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DENYING DEFENDANTS THE BENEFIT OF A REASONABLE DOUBT: FEDERAL RULE OF EVIDENCE 609 AND PAST SEX CRIME CONVICTIONS

Julia T. Rickert*

The vast majority of jurisdictions in the United States allow the credibility of testifying defendants to be impeached with evidence of prior felony convictions. This past crime evidence is admitted solely to show that the defendant may lack credibility. It is not admitted to show that the defendant has a tendency to commit crimes in general or that he or she is a bad, dangerous person. Juries are given a limiting instruction that is supposed to prevent improper use of the evidence, but courts and legislatures acknowledge that despite limiting instructions, past crime evidence can illegitimately prejudice a jury against a defendant. For this reason, judges are required to compare the prejudicial effect of past crimes evidence to its probative value before it is admitted. If the evidence is even slightly more prejudicial than probative of credibility, it is to be excluded.

Sex offense convictions are extraordinarily prejudicial—overwhelming evidence shows that sex offenders are the most feared and despised group in this country—and these convictions are not particularly probative of credibility. Yet judges rarely acknowledge this when comparing the probative value of past sex crime convictions to their prejudicial effect on jurors. This failure undermines evidentiary principles that are fundamental to our system of criminal justice. A defendant who previously was convicted of a sex offense is left with three bad choices: he or she can accept a plea bargain regardless of actual guilt; go to trial but decline to testify; or testify, but lose the jury’s goodwill when the sex crime conviction is presented. An acquittal based on valid reasonable doubt becomes much less likely.

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For jurors in a criminal trial to fulfill their duty of determining whether a person is guilty of a particular act beyond a reasonable doubt, they must not be diverted from that task by intense dislike for a defendant who has previously been convicted of a sex crime. Legislatures and courts should adopt a rule that prior sex crime convictions are presumptively inadmissible to impeach credibility.

I. INTRODUCTION

Late one cold night in Chicago, a homeless man came upon an unlocked car parked on the street. He decided he would sleep in it. Early the following morning, he awoke just as a police cruiser pulled parallel to the car. He was arrested and later charged with burglary. Because of his criminal history, the man faced six to thirty years if convicted. The prosecutor offered him eight years in exchange for a guilty plea.

The crime of burglary, a Class 2 felony in Illinois, is committed when one “knowingly enters or without authority remains within a building, housetrailer, watercraft, aircraft, motor vehicle as defined in The Illinois Vehicle Code, railroad car, or any part thereof, with intent to commit therein a felony or theft.”¹ The requisite intent to commit a felony or theft can be inferred from the bare circumstance of having entered without authority.² This inference can of course be rebutted.

In this case, the defendant had not disturbed any of the valuables in the car. The police had been called by the car’s owner, who reported the presence of someone in his vehicle, but did not specify whether the person was awake or asleep. The police report did not comment on whether the homeless man appeared to have just awoken, but it did indicate that sunglasses were found in the homeless man’s pocket. The vehicle owner told the police that the sunglasses looked familiar and *may* have been left in his car by a friend. The trespasser, however, claimed the sunglasses were his own. What no one disputed was that the car contained items of value that had not been disturbed, such as a cellular phone, a stereo, and compact discs.

The known facts and the defendant’s convincing explanation of his motive for entering the car supported an argument that he was merely guilty

¹ 720 ILL. COMP. STAT. ANN. 5/19-1 (West 2003).

² See *People v. Boguszewski*, 580 N.E.2d 925, 926 (Ill. App. Ct. 1991) (“Unlawful entry into a building containing personal property that could be the subject of larceny gives rise to an inference of intent sufficient to sustain a burglary conviction. However, this inference is permissible only in the absence of circumstances that are inconsistent with an intent to commit a theft.”) (citations omitted).

of criminal trespass to a vehicle, a Class A misdemeanor under Illinois law.³ The prosecutor was devoted to the felony charge, however, and so the defendant would need to testify at trial to rebut the assumption that he intended to commit a felony or theft within the vehicle he had entered. Testifying would be the only way for him to introduce evidence of his state of mind and the only way to knock out the intent element required under the burglary statute. Put simply, the whole case depended on his testimony.

The defense attorney on the case described it as “eminently triable.” There was only one potential hitch: would the prosecution be allowed to introduce the defendant’s prior convictions to call into question his character for truthfulness? The defendant had previously been convicted of two counts of aggravated sexual assault.

If the jurors were to disbelieve the defendant’s testimony, they could convict him of the felony rather than the misdemeanor. While no one likes the idea of a homeless man sleeping in his or her car, this particular homeless man—a convicted sex offender—was just the sort of person that a jury might be inclined to keep off the streets for as long as possible by finding him guilty of a felony rather than a misdemeanor. A lot—maybe everything—was riding on whether his prior convictions would be admitted to impeach his credibility.

Sexual assault is not among those crimes traditionally thought to bear directly on truthfulness. Past crimes like perjury, forgery, and fraud, which in most jurisdictions are automatically admissible to impeach witness credibility, more immediately allow us to judge a person’s propensity to lie.⁴ Nonetheless, under Illinois law, any type of felony can be admitted to impeach witness credibility, so long as the probative value of the evidence outweighs its prejudicial effect.⁵

Common sense suggests that the probative value of admitting this homeless man’s conviction would be vastly outweighed by the prejudicial effect of allowing the jury to hear about his past sex crime, because people tend to despise sex offenders. Yet judges have a significantly different understanding of the level of prejudice sex crime convictions inspire: they

³ See 720 ILL. COMP. STAT. ANN. 5/21-2 (West 2003) (“Whoever knowingly and without authority enters any part of or operates any vehicle, aircraft, watercraft or snowmobile commits a Class A misdemeanor.”).

⁴ Part II, *infra*, discusses the particulars of Federal Rule of Evidence 609. The rule is supposed to allow counsel to impeach a witness’s “character for truthfulness” with evidence of prior convictions—but not if this will lead to conviction “on an improper basis.” FED. R. EVID. 609.

⁵ See *People v. Montgomery*, 268 N.E.2d 695, 698-99 (Ill. 1971).

will admit these convictions as evidence in non-sex crime trials to impeach the defendant's credibility as a witness.⁶

Understanding this dynamic, the prosecutor in the homeless man's case offered him seven years instead of eight and made clear that this offer would expire quickly. His attorney explained to him that his past convictions would likely be admitted if he chose to go to trial and testify. Upon learning this, the risk-averse client decided to take the plea bargain: seven years in state prison for sleeping in someone else's car.⁷

This result reveals significant system distortion. The prosecutor was given inordinate leverage in the plea negotiation, and the defendant was unduly discouraged from explaining his actions to a jury. He received a lengthy sentence for a minor offense. Taxpayers will foot the bill for his incarceration. This distortion is caused by the ability of prosecutors to present past sex crime convictions for impeachment at trial. In this Comment, I argue that such evidence is almost always more prejudicial than probative of credibility and should be excluded for that reason.

* * *

The vast majority of jurisdictions in the United States allow a trial witness's credibility to be impeached with evidence of a prior felony conviction, even if it is a sex offense conviction.⁸ This past crime evidence is admitted *only* to show that the defendant, who has chosen to testify, may lack credibility⁹—*not* to show that the defendant has some tendency to commit crimes in general or that he is a bad, dangerous person.¹⁰ Juries are given a limiting instruction that is supposed to prevent improper use of the evidence, but courts and legislatures acknowledge that despite limiting instructions, past crime evidence can illegitimately prejudice a jury against

⁶ For descriptions of these cases, see *infra* Part II.

⁷ This is a real case that I observed while a summer clerk for the Cook County Public Defender.

⁸ 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, 4-27 (1999). No jurisdiction that I am aware of has adopted a rule that *specifically* allows for the admission of past sex crimes for impeachment purposes. Instead, the rule is that felonies generally—a category which includes sex crimes—are admissible. In practice, sex crime convictions are commonly admitted to undermine credibility. Later in this Comment, I discuss the relevance to my central thesis of those laws—common throughout the United States—that allow prior sex crime convictions evidence in to show the defendant's proclivity to commit such crimes when the charge before a court is also a sex crime. See *infra* Parts III-IV. Sex offenses are in this treatment unique among crimes.

⁹ Dodson, *supra* note 8.

¹⁰ *Id.*

a defendant.¹¹ For this reason, judges are required to consider the prejudicial effect of past crimes evidence before admitting it.

Judges regularly fail to recognize the exceptionally prejudicial effect of defendants' prior sex crime convictions.¹² This means that when an individual charged with a non-sexual offense wants to testify at trial but knows that he may have his credibility impeached by evidence of a prior sex crime conviction, he has one of three choices: he may accept a plea bargain regardless of actual guilt; he may go to trial but decline to testify, potentially undermining his defense; or he can testify and take his chances with the jury. A man on trial for tax evasion could find himself explaining his remorse for a rape that he was convicted of eight years before, rather than simply explaining to the jury that he had followed his accountant's instructions when he filed his tax return and was unaware of the error on that form. This is a problem because the prejudicial effect of a sex crime conviction will nearly always outweigh the probative value of that evidence as to credibility, making an acquittal based on valid reasonable doubt much less likely. The fact is, known or alleged sex offenders¹³ are the most despised group of criminals in this country.¹⁴ Citizens are terrified of them and our legal system sets them apart from other criminals, subjecting them to special restrictions and punishments.¹⁵

Support for my claim that past sex crime convictions are always or nearly always more prejudicial than probative of witness credibility comes from diverse sources. But all of this support relates to our society's profound aversion to sex offenders or the unique handling of these offenders by our legal system.¹⁶ In this Comment, rather than denouncing the fact that sex offenders are singled out, I propose further exceptional treatment of them: they should be given special protection when on trial for

¹¹ The ineffectiveness of limiting instructions in the context of past sex crimes admitted to show lack of credibility is discussed later in this Comment. *See infra* Part IV.

¹² *See infra* Part II. The full scale of this problem remains unknown, and a comprehensive examination of trial court evidentiary rulings would only begin to answer the question; it may not be possible to determine how frequently defendants with past sex crime convictions accept plea deals to avoid hostile juries.

¹³ Not all sex offenses are created equal. For example, child rape is much more despicable than "flashing." But Part III.B.1 will explain why merely labeling an act a "sex offense" makes people react to it with strong emotions.

¹⁴ It is true that alleged terrorists have recently gained ground and are also exceptionally hated and feared. If a time comes when convicted terrorists are regularly being tried for subsequent offenses, a rule barring the use of those convictions to impeach credibility may become necessary.

¹⁵ *See infra* Part III.

¹⁶ *See infra* Part II.

subsequent *non-sexual* offenses so that jurors do not convict them for the wrong reasons.

This Comment proceeds in four Parts. Part II provides background information on the use of prior convictions to impeach credibility and on the current practice with respect to prior sex crime convictions. Part III discusses why sex crimes are unique, their slight-at-best probative value, and the overwhelming evidence that they incite great prejudice. The important question is whether these social views of sex offenders are imported into the jury box. Part IV suggests that they are, and that juries are helpless to make decisions without being influenced by these biases. This creates the need for special treatment of past sex crimes evidence. Part V offers potential legislative and judicial solutions to the problem identified.

II. BACKGROUND: ADMITTING PRIOR CONVICTIONS IN STATE AND FEDERAL COURT

At common law, defendants were barred from testifying at their own trials, because it was thought that the intensity of a defendant's interest in the outcome of the trial rendered his or her testimony unreliable.¹⁷ In many cases, this prohibition served to cripple a defendant's ability to rebut the prosecution's allegations.¹⁸ Fortunately, a realization that the common law was unjust on this point took hold after the Civil War, and every state but Georgia passed a statute allowing defendants to take the stand.¹⁹ Congress also passed such a statute in 1878 providing that "[i]n trial of all persons charged with the commission of offenses against the United States . . . the person charged shall, at his own request, be a competent witness."²⁰ Finally, in 1987, the Supreme Court found that it was not only unfair to bar defendants from testifying, but that it also violated the Constitution.²¹

Another group barred at common law from taking the stand was made up of those who had committed "infamous crimes," which included treason, any felony, and *crimen falsi*.²² That last category is slippery. The Illinois Supreme Court explained in 1901:

¹⁷ Alexander G.P. Goldenberg, *Interested, but Presumed Innocent: Rethinking Instructions on the Credibility of Testifying Defendants*, 62 N.Y.U. ANN. SURV. AM. L. 745, 749-50 (2007).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 18 U.S.C. § 3481 (2006).

²¹ *Rock v. Arkansas*, 483 U.S. 44, 51 (1987) ("The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution.").

²² THOMAS WELBURN HUGHES, AN ILLUSTRATED TREATISE ON THE LAW OF EVIDENCE 276 (1905).

Crimen falsi, according to the better opinion, does not include all offenses which involve a charge of untruthfulness, but only such as injuriously affect the administration of public justice, such as perjury, subornation of perjury, suppression of testimony by bribery or conspiracy, to procure the absence of a witness, or to accuse one wrongfully of a crime, or barratry, or the like.²³

The concern behind this long-defunct rule—and others, such as the rule that barred the testimony of “those who lack religious belief”²⁴—was the same as that behind the rule excluding defendant testimony: the integrity of the trial must be protected.

Modern supporters of these old common law rules, if they exist, are not very vocal, but much attention understandably is still given to the fact that witnesses—be they defendants or otherwise—do sometimes lie on the stand. How are jurors to spot the perjurers? Demeanor evidence and plain-old attentiveness to the coherence of witness testimony are rarely thought to be sufficient by U.S. legislatures and courts, and so most jurisdictions allow evidence of prior convictions to be admitted for the purpose of undermining witness credibility.²⁵

Levels of permissiveness vary among jurisdictions, but most states, including Illinois, have adopted some version of Rule 609 of the Federal Rules of Evidence.²⁶ The Rule reads in relevant part:

Impeachment by Evidence of Conviction of Crime

(a) General rule—For 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.²⁷

²³ *Matzenbaugh v. People ex rel. Galloway*, 62 N.E. 546, 548 (Ill. 1901).

²⁴ HUGHES, *supra* note 22, at 276.

²⁵ See Dodson, *supra* note 8.

²⁶ Illinois does not have a code of evidence. In *People v. Montgomery*, 268 N.E.2d 695 (Ill. 1971), the Illinois Supreme Court decided that the provisions of the 1971 draft of Rule 609 of the Federal Rules of Evidence would be adopted.

²⁷ FED. R. EVID. 609. The rest of Rule 609 provides:

(b) Time limit.—Evidence of a conviction under this rule is not admissible if a period of more

The congressional debate over Rule 609 was quite contentious,²⁸ and the Rule has continued to be controversial ever since it was promulgated²⁹ as a result of tension between fears that the guilty will go free and concerns that the innocent will be punished.³⁰ The Rule has been amended repeatedly, vacillating between being more and less permissive.³¹

The compromise reached by those who support easy admission of past crimes evidence and those who do not is embodied in the Rule's most notorious subsections. Under Rule 609(a)(2), crimes of "dishonesty or false statement"—something akin to *crimen falsi*—are automatically admissible, regardless of whether they are felonies or misdemeanors; other felonies are subjected to the test mandated by Rule 609(a)(1), which balances probative value against prejudicial effect.

than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation.—Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications.—Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal.—The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Id.

²⁸ Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2295-96 (1994); see also *id.* at 2303 ("The extent of the floor debate in the House over Rule 609(a) far exceeded that relating to any other provision in all the proposed Federal Rules of Evidence.").

²⁹ 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, 289 (2008) (describing the admission of prior convictions to impeach defendant testimony as "one of the most controversial trial practices in American criminal jurisprudence").

³⁰ See Gold, *supra* note 28, at 2310 ("[J]ust below the surface, the fight over Rule 609(a) became more ideological, implicating the interests of society in convicting the guilty, and the interests of the accused in receiving a fair trial and in being acquitted when innocent of the crimes currently charged.").

³¹ See FED. R. EVID. 609 advisory committee's notes.

The crimes automatically admissible for witness impeachment purposes under Rule 609(a)(2) are understood to be “perjury or subornation of perjury, false statement, criminal fraud, embezzlement or false pretense, or any other offense, in the nature of *crimen falsi* the commission of which involves some element of untruthfulness, deceit or falsification bearing on the accused’s propensity to testify truthfully.”³² There has been disagreement over exactly which crimes fit into this category,³³ but sex offenses clearly do not.

Felonies of any type are deemed admissible for impeachment purposes on the theory that those who commit felonious acts are simply less credible than are law-abiding citizens.³⁴ Felony sex offenses, like any other felony, are subject to the balancing test mandated by 609(a). The rule is that when the witness in question is the defendant, a past conviction with greater prejudicial effect than probative value must be excluded; for other witnesses, the prejudicial effect must “substantially outweigh” the probative value to be non-admissible, which is the test under Federal Rule of Evidence 403.³⁵ Trial court judges are given broad discretion in their application of this test,³⁶ and their determinations are reviewed only for abuse of discretion.³⁷ The Fifth Circuit requires that prejudice and probativity be weighed “on the record,”³⁸ while other circuits merely encourage such an approach.³⁹

The application of any balancing test that asks a judge to determine what impression a piece of information will make on the minds of jurors is

³² *Id.*

³³ “The Advisory Committee concluded that the Conference Report provides sufficient guidance to trial courts and that no amendment is necessary, notwithstanding some decisions that take an unduly broad view of ‘dishonesty,’ admitting convictions such as for bank robbery or bank larceny.” *Id.*

³⁴ See Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763, 776 (1961) (“The premise of the broad impeachment rules seems to be that a person’s general character can be determined by evidence of past criminal acts and that general character can be a meaningful index of propensity to lie.”).

³⁵ 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.”); see also FED. R. EVID. 404 (barring admission of character evidence to prove action in conformity therewith, except in particular circumstances).

³⁶ *United States v. Martinez*, 555 F.2d 1273, 1276 (5th Cir. 1977) (explaining that the trial court has broad discretion in its application of the Rule 609 test).

³⁷ *United States v. Shaw*, 701 F.2d 367, 385 (5th Cir. 1983).

³⁸ *United States v. Preston*, 608 F.2d 626, 639 (5th Cir. 1979).

³⁹ See *United States v. De La Cruz*, 902 F.2d 121, 123 (1st Cir. 1990); *United States v. Key*, 717 F.2d 1206, 1208-09 (8th Cir. 1983); *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976).

inherently fraught with challenges. Regardless of whether judges are uniquely or especially qualified to make such psychological findings, they are tasked with the job, and therefore have developed some guidelines for performing it. The District of Columbia Circuit's influential take on how a judge's discretion should be exercised in this context was laid out in *United States v. Gordon*: "[W]e must look to the legitimate purpose of impeachment which is, of course, not to show that the accused who takes the stand is a 'bad' person but rather to show background facts which bear directly on whether jurors ought to believe him rather than other and conflicting witnesses."⁴⁰

The *Gordon* court identified several factors that should be weighed when making a past crimes admissibility determination.⁴¹ These factors were later summarized in a Seventh Circuit case as follows: "(1) The impeachment value of the prior crime. (2) The point in time of the conviction and the witness' subsequent history. (3) The similarity between the past crime and the charged crime. (4) The importance of the defendant's testimony. (5) The centrality of the credibility issue."⁴²

Gordon did not purport to furnish a comprehensive analytical tool,⁴³ but there is one area in which the factors fall egregiously short: they do not acknowledge that, regardless of the charged crime, some felony convictions are far more likely to inspire prejudice in jurors than are others. Nor is this fact routinely acknowledged by judges presiding over trials that involve defendants who were previously convicted of sex crimes. Instead, it has been held proper to impeach a defendant charged with bank robbery using evidence of his prior conviction for sexual assault.⁴⁴ The credibility of a defendant charged with "knowingly and intentionally causing a threatening communication to be delivered by mail" has been impeached with evidence of an aggravated sexual abuse conviction.⁴⁵ Even when a multitude of less-inflammatory felonies were available to the prosecution for impeachment purposes, sex crime convictions have been admitted into evidence.⁴⁶ In

⁴⁰ 383 F.2d 936, 940 (D.C. Cir. 1966).

⁴¹ *Id.*

⁴² *Mahone*, 537 F.2d at 929.

⁴³ *Gordon*, 383 F.2d at 941 ("[T]he very nature of judicial discretion precludes rigid standards for its exercise; we seek to give some assistance to the trial judge to whom we have assigned the extremely difficult task of weighing and balancing these elusive concepts.").

⁴⁴ *United States v. White*, 222 F.3d 363 (7th Cir. 2000).

⁴⁵ *United States v. Turner*, 960 F.2d 461 (5th Cir. 1992).

⁴⁶ *United States v. Montgomery*, 390 F.3d 1013 (7th Cir. 2004). A man charged with being a felon in possession of a firearm had six felony convictions on his record, one of which was a sex crime. *Id.* All six were admitted to impeach his credibility. *Id.*

most state courts, prior sex crime convictions are also generally admissible for impeachment purposes.

No state has singled out sex crimes for special treatment in the witness impeachment context.⁴⁷ A few, however, have eschewed adoption of Rule 609 and have created alternative rules that either increase the chance that past sex crime evidence will be admitted or decrease it as compared to Rule 609. California and Hawaii are among these rogue states, and both avoid balancing prejudicial effect against probative value—but that is where the similarities end. California law states, “For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony,” unless the witness has been pardoned or has received an official certificate of rehabilitation.⁴⁸ This is much more permissive than Federal Rule of Evidence 609. Hawaii, conversely, will not admit prior conviction evidence to attack credibility unless the defense has “introduced testimony for the purpose of establishing the defendant’s credibility as a witness” and the prior conviction was for a crime of dishonesty.⁴⁹ In other words, if a defendant testifies that he or she is impeccably honest, but actually has been previously convicted of fraud, then that conviction can be admitted for impeachment in Hawaii.

One other state-law impeachment doctrine worth mentioning is impeachment by evidence of a conviction involving “moral turpitude.”⁵⁰ Sex crimes fit squarely into that category, but this approach to impeachment

⁴⁷ My research has not turned up any jurisdiction that does so.

⁴⁸ CAL. EVID. CODE § 788 (West 1995).

⁴⁹ HAW. REV. STAT. ANN. § 626-1, R. 609 (LexisNexis 2007).

⁵⁰ The former Alabama “moral turpitude” impeachment statute reads:

(a) No objection must be allowed to the competency of a witness because of his conviction for any crime, except perjury or subornation of perjury.

(b) As affecting his credibility, a witness may be examined touching his conviction for a crime involving moral turpitude, and his answers may be contradicted by other evidence.

ALA. CODE § 12-21-162 (LexisNexis 2005). Walton Jackson conducted a survey of Alabama’s appellate courts to determine which crimes have been held to involve moral turpitude. Such crimes include:

abortion; adultery; assault in the second degree; assault with the intent to murder; assault with the intent to rob; altering the identification of a firearm; attempted theft in the second degree; attempted sexual abuse; burglary; buying, receiving, and concealing stolen goods; conspiracy where the object of the conspiracy is a crime involving moral turpitude; carnal knowledge; desertion in the time of war; forgery; fraud; gambling; grand larceny; income tax evasion; larceny (theft in today’s nomenclature); manslaughter in the first degree; murder; rape; robbery; passing a worth- less check; and the illegal sale of controlled substances.

J. Walton Jackson, Comment, *Impeachment of a Witness by Prior Convictions Under Alabama Rule of Evidence 609: Everything Remains the Same, or Does It?*, 48 ALA. L. REV. 253, 257-58 (1996).

has fallen out of favor.⁵¹ This move may reflect a growing understanding that impeachment with certain past crimes encourages jurors to convict on an improper basis.

III. WHAT'S SO SPECIAL ABOUT SEX CRIMES?

Those commentators who argue that virtually *no* prior convictions should be admitted to attack credibility because they cause undue prejudice or have an undesirable chilling effect on defendant testimony could well be right.⁵² And admitting that sort of evidence in the case of defendant-witnesses may not be necessary, because if the defendant is guilty, he or she already has a strong incentive to lie on the stand, and jurors know it.⁵³ But there is something to be said on the other side of the argument: it is plausible that felons are more prone to dishonesty than are law-abiding citizens.⁵⁴ And there is no doubt that career con-artists and habitual perjurers can make pretty slick-yet-unreliable witnesses. Perhaps in such cases the jury should be warned about the witness's tendencies.⁵⁵ When it comes to evidence of past sex crimes, however, there are a slew of reasons to believe that such evidence is vastly more prejudicial than it is probative

⁵¹ Alabama has adopted Rule 609 of the Federal Rules of Evidence. Compare FED. R. EVID. 609, with ALA. CODE § 12-21-162(b).

⁵² See, e.g., Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules that Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851, 853 (2008) (describing the legal rule permitting impeachment with prior convictions as bringing about "the defendant-silencing status quo by severely penalizing defendants who exercise the right to testify"); Dodson, *supra* note 8; *Other Crimes Evidence at Trial*, *supra* note 34, at 774-78.

⁵³ See *Brown v. United States*, 370 F.2d 242, 244 (D.C. Cir. 1966) ("One need not look for prior convictions to find motivation to falsify, for certainly that motive inheres in any case, whether or not the defendant has a prior record. What greater incentive is there than the avoidance of conviction? We can expect jurors to be naturally wary of the defendant's testimony, even though they may be unaware of his past conduct.").

⁵⁴ See *United States v. Martinez*, 555 F.2d 1273, 1276 (5th Cir. 1977) ("The rationale of the rule allowing impeachment by the use of former convictions is that unbelievable may be inferred from defendant's general readiness to do evil. Prior convictions may indicate the accused has a criminal nature and thus, has a propensity to falsify his testimony.").

⁵⁵ The case for admitting some, but not all, prior convictions for impeachment purposes was made well in *Brown*, 370 F.2d at 244-45:

The reason for exposing the defendant's prior record is to attack his *character*, to call into question his reliability for truth-telling by showing his prior, relevant antisocial conduct

[T]he trial judge, in weighing the prejudice that might result from its admission against the interest in having the defendant testify, should focus on just how relevant to credibility a particular conviction may be. While one who has recently been convicted of perjury might well be suspected of lying again under oath, the fact that a defendant accused of assault has already been convicted of assault has no such bearing on credibility. Certainly the prior assault establishes a history of violent behavior, but proof of prior violent behavior is inadmissible to prove assault.

of credibility. I will explore the evidence that sex crimes are especially prejudicial below, but first I will discuss the other side of the balancing test: the probative value prior sex crime convictions have in the credibility context.

A. PROBATIVE VALUE

How probative of witness credibility are previous sex crime convictions? Though I have found no definitive answer to this question, such convictions are arguably less probative of credibility than are many other crimes. As explained above, Rule 609 acknowledges that some criminal convictions are more indicative of dishonesty than others.⁵⁶ Crimes of “dishonesty or false statement,” governed by Rule 609(a)(2), are considered so probative of credibility that they should never be excluded, and so Congress has removed any judicial discretion to do so.⁵⁷ Judges have reasoned that felonies not falling under 609(a)(2) also vary in their relevance to credibility.⁵⁸ Bank robbery, for instance, is probably more indicative of dishonesty than is manslaughter.

So where does this leave sex offenses, relatively speaking? Such crimes, particularly if it is true that they are the manifestation of a

⁵⁶ The defendant who is most likely to lie on the stand is the guilty defendant, regardless of whether this is the first time or the tenth time he or she is being prosecuted. If I had to make my best guess as to a defendant’s guilt or innocence, without being able to judge from the other evidence available, I would want to know if the defendant had committed crimes previously. It would demonstrate to me a propensity to commit crimes. But Rule 609 is not about propensity; it is about credibility. Plus, it should always be remembered that many persons with criminal records have been pegged for very serious crimes they did not commit because such members of society are easy targets for law enforcement officials and career prosecutors.

⁵⁷ See H.R. REP. NO. 93-1597, at 7103 (1974) (“The admission of prior convictions involving dishonesty and false statement is not within the discretion of the Court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted. Thus, judicial discretion granted with respect to the admissibility of other prior convictions is not applicable to those involving dishonesty or false statement.”). The Rule also conserves judicial resources by relieving judges of the burden of applying a balancing test in those cases.

⁵⁸ Consider the following discussion from *Gordon v. United States*:

In common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man’s honesty and integrity. Acts of violence on the other hand, which may result from a short temper, a combative nature, extreme provocation, or other causes, generally have little or no direct bearing on honesty and veracity. A “rule of thumb” thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not; traffic violations, however serious, are in the same category.

383 F.2d 936, 940 (D.C. Cir. 1967).

compulsion,⁵⁹ arguably fall nearer to manslaughter than to bank robbery. Some courts have agreed and have found that sex crime convictions have little probative value in the credibility context.⁶⁰ Additionally, studies show that those who are convicted of sex offenses are significantly less likely to commit non-sex crimes than are other types of criminals.⁶¹ Does this mean that sex offenders are less likely to commit the crime of perjury than are defendants previously convicted of non-sex crimes? Perhaps not, but in any event, I have encountered no argument that past sex crimes are especially probative of a witness's propensity to lie on the stand.

B. PREJUDICIAL EFFECT

The prejudicial effect of impeachment with past sex crime convictions is much clearer than their probative value. Without doubt, the fact that a witness-defendant was previously convicted of a sex crime is exceptionally and inappropriately prejudicial. While considering the evidence that follows to support this claim, keep in mind why Rule 609 exists:

Since all effective evidence is prejudicial in the sense of being damaging to the party against whom it is offered, prejudice which calls for exclusion is given a more specialized meaning: *an undue tendency to suggest decision on an improper basis, commonly but not necessarily an emotional one, such as bias, sympathy, hatred, contempt, retribution or horror.*⁶²

There are numerous reasons, all involving the special status of sex offenses in our laws and minds, to conclude that prior sex crime convictions are exactly the type of prejudicial evidence described above.

Behind the ways sex offenders are set apart by our legal system is, naturally, society's view of sex offenders. And the public's perception is in

⁵⁹ See Michael Vitiello, *Punishing Sex Offenders: When Good Intentions Go Bad*, 40 ARIZ. ST. L.J. 651, 653 (2008).

⁶⁰ See *Christmas v. Sanders*, 759 F.2d 1284 (7th Cir. 1985) (explaining that "the trial judge correctly noted that a conviction for rape was not highly probative of credibility"); *United States v. Larsen*, 596 F.2d 347, 348 (9th Cir. 1979) ("The fact that a defendant has been convicted of child molesting bears only nominally on credibility . . .").

⁶¹ "Sex offenders were less likely than non-sex offenders to be rearrested for any offense—43 percent of sex offenders versus 68 percent of non-sex offenders." BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *available at* <http://www.ojp.usdoj.gov/bjs/crimoff.htm#recidivism> (last visited Oct. 26, 2009). This statistic should not be read as suggesting that sex offenders don't have a tendency to commit future sex offenses: "Sex offenders were about four times more likely than non-sex offenders to be arrested for another sex crime after their discharge from prison—5.3 percent of sex offenders versus 1.3 percent of non-sex offenders." *Id.* Furthermore, "Within 3 years of release, 2.5% of released rapists were rearrested for another rape," while only "1.2% of those who had served time for homicide were arrested for a new homicide." *Id.*

⁶² *Woods v. Zeluff*, 158 P.3d 552, 554 (Utah Ct. App. 2007) (emphasis added) (citation omitted).

turn influenced by the legal regime it inspired. An examination of both sides of the equation follows.

1. Society's Attitude Toward Sex Offenders

Multiple studies have shown that repugnance, anger, and fear are the most common reactions to sex offenders.⁶³ Community members' anxiety levels rise sharply when a sex offender moves nearby,⁶⁴ while property values fall.⁶⁵ Released sex offenders face harassment, vandalism, unemployment, homelessness, and, on occasion, murder.⁶⁶ Remarkably, one study found that people object more strenuously to living near convicted child molesters than to living near convicted murderers.⁶⁷

Even prejudice against *potential* sex offenders is pervasive. Long before conviction, the merest allegation that a person has committed a sex crime can turn communities against the accused, even if no real evidence has been offered.⁶⁸ This was recently illustrated dramatically by the Duke

⁶³ See Robert Paul Doyle, Proposition 83, Framing and Public Attitudes Toward Sex Offenders: An Application of Heuristic Models of Social Judgment (Aug. 10, 2009) (working paper), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1444688. Sex crimes have been described as the "most feared" crimes. See Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 298 (2006).

⁶⁴ See Michael P. Griffin & Desiree A. West, *The Lowest of the Low? Addressing the Disparity Between Community View, Public Policy, and Treatment Effectiveness for Sex Offenders*, 30 LAW & PSYCHOL. REV. 143, 156-57 (2006).

⁶⁵ *Id.* at 157 ("[H]ouses were sold for 17.4% less money than other homes if they were within 0.1 miles of a registered sex offender.").

⁶⁶ See Carpenter, *supra* note 63, at 360 (explaining the stigma and many difficulties faced by registered sex offenders); *id.* at 301 n.16 (citing the case of a man who murdered two registered child molesters after learning they had moved to his area). Carpenter asserts that "the collective fear over sex offenders continues to escalate." *Id.* at 301. Consider the following description from *E.B. v. Verniero* as well:

[R]egistrants and their families have experienced profound humiliation and isolation as a result of the reaction of those notified. Employment and employment opportunities have been jeopardized or lost. Housing and housing opportunities have suffered a similar fate. Family and other personal relationships have been destroyed or severely strained. Retribution has been visited by private, unlawful violence and threats and, while such incidents of "vigilante justice" are not common, they happen with sufficient frequency and publicity that registrants justifiably live in fear of them. It also must be noted that these indirect effects are not short lived. While there are suggestions in the record that the circumstances of a registrant may stabilize as time passes after notification, the statute permits repeat notification over a period of many years.

119 F.3d 1077, 1102 (3d Cir. 1997).

⁶⁷ Griffin & West, *supra* note 64, at 156 (citing Alica Caputo & Stanley L. Brodsky, *Citizen Coping with Community Notification of Released Sex Offenders*, 22 BEHAVIORAL SCI. & L. 239 (2004)).

⁶⁸ See generally Neil Vidmar, *Generic Prejudice and the Presumption of Guilt in Sex Abuse Trials*, 21 LAW & HUM. BEHAV. 5 (1997).

lacrosse team rape scandal.⁶⁹ A dismayed community, a shamed university, and an over-eager prosecutor visited grave consequences on the young men charged—without first objectively assessing their guilt.⁷⁰ Such condemnation is infinitely swifter and more enduring when the alleged victim is a child. “The media and the public are ready to condemn those accused of child sex crimes well before they have had their chance to present a defense, often before the prosecution even has enough evidence for a formal charge.”⁷¹ The documentary film *Capturing the Friedmans* is a chilling account of what can happen when allegations of child sex abuse are leveled.⁷² The most outlandish stories will be given credence once people have become inflamed and frightened.⁷³

Do these extreme negative attitudes extend to all sex offenders, or just the worst ones? There is reason to believe that simply calling an act a sex offense makes most people react more negatively to it. A paper by Robert Doyle posits that the media’s intense focus on the most heinous sex offenders triggers the “availability heuristic” and the “representativeness heuristic,” causing the public to perceive most or all so-called sex offenders as extremely threatening and intractably deviant.⁷⁴ All sex offenders come to be seen as dangerous sexual predators.⁷⁵ This effect is demonstrated by a study showing that, on average, non-victims have a more negative perception of sex offenders than sex crime victims have.⁷⁶

Heuristics aside, there is a conscious attempt underway to associate less serious sex offenses with the most serious ones. A recent commentary on CNN.com made this plea:

⁶⁹ See Aaron Beard, *Prosecutors Drop Charges in Duke Case*, WASH. POST, Apr. 11, 2008, at A1.

⁷⁰ *Id.*

⁷¹ Anna K. LaRoy, Comment, *Discovering Child Pornography: The Death of the Presumption of Innocence*, 6 AVE MARIA L. REV. 559, 559-60 (2008).

⁷² See CAPTURING THE FRIEDMANS (Home Box Office 2003).

⁷³ *See id.*

⁷⁴ *See generally* Doyle, *supra* note 63. The availability heuristic is employed when people estimate the frequency of a particular circumstance based on the ease with which it comes to mind. *Id.* at 13. The representativeness heuristic is the tendency of individuals to attribute the characteristics of the most vivid and emotion-provoking class members to the entire class (*e.g.*, sex offenders). *Id.* at 14.

⁷⁵ *Id.* at 22; Griffin & West, *supra* note 64, at 155 (“Inclusive labeling, in this instance, is the overgeneralization that all sex offenders are predators. Politicians, media, and professionals in the field interchange the terms ‘sex offender’ and ‘sexual predator’ regardless of the fact that they are not the same construct.”).

⁷⁶ Doyle, *supra* note 63, at 14 (citing K. Ferguson & C.A. Ireland, *Attitudes Towards Sex Offenders and the Influence of Offence Type: A Comparison of Staff Working in a Forensic Setting and Students*, 8 BRIT. J. FORENSIC PRAC. 10-19 (2006)).

As a nation, we must realize there is no such thing as a “minor” sexual offense Sex offenders start off by nabbing the easy prey—committing the so-called “minor” sexual offenses like flashing random women Then, after getting away with it or receiving a slap on the wrist, they become hungrier and develop into full-fledged predators. And it’s only when they sink their teeth into their prey that the legal system finally brings down the hammer. But it’s too late. . . . To stop this progression, we must start treating all sexual offenses as major crimes. . . . The simple answer is to take all sex offenders off the streets, from the moment they commit the first “minor” offense.⁷⁷

Anecdotally, those outside of the legal community with whom I have discussed my Comment topic have expressed a greater willingness to convict a defendant who has a past sex crime conviction than a defendant who was previously convicted of another type of offense. Many did not think it was improper to be influenced by knowledge of the conviction. Some even expressed a lack of concern over the hypothetical defendant’s actual guilt in the crime charged. After describing the problem addressed in this Comment to one acquaintance, he suggested, “Maybe the answer is for those sex offenders to just not do that stuff in the first place,” which perfectly illustrates my point. The studies discussed above suggest that this attitude is pervasive.

2. *Special Rules for Prosecuting Sex Offenders*

Though Federal Rule of Evidence 609 doesn’t give special status to sex crimes, Rules 413 and 414 do. These rules facilitate sex crime prosecutions by making an exception to the general ban on character propensity evidence:⁷⁸ a past act of sexual assault or child molestation can be admitted to show propensity to commit the same type of crime.⁷⁹ Rule 413(a) provides that “[i]n a criminal case in which the defendant is accused

⁷⁷ Jane Velez-Mitchell, *Commentary: Get Tougher on Sex Offenders*, CNN.COM, Jan. 14, 2009, <http://www.cnn.com/2009/CRIME/01/13/mitchell.sex.crime>.

⁷⁸ The general rule is that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” FED. R. EVID. 404(b).

Two rationales for this rule have been offered:

[O]ne rationale for the propensity ban has been the recognition that similar acts evidence is, logically, so minimally relevant that its probative value is, as a matter of law, unlikely to outweigh its prejudicial effect if presented to jurors.

* * *

[Another rationale is] that it invites the finder of fact to punish the offender for conduct unrelated to the crime charged

Rosanna Cavallaro, *Criminal Law: Federal Rules of Evidence 413-15 and the Struggle for Rulemaking Preeminence*, 98 J. CRIM. L. & CRIMINOLOGY 31, 61-64 (2007).

⁷⁹ FED. R. EVID. 413-414.

of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant."⁸⁰ Rule 414(a) makes the same provision for cases in which the defendant is charged with child molestation.⁸¹ The defendant need not have been convicted of the past offense.

A belief that sex offenses are different from other offenses is behind the Rules 413 and 414 exceptions. Sex offenses, it is believed, are often committed by sick individuals who engage in habitual, compulsive behavior that causes outrageous harm to vulnerable members of society.⁸² Moreover, the nature of these crimes can make responsibility for them difficult to prove.⁸³ What prosecutors need is an extra tool to ensure that these offenders come to justice, and that is what Rules 413 and 414 provide.⁸⁴

The relevance of Rules 413 and 414 to my argument is that they are one of the ways sex offenders are singled out in our legal system; they are prosecuted under special evidentiary rules so as to increase the chance that they will be convicted.⁸⁵ Although the rule I propose—exclusion of past sex crimes to impeach credibility—would instead lead to fewer convictions, this result is not in tension with Rules 413 and 414. Those rules, like mine,

⁸⁰ FED. R. EVID. 413.

⁸¹ FED. R. EVID. 414.

⁸² See CONG. REC. H8991-H8992 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) (“The proposed reform is critical to the protection of the public from rapists and child molesters, and is justified by the distinctive characteristics of the cases it will affect. In child molestation cases, for example, a history of similar acts tends to be exceptionally probative because it shows an unusual disposition of the defendant—a sexual or sadosexual interest in children that simply does not exist in ordinary people.”).

⁸³ *Id.*

[C]hild victims . . . credibility can readily be attacked in the absence of substantial corroboration. In such cases, there is a compelling public interest in admitting all significant evidence that will illumine the credibility of the charge and any denial by the defense.

Similarly, adult-victim sexual assault cases are distinctive, and often turn on difficult credibility determinations. Alleged consent by the victim is rarely an issue in prosecutions for other violent crimes—the accused mugger does not claim that the victim freely handed over [his] wallet as a gift but the defendant in a rape case often contends that the victim engaged in consensual sex and then falsely accused him.

⁸⁴ See FED. R. EVID. 413-14.

⁸⁵ See CONG. REC. H8991-H8992 (statement of Rep. Molinari). Commenting on the prior crimes evidence rules for sexual assault and child molestation cases, Representative Molinari said, “The enactment of this reform is first and foremost a triumph for the public—for the women who will not be raped and the children who will not be molested because we have strengthened the legal system’s tools for bringing the perpetrators of these atrocious crimes to justice.” *Id.* at H8991.

are an attempt to increase accuracy at trial.⁸⁶ It could be that evidence admitted under 413 or 414 is frequently more prejudicial than it is probative (of propensity to commit a crime rather than credibility)—certainly many argue as much⁸⁷—but assessing the propriety of admitting evidence of a defendant’s propensity to commit a particular crime is a very different inquiry from the one I am undertaking.

3. *The Prison Experience of Sex Offenders*

Even in prison, the universal prejudice against sex offenders is apparent. Incarcerated sex offenders face differential official treatment and are subject to disproportionate levels of abuse from guards and other inmates. Uniquely, sex offenders may be required to admit their guilt as part of a mandatory treatment program despite compelling Fifth Amendment concerns.⁸⁸ In some prisons, they are designated by special jumpsuits, a sort of scarlet letter.⁸⁹ Oftentimes, sex offenders are kept in higher-security facilities than the grade of their offenses merits, because “were they to escape, however unlikely, it could be a public relations disaster.”⁹⁰

Prison guards and even other criminals despise sex offenders, and, as a result, they have a harder time in prison than their peers.⁹¹ They make up “a distinct and disfavored category within prison populations, subject to

⁸⁶ See David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15, 19 (1994) (“The proposal of these rules presupposes that they will be more effective than the current rules in promoting accurate fact-finding and achieving just results.”).

⁸⁷ See generally Louis M. Natali, Jr. & R. Stephen Stigall, “*Are You Going to Arraign His Whole Life?*”: *How Sexual Propensity Evidence Violates the Due Process Clause*, 28 LOY. U. CHI. L.J. 1 (1996).

⁸⁸ See *McKune v. Lile*, 536 U.S. 24 (2002). See generally Merrill A. Maiano, Comment, *Sex Offender Probationers and the Fifth Amendment: Rethinking Compulsion and Exploring Preventative Measures in the Face of Required Treatment Programs*, 10 LEWIS & CLARK L. REV. 989 (2006).

⁸⁹ Sydney Tarzwell, Comment, *The Gender Lines Are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 172 (2006).

⁹⁰ Joan Petersilia, *California’s Correctional Paradox of Excess and Deprivation*, 37 CRIME & JUST. 207, 220 (2008).

⁹¹ See Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 442 (2006) (explaining that sex offenders “choose voluntary isolation to avoid harassment from other prisoners”); Ahmed A. White, *The Concept of “Less Eligibility” and the Social Function of Prison Violence in Class Society*, 56 BUFF. L. REV. 737, 755 (2008) (classifying sex offenders in prison as “easy targets of contempt”). See generally James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1 (1999).

heightened abuse from both corrections officers and fellow inmates.”⁹² And they are “disproportionately likely to be the target of sexual assault in prison.”⁹³ The problem of abuse is so bad that some European prison systems automatically place sex offenders in protective custody.⁹⁴ But more often in the United States, the abuse of sex offenders in prison is viewed as an unofficial part of their sentences.⁹⁵ At least one incarcerated sex offender, a man named Jack MacLean, has alleged that his civil rights were violated by the threats and ill treatment he received from guards and other inmates after they discovered his sex-offender status.⁹⁶ In MacLean’s case, a *People* magazine story exposing him as the so-called “gentle rapist” had elicited significant hostility toward him throughout the prison.⁹⁷ Predictably, his suit failed.⁹⁸

4. Civil Commitment

In more and more jurisdictions, judges may determine that particular sex offenders remain a threat to the public and should be held beyond their criminal sentences indefinitely.⁹⁹ The psychological classification of sex offenders as mentally ill persons provides the justification for this

⁹² Alice Ristroph, *Sexual Punishments; Sexuality and the Law*, 15 COLUM. J. GENDER & L. 139, 159-60 (2006).

⁹³ *Id.* at 160.

⁹⁴ *See Life Behind Bars: A Cycle of Violence, Despair and Drugs*, IRISH EXAMINER, May 13, 2008.

⁹⁵ *See Ristroph, supra* note 92, at 144-45 (noting further that “[t]he punishment/penal practices dichotomy underlies Eighth Amendment doctrine and leaves prison conditions largely outside the reach of the constitutional prohibition of ‘cruel and unusual punishments’”).

⁹⁶ *MacLean v. Secor*, 876 F. Supp. 695 (E.D. Pa. 1995).

⁹⁷ *Id.*; David Grogan, *Heart of Darkness*, PEOPLE, May 25, 1992, available at <http://www.people.com/people/archive/article/0,,20112756,00.html>.

⁹⁸ *MacLean*, 876 F. Supp. at 697 (“I find that plaintiff’s Fifth Amendment and Eighth Amendment claims based on defendants’ alleged verbal threats do not raise claims of constitutional magnitude.”).

⁹⁹ One example is Illinois’s Sexually Violent Persons Commitment Act. *See* 725 ILL. COMP. STAT. ANN. 207/9 (West 2008) That provision states:

The Illinois Department of Corrections or the Department of Juvenile Justice, not later than 6 months prior to the anticipated release from imprisonment or the anticipated entry into mandatory supervised release of a person who has been convicted or adjudicated delinquent of a sexually violent offense, shall send written notice to the State’s Attorney in the county in which the person was convicted or adjudicated delinquent of the sexually violent offense informing the State’s Attorney of the person’s anticipated release date and that the person will be considered for commitment under this Act prior to that release date.

Id. In 2006, Congress created a grant system to fund such programs as part of the Adam Walsh Child Protection and Safety Act. For the text of this statute, see *infra* note 106.

practice.¹⁰⁰ The Supreme Court has decided that internment in a maximum security facility is not a “punishment” when it results from a finding that a person is “sexually dangerous” and will be given treatment while confined.¹⁰¹

Attempting to cure mentally ill sex offenders is admirable and necessary, but it is easy to see how such a procedure could be abused by those who want to make sure that child molesters and rapists are punished interminably. Such individuals are not in short supply, and civil commitment in many cases amounts to a life sentence.¹⁰² These programs are expanding rapidly in response to “public fury over grisly sex crimes,” leading government officials to tout the severity of their state’s civil commitment statutes.¹⁰³ Gratuitous uses are sometimes thwarted, however, as happened recently in Minnesota when a federal judge denied a U.S. Attorney’s attempt to commit a sex offender “despite assessments by federal prison system authorities that he was not a candidate for civil commitment and would be manageable in a halfway house.”¹⁰⁴ The judge had harsh words for the prosecutor, calling his actions “inexplicable” and “nothing short of remarkable.”¹⁰⁵

5. Sex-Offender Registries and Related Measures

In recent years, there has been an unceasing effort to track and expose sex offenders who have returned to society. The number of special laws has exploded.¹⁰⁶ There is a national sex offender registry

¹⁰⁰ *Allen v. Illinois*, 478 U.S. 364, 366 (1986) (explaining that civil commitment was justified because “[b]oth psychiatrists expressed the view that petitioner was mentally ill and had criminal propensities to commit sexual assaults”).

¹⁰¹ *See id.* at 374 (“This Court has never held that the Due Process Clause of its own force requires application of the privilege against self-incrimination in a noncriminal proceeding, where the privilege claimant is protected against his compelled answers in any subsequent criminal case. We decline to do so today.”).

¹⁰² *See* Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES, Mar. 4, 2007, at A1.

¹⁰³ *Id.*

¹⁰⁴ Larry Oakes & Dan Browning, *Judge Smacks Prosecutors for Commitment Try*, STAR TRIB. (Minneapolis), June 10, 2008, at 11A.

¹⁰⁵ *Id.*

¹⁰⁶ The following is a list of recent federal sex offender registration laws and their major provisions:

1994—Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act. This act requires states to track released sex offenders by confirming their place of residence annually for ten years or, in the case of violent sex offenders, quarterly for the rest of their lives.

and every state has one of its own.¹⁰⁷ These databases are supposed to allow law enforcement to monitor offenders' movements and also alert

1996—Megan's Law. This act requires states to disseminate the information collected in their sex offender registries to the public.

1996—The Pam Lychner Sex Offender Tracking and Identification Act of 1996. This act requires the Attorney General to create and maintain a national sex offender database and requires the FBI to periodically verify sex offenders' addresses.

1997—The Jacob Wetterling Improvements Act. This act had many substantial provisions, among them the requirement that states participate in the national registry, the requirement that sex offenders register in states in which they work or attend school but do not reside, and the extension of registration laws to sex offenders convicted in a military tribunal.

1998—Protection of Children from Sexual Predators Act. This act increased penalties for federal crimes related to the sexual exploitation of children and requires electronic communication service providers to alert authorities to violations of child pornography laws.

2000—The Campus Sex Crimes Prevention Act. This act requires sex offenders who are employed by or enrolled at an institution of higher education to inform the institution of their status.

2003—Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act. This act, among other changes, increased penalties for some sex crimes and eliminated statutes of limitation for some sex crimes. It also requires states and the Department of Justice to maintain websites containing the information in their sex offender registries.

2006—Adam Walsh Child Protection and Safety Act. This act did many things, including raising mandatory minimum sentences for sex offenders, creating the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART Office), and authorized a grant program to fund the creation or operation of civil commitment programs for sex offenders.

Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), U.S. DEP'T OF JUSTICE, <http://www.ojp.usdoj.gov/smart/legislation.htm>. For a critique of these laws by an online community that objects to the "draconian laws" that "[n]o other criminal has to live by," see Sex Offender Issues Blog, <http://sexoffenderissues.blogspot.com/2007/05/introduction.html> (May 25, 2007).

¹⁰⁷ See Dru Sjodin National Sex Offender Public Website, <http://www.nsopw.gov/Core/Conditions.aspx> (last visited Nov. 7, 2009). Links to national and state registries are available at <http://www.fbi.gov/hq/cid/cac/registry.htm>.

community members to the presence of possible sexual predators.¹⁰⁸ A global registry is now under consideration.¹⁰⁹

Other laws with the same goal as the registries are also in place. Released offenders can be required to alert their new neighbors to their presence.¹¹⁰ They may also be prohibited from living in certain areas, such as near schools.¹¹¹ Failure to comply can lead to further criminal penalties.¹¹²

All of these rules demonstrate that, from society's perspective, sex offenders are different than other criminals. They are believed to be more dangerous than other criminals because they are thought to act compulsively and target particularly vulnerable people.¹¹³ Although a few

¹⁰⁸ The national database explains:

Using this Website, interested members of the public have access to and may search participating Jurisdiction Website public information regarding the presence or location of offenders who, in most cases, have been convicted of sexually violent offenses against adults and children and certain sexual contact and other crimes against victims who are minors. The public can use this Website to educate themselves about the possible presence of such offenders in their local communities.

Dru Sjodin National Sex Offender Public Website, <http://www.nsopw.gov/Core/Conditions.aspx?AspxAutoDetectCookieSupport=1>.

¹⁰⁹ Deena Guzder, *A Move to Register Sex Offenders Globally*, TIME.COM, Sept. 7, 2009, available at <http://www.time.com/time/world/article/0,8599,1920911,00.html>.

¹¹⁰ See Carpenter, *supra* note 63, at 327 (“Community notification has been deemed a justifiable intrusion into the registrant’s expectation of privacy because of ‘the public’s interest in safety.’”).

¹¹¹ See ARIZ. REV. STAT. ANN. §§ 13-3821 to -3827 (2001 & Supp. 2009) (giving the registration requirements for sex offenders); CAL. PENAL CODE § 3003(g) (West Supp. 2010) (providing that high risk sex offenders “shall not be placed or reside, for the duration of [their] parole, within one-half mile of any public or private school including any or all of kindergarten and grades 1 to 12, inclusive”); see also *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005) (upholding statute prohibiting sex offenders in Iowa from residing near schools).

¹¹² See 730 ILL. COMP. STAT. ANN. 150/10 (West 2008).

¹¹³ See generally Susan R. Schmeiser, *The Ungovernable Citizen: Psychopathy, Sexuality, and the Rise of Medico-Legal Reasoning*, 20 YALE J.L. & HUMAN. 163 (2008). Schmeiser explains one theory, proposed by psychologist and lawyer Bertram Pollens, supporting alternative ways of treating sex offenders in the legal system:

Pollens argued that the goal of treatment for sex offenders to cure their disease required a wholly different legal approach from one that imposed penal sentences for specific acts according to their perceived severity:

[The laws] should conform with modern, scientific knowledge, and the old traditional notions of sanity and insanity should be discarded. A code should be drafted which would provide for the adequate study of each defendant and the sentence imposed should be for treating and not punishing him. This would, of course, necessitate taking into consideration his entire makeup—physical, mental, emotional, as well as his social environment—and it would necessitate the establishment of a psychiatric and psychological clinic for each court.

areas have instituted murderer registries, such registries remain rare and do not enjoy the wide support given to sex offender registries.¹¹⁴

Fear of sex offenders is so intense that legislators would rather err on the side of overzealousness than risk the appearance of having done too little.¹¹⁵ For this reason they periodically expand the definition of “sex offender” to require more people to register.¹¹⁶ In twenty-nine states, teenagers who have consensual sex with one another can be convicted of a crime and forced to register for many years.¹¹⁷ In thirteen states, urinating in public can get you on the list.¹¹⁸ Thirty-two states register flashers and streakers.¹¹⁹ It may be that juror prejudice against people with prior convictions for minor sex offenses would not lead them to convict on an improper basis;¹²⁰ my point is that community fear and dislike of sex offenders is so intense that lawmakers feel obliged to cast a wide net.

6. *A Unique Criminal Sentence*

Desperation to prevent sex offender recidivism has led some states to adopt measures that would be judged entirely too extreme in any other context. The most notorious is “chemical castration.” Some states mete out that sentence to sex offenders for life.¹²¹ The term sounds unpleasant, yet in reality it is a euphemism: “chemical castration” is actually far more harmful than its name would suggest.¹²² This is due to the daily drug regimen, which has horrendous side effects, including “irreversible loss of bone

In Pollens’s vision of a modernized legal response to the problem of sex crimes, the mental health professions became not merely adjuncts to the legal one, but indeed co-partners in each stage of the legal process.

Id. at 202.

¹¹⁴ Editorial, *Murder Registry Won’t Further Public Safety*, HONOLULU ADVERTISER, Aug. 7, 2007, at 6A (explaining that a murder registry cannot be justified on the same grounds as a sex offender registry because recidivism rates are much lower among murderers).

¹¹⁵ *Unjust and Ineffective*, ECONOMIST, Aug. 8, 2009, at 21, 22.

¹¹⁶ *Id.* (“Every lawmaker who wants to sound tough on sex offenders has to propose a law tougher than the one enacted by the last politician who wanted to sound tough on sex offenders.”).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Doyle, *supra* note 63, and Velez-Mitchell, *supra* note 77, suggest otherwise, but potentially the sex offenses that are always more prejudicial than probative do not include some minor offenses.

¹²¹ See John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 U. ST. THOMAS L.J. 559 (2006).

¹²² *Id.* at 572-74.

mass, diabetes mellitus, pulmonary embolism, and depression.”¹²³ Other jurisdictions are considering mandating traditional castration for some offenders,¹²⁴ and arguably that would be more humane—though it is reminiscent of cutting off a thief’s hand.

* * *

You never hear anyone say that a released sex offender has “paid his debt to society.” Sex offenders are perceived to be especially and persistently dangerous, and this view is reflected in the laws that apply exclusively to them.¹²⁵ The question whether this is justified or effective is irrelevant to my argument, which is concerned only with prevalent attitudes toward sex offenders and how they influence juror decision-making.

IV. CAN’T JURORS PUT THEIR NEGATIVE FEELINGS ASIDE?

It is no secret that juror prejudice can affect the outcome of a trial even when limiting instructions are given. Prosecutors and defense attorneys know it well and strategize appropriately, both during voir dire and during trial. Perhaps some jurors are able to put aside their personal feelings, but as a group, all the evidence suggests that they cannot or perhaps will not consider past crimes evidence only in the context of credibility despite being instructed to do so.¹²⁶

Limiting instructions of this type have been criticized for decades as ineffective to prevent juror prejudice.¹²⁷ The *Gordon* court noted that “[t]he impact of criminal convictions will often be damaging to an accused and it is admittedly difficult to restrict its impact, by cautionary instructions, to the issue of credibility.”¹²⁸ Studies have shown that the court’s concern was well founded. Most jurors use the defendant’s criminal record to infer that

¹²³ *Id.* at 561.

¹²⁴ “[Several states are] currently debating the imposition of surgical castration, a punishment practice that fell out of usage in England in the thirteenth century.” John F. Stinneford, *The Original Meaning of “Unusual”*: *The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1747 (2008).

¹²⁵ See Vitiello, *supra* note 59, at 653 (“These laws are premised on a view of the sexual predator as incorrigible, unable to control his conduct, and likely to repeat his predatory conduct if released into the public without special monitoring.”).

¹²⁶ See generally Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions*, 9 LAW & HUM. BEHAV. 37 (1985); *Other Crimes Evidence at Trial*, *supra* note 34, at 775-76.

¹²⁷ See *Other Crimes Evidence at Trial*, *supra* note 34, at 775-76 (“[J]urors have an almost universal inability and/or unwillingness either to understand or follow the court’s instruction on the use of defendant’s prior criminal record for impeachment purposes.”).

¹²⁸ *Gordon v. United States*, 383 F.2d 936, 939 (D.C. Cir. 1967).

he is a “bad man” and probably guilty.¹²⁹ They often disregard or do not understand limiting instructions.¹³⁰ Dodson explains that “the conclusion these scientists have reached simply confirms what lawyers, judges, and courts have known all along. Juries will use evidence of prior convictions for impermissible purposes and a judge’s limiting instruction will have little or no effect on jurors.”¹³¹ There is even evidence of a “backfire effect”—instructing jurors not to consider evidence for a particular purpose can cause them to do just that.¹³²

In a trial where the jury learns that the defendant was previously convicted of a sex crime, the failure of limiting instructions is a more serious matter, because the bias against sex offenders is so strong. Imagine the effect of attitudes similar to that of the CNN commentator who believes that all sex offenders should be taken off the streets immediately¹³³ in a case like the one I described at the outset of this Comment. A juror who feels that way likely would be inclined to convict the defendant of the greater charge, burglary, just to lock him away for as long as possible. This is the sort of conviction “on an improper basis” the Federal Rules of Evidence are meant to avoid.

Voir dire allows for some biased persons to be weeded out, but the task of assembling a jury of twelve citizens who do not have a visceral distaste for sex offenders may be nearly impossible; and if twelve such people could be assembled, I am not sure how much they could be trusted by anyone. Because limiting instructions also fail to keep the intense social bias against sex offenders out of the jury room,¹³⁴ a new legal framework must be substituted for the one no longer working. For jurors in criminal trials to do their duty—determine whether a person is guilty of a particular act beyond a reasonable doubt—they must not be diverted from that task by

¹²⁹ See *Other Crimes Evidence at Trial*, *supra* note 34, at 777 (“The jurors almost universally used defendant’s record to conclude that he was a bad man and hence was more likely than not guilty of the crime for which he was then standing trial.”).

¹³⁰ Dodson, *supra* note 8, at 31, 42-43.

¹³¹ *Id.*

¹³² See Joel D. Lieberman & Jamie Arndt, Understanding the Limits of Limiting Instructions: Social Psychology Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence, 6 *PSYCHOL. PUB. POL’Y & L.* 689-90 (2000) (noting one study in which “mock-juror judgments were significantly more punitive when the judge issued an admonition to disregard limited-use evidence”).

¹³³ See Velez-Mitchell, *supra* note 77.

¹³⁴ When a defendant is currently being prosecuted for a sex crime, juror prejudice is perhaps unavoidable. See Vidmar, *supra* note 68, at 5 (“I do not care how sophisticated or law smart jurors are, when they hear that a child has been abused, a piece of their mind closes up and this goes for the judge, the juror, and all of us.”). There is no simple solution to this problem—juror prejudice in sex crime cases—but there is a solution for the problem that I have identified. See *infra* Part V.

intense dislike for defendants who have previously been convicted of sex crimes. The next Part provides some potential solutions.

V. PROPOSED SOLUTIONS

Prosecutors should be prohibited from impeaching defendant-witness credibility with evidence that the defendant was previously convicted of a sex crime.¹³⁵ Ideally, Congress will amend Federal Rule of Evidence 609 and state legislators will follow suit. My proposed Rule 609 adds a third section:

(a) General rule—For 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.

(3) evidence that the accused has been convicted of rape, sexual assault, sexual abuse, child molestation, possession of child pornography, or any other offense that requires sex offender registration is not admissible under this rule. This subsection will not be construed to interfere with the functioning of Federal Rules of Evidence 413–15.

The wisdom of Congress “arrogating to itself the responsibility for balancing concepts of probative value and prejudice that is [historically] assigned to the courts” has been questioned,¹³⁶ but I see no reason to believe that this particular move by Congress would be an improper limitation on judicial discretion. The new subsection would be a sort of corollary to the subsection governing the admission of crimes of “dishonesty or false statement.” The underlying principle is that those crimes are always more probative than prejudicial; conversely, sex crimes are always more prejudicial than probative. If Congress can conclude there is no need for a

¹³⁵ To be clear, I am not arguing against the use of past sex crime convictions to show the defendant’s propensity to commit sex crimes in a sex crime prosecution. Whatever the merits of this practice, my argument is merely that it is unduly prejudicial to expose a defendant’s possible propensity to commit sex crimes when the current charge is retail theft.

¹³⁶ See Cavallaro, *supra* note 79, at 68 (censuring courts for their failure “to broach the question of the power or propriety of Congress’s act arrogating to itself the responsibility for balancing concepts of probative value and prejudice that is assigned to the courts by Rule 403 and the long pre-Rules history of judicial control of questions of relevance and admissibility”).

balancing test in the former case, it should be able to recognize that there is certainly no need in the latter case, where the magnitude of prejudice is so clear.

Yet there is little chance that an elected body will create a rule designed to afford greater protection to sex offenders who get into subsequent legal trouble. Congress is rarely able to muster the political will to reduce criminal penalties or advance protections for any criminal defendants, because members fear that when election time rolls around there will be cries that they have been “soft on crime.” A judicial solution is undoubtedly more realistic.

Judges have already taken some action to limit the use of Rule 609, as the *Gordon* factors described in Part II, above, demonstrate.¹³⁷ I propose that appellate judges should definitively hold that because prior sex crime convictions inspire such prejudice, evidence of their existence should not be admitted for witness impeachment. There is no need to apply a balancing test on a case-by-case basis, because an honest balancing test will always come up with the same result.

If a categorical exclusion is unrealistic, there are more modest changes that would at least partially alleviate the unfairness resulting from the current rules. One would be to add a sixth factor to the *Gordon* test and direct trial court judges to lean toward exclusion of a prior conviction if it is sexual in nature, just as prior convictions are understood to have special prejudicial weight when they are very similar to the crime currently charged. These five existing factors were laid out before the recent surge of hostility toward sex offenders and should now be revisited. It is unlikely that this approach would be terribly effective, however, if the regular admittance into evidence of past “similar” convictions is any indication of the effectiveness of *Gordon*.¹³⁸

Another alternative—one which may be more effective—would be the adoption by judges or legislatures of a rebuttable presumption that sex crime convictions are more prejudicial than probative of witness credibility. The prosecution would bear the burden of establishing that the conviction’s probative value outweighs its prejudicial effect, and the court would be forced to consider the issue separately and on the record.

¹³⁷ *United States v. Gordon*, 383 F.2d 936, 940 (D.C. Cir. 1966).

¹³⁸ *See United States v. Browne*, 829 F.2d 760, 763-64 (9th Cir. 1987) (explaining that a lower court decision to admit a prior armed robbery conviction to impeach the credibility of a defendant charged with armed robbery was proper because other factors, such as proximity in time, weighed in favor of admissibility); *United States v. Charmley*, 764 F.2d 675, 677 (9th Cir. 1985) (finding that the lower court did not abuse its discretion when it admitted a prior armed robbery conviction to impeach the credibility of a defendant in an armed robbery case).

VI. CONCLUSION

The problem I have described here is not unknown to judges. At least one acknowledged it when a witness who had previously been convicted of sexual assault was a witness for the government:

[R]egistration as a sex offender is a “scarlet letter.” So although the jury might have considered Richards more likely to be untruthful if it had known of his conviction, there is a significant danger that it would have instead improperly discounted his testimony because of personal revulsion for sex offenses.¹³⁹

Yet the strength of jurors’ “personal revulsion for sex offenses” is frequently ignored when the witness is the defendant.¹⁴⁰ This inconsistent treatment is especially troubling considering that, under Rule 609, a non-defendant witness’s prior felony conviction will only be excluded if the prejudicial effect *substantially* outweighs the probative value, while a witness-defendant’s prior conviction is to be excluded if it is slightly more prejudicial than probative. It is unlikely that a sexual assault conviction in one case was substantially more prejudicial than probative of credibility,¹⁴¹ but that an aggravated sexual abuse conviction in another case was not even slightly more prejudicial than probative.¹⁴² Could it be that judges are influenced by their own feelings toward sex offenders when they apply Rule 609? Surely some are. And jurors, I contend, generally are, leaving them unable to consider the current charge objectively. Because the prejudicial effect of a defendant’s prior sex crime conviction decidedly outweighs the probative value of that information, prior sex crime convictions should no longer be admitted under Rule 609.

¹³⁹ *United States v. Jackson*, 549 F.3d 963 (5th Cir. 2008) (involving a witness who had been convicted of sexual assault).

¹⁴⁰ *See United States v. Montgomery*, 390 F.3d 1013 (7th Cir. 2004); *United States v. White*, 222 F.3d 363 (7th Cir. 2000); *United States v. Turner*, 960 F.2d 461 (5th Cir. 1992). All three cases upheld lower court decisions allowing the defendant’s prior conviction for aggravated sexual abuse to be admitted under Rule 609.

¹⁴¹ *Jackson*, 549 F.3d at 979.

¹⁴² *Turner*, 960 F.2d at 466.

