended) *prohibit* impeachment.[120] And I argued that an advantage of such an adjustment would be increased testimony by this category of witness, which in turn could lessen juries' implicit racial bias.[121] To shore up this claim, I drew on research offering support for the notion that individuating information, by bringing someone to life as an individual, can do something to mitigate implicit stereotypes.[122] I joined other scholars in identifying additional goals that increasing the rate of testimony by those on trial might achieve: we might hear more about their lives,[123] and about the hardships inflicted on them by abusive police officers or poverty or both,[124] and thus we might build juror empathy and move away from assumptions of guilt.[125] When my arguments about the importance of preventing this form of impeachment were dealt with in a scholarly footnote suggesting that this would not make much of a difference,[126] I found that a little abrupt.

Now the footnote seems exactly right. Get rid of this practice and there remain numerous reasons not to testify; numerous reasons not to go to trial; numerous reasons why this "individuating" narrative might do as much to confirm as to combat stereotypes, particularly if elicited by an inexperienced, under-resourced defense attorney; numerous reasons why jurors will still assume propensity or a record or guilt regardless of the admissible evidence. Because, again, the same forces that we can assume are driving Rule 609—racialized hostility, distrust,

120. Roberts, *supra* note 68, at 880.

121. *See id*. at 880–82.

122. *See id*. at 874–77.

123. *See id*. at 882 ("[W]hether or not defendants have stories of innocence to offer, they have details of their lives to offer that may be essential to a fair resolution of the case and that may be a useful part of the jurors' education.").

124. *See id*. at 881–82.

125. *See id*. (stating that "invocations of the right to silence appear to lead to assumptions of guilt" and "may help prevent a 'fair judgment' ").

126. Capers, *supra* note 108, at 891 n.136 ("It should be noted that several scholars have called for the abolition of Rule 609 . . . precisely because it contributes to jurors convicting based on past behavior. *See, e.g.*, Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977 (2016). However, the fact that jurors likely assume prior convictions in the case of minority defendants suggests that merely eliminating Rule 609 will be ineffective.").

and assumptions of criminality—are still here and can be weaponized in myriad ways.

Similarly, to support my recommendations of Hawai'i, Kansas, and Montana as models for other states to consider, I searched around for ways to show that those reforms "worked." But that project is a complex one. By what means would we measure "success"? Who would benefit if there was more testimony from those on trial, if it meant more convictions? Who would benefit from more criminal trials, if it meant longer sentences?[127] Do more trials and more testimony do anything other than legitimate a system that does not merit legitimation?

In addition to possibly bolstering the broader system by suggesting that changing one aspect of it could produce a meaningful difference, I may have also bolstered it by explicitly assuaging those who might have worried that the system was in the crosshairs. In a piece that urged changes to prior conviction impeachment that were designed to respond to problems with the "reliability" of convictions, I made a conciliatory move.[128] I offered explicit reassurance to those who might have feared that attacking the weight and meaning given to convictions in this context threatened the use of convictions for sentencing or anything else. Don't worry, I said. "The implications . . . are not so radical."[129] But perhaps they are.

D. Being Wary of Reform Efforts that Aim to Reorder Things Within the Existing Framework

Abolitionism has been dismissed for its audaciousness—because, as some have put it, everything would have to change.[130] Abolitionism's willingness to look to new landscapes, however, highlights that there is another kind of audacity in proposing mere rearrangements within existing frameworks.[131] We academics

127. *See, e.g.*, NAT'L ASS'N CRIM. DEF. LAWS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 5 (2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on- [https://perma.cc/MUC5-76F8] ("Guilty pleas have replaced trials for a very simple reason: individuals who choose to exercise their Sixth Amendment right to trial face exponentially higher sentences if they invoke the right to trial and lose.").

128. Roberts, *supra* note 67, at 608.

129. *Id.*

130. *See* Morgan, *supra* note 110, at 1203 ("Leading abolitionist theorist Ruth Wilson Gilmore captures this by saying that to create an abolitionist society, abolitionists have to change one thing: everything.").

131. *See* Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 103 (2020) (quoting André Gorz for the proposition that non-reformist reforms are "conceived not in terms of what is possible within the framework of a given system and administration, but in view of what should be made possible in terms of human needs and demands").

sometimes seem to take it as a given that certain fundamental values may have to be compromised so that our frameworks can stay the same.

There are many examples of ways in which the scholarly prior conviction impeachment landscape has bought into an assumption—either explicit or implicit—that we need to take the existing framework as a given and just try to reorder elements within it so that they are in better harmony. The fixedness of the framework allows the best compromise to emerge as the winning proposal, regardless of whether the values compromised are fundamental ones. Thus, for example, I have written that we should assume that the federal regime of prior conviction impeachment is not going anywhere, and that we should just think how best to balance litigants' desires to impeach against the relevant concerns. [132] I have wrestled with the notion that settling on a position with respect to whether the defense should be permitted to impeach prosecution witnesses will require compromising either the stance that prior conviction impeachment should have no role to play in our evidentiary system, or the stance that in a system set up against the defense I prefer not to advocate for the lessening of defense protections.[133] In that same area, another tension exists—between protecting the defense's right to confront and protecting the desire of complainants (and in some states, their constitutional right)[134] to be treated with respect and dignity.[135] And Jeffrey Bellin has written about the dilemma for the person facing criminal charges who wants to avoid the silence penalty but also wants to avoid the prior offense penalty.[136]

These are all horrible dilemmas and tensions. And if two things are in horrible tension, you can think about how best to balance them or you can consider pushing at the framework that is creating that tension. Abolitionism may inspire us—in our thinking, writing, and teaching—to do more rejection of the framework and less perfecting of the balance.[137]

---

132. *See* Roberts, *supra* note 67, at 604.

133. *See* Roberts, *supra* note 10, at 1236–41.

134. *See* Anna Roberts, *Victims, Right*?, 42 CARDOZO L. REV. 1449, 1478–79 (2021) (mentioning that "victims' rights" provisions often cite the values of respect and dignity and giving an example of a complaining witness invoking a state constitutional guarantee of "fairness, respect, and dignity" in support of a suit claiming a right to be referred to as a "victim").

135. *See* Roberts, *supra* note 10, at 1248–51 (suggesting that the untenable nature of such a balancing militates in favor of thinking beyond the existing system).

136. Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395 (2018).

137. *See* Morgan, *supra* note 110, at 1222 (drawing on Mariame Kaba's work to recommend questions that professors might pose to students such as the following: "Take a given social problem. Identify the relevant laws, develop legal claims. Then ask, what would it look like to transform not only the legal regime related to the social problem but the social conditions that produced the social problem in the first place?").

CONCLUSION

The debate about what abolitionism might teach us about criminal-system reform ambitions is a hot and evolving one. Future years promise more discussion and insight. But even in this question-asking stage, it is important that evidence and evidentiary reform projects be a part of the discussion. For just as a phenomenon like prior conviction impeachment cannot be seen in isolation from all who contribute to its operation, the broader evidentiary regime cannot be seen in isolation from the criminal system that it fuels and that fuels it.

This Article has suggested that even as we continue our efforts at change, we might frame prior conviction impeachment not as a practice that needs to be fixed because it undermines the system's legitimacy, but as an example of what our evidence law can do and what our criminal system can do. What our prosecutors cling to and how desperately; what our judges rationalize and how desperately. Even despite, or because of, its racial disparities and all the other critiques that have been launched at it.[138] Comprehending the strength and nature of the root forces behind it is necessary if there is to be any sort of lasting change—either within or beyond the criminal system.

138. *See id.* at 1210 ("Abolitionists often proclaim that the criminal justice system is not broken but functioning as it's supposed to: as a tool for racial, gender, class, and disability subordination.").