Character Impeachment Evidence: Psycho-Bayesian (!?) Analysis and a Proposed Overhaul

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At first I thought it was very unlikely that, if Defoe committed robbery, he would be willing to lie about it. But now that I know he committed forgery a year before, that possibility seems substantially more likely.

INTRODUCTION

This fictitious quotation appears utterly lacking in logic or common sense. And yet, because of the perceived chance that juries will follow such trains of inference, the area of character impeachment has become one of the most difficult and controversial in the law of evidence. This Article argues for a sweeping reform of the law in this area.

The current law, reviewed in Part I, varies widely from one jurisdiction to another, but the Federal Rules of Evidence are representative. Rule 608(a)1 allows an impeaching party to offer opinion or reputation evidence of a witness's poor character for truthfulness, and rule 608(b) allows the impeacher, subject to the discretion of the trial judge, to ask the witness about specific instances of her2

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1. All references to evidentiary rules in this Article are to the Federal Rules of Evidence unless otherwise noted.

2. For simplicity, this Article generally uses feminine pronouns to refer to witnesses other than criminal defendants, as to which it generally uses masculine pronouns. This is not a satisfying solution; the language needs a full set of gender neutral pro-
prior conduct that suggest she has a poor character for truthfulness. Rule 608 draws no distinction between a criminal defendant and any other witness. In contrast to the open-ended nature of rule 608, rule 609 establishes categorical rules governing when the impeacher may prove that the witness has previously been convicted of a crime. The balancing test governing admissibility of certain crimes is weighted differently depending on whether or not the witness is the accused in a criminal case; for the most part, however, the most critical factor under rule 609 is not the identity of the witness, but rather the nature of the prior crime.3

The revision proposed here has two parts. First, and most importantly, character impeachment of a criminal defendant who takes the witness stand ought to be abolished in all of its forms—opinion and reputation, specific bad acts, and prior convictions. This Article does not suggest limiting other forms of impeachment, such as by proof of bias or of prior inconsistent statements. Nor does it deny that in some circumstances prior bad acts of a defendant should be admitted for substantive purposes, such as to show that the defendant had the motive or ability to commit the crime charged.4 The contention of this Article is simply that an accused ought not be subjected to impeachment offered to show that he has a poor general character for truthfulness.

This contention is not based on any assertion that prior crimes reveal little about a person's general truthtelling inclination. Rather, Part III of this Article attempts to show by careful analysis that, in the particular context of an accused who testifies in his own behalf, evidence about prior bad acts, or about his truthtelling character in general, is almost certain to yield no significant new information about his truthtelling inclination in the specific case. Almost certainly, whatever probative value the evidence does have will be dwarfed by the prejudicial impact that evidence will have if the defendant takes the stand, and by the inhibiting effect it has in making him reluctant to do so.

The elimination of all character impeachment evidence of criminal defendants would be a change of enormous importance. As a quick glance through the pages of the United States Code An-

3. See infra notes 20–25 and accompanying text.

4. See, e.g., FED. R. EVID. 404(b). Thus, the Article contends only that the accused's character as a witness ought not be opened to scrutiny.
notated covering rule 609 suggests, prosecutors offer this type of evidence very frequently, and both sides recognize its potency and often litigate its admissibility with great vigor. Moreover, because the rule often inhibits defendants from testifying, the mere anticipation of character impeachment evidence can have great effect. If prosecutors could not present such evidence, more criminal defendants would take the stand, and those who did would not be subject to this potentially devastating form of impeachment. The pro-defendant effects of eliminating the rule might, however, justify another change, one favoring the prosecution. The inhibiting effect of anticipated character impeachment evidence is probably the principal factor supporting the rule of *Griffin v. California*, constitutionally barring a prosecutor from commenting on an accused's failure to testify; thus, as Part III discusses, eliminating character impeachment may well call for a reevaluation of *Griffin*.

The considerations affecting the value and danger of character impeachment evidence are altogether different when the witness is someone other than an accused. Part IV argues that in some circumstances a prior crime may have sufficient bearing on the truth-telling inclination of a witness, other than an accused, to warrant admissibility. This holds true even if the prior crime did not in itself involve dishonesty and was not particularly serious, and even if it occurred rather remotely in the past. The nature of the prior crime may be significant in determining the value of the evidence and its potential prejudicial effect, but often other factors, such as the relationship of the witness to the case, will be more important in determining admissibility.

Under the second part of the proposed revision, the flexible standard of rule 608 for impeachment by bad acts should apply as well to impeachment by prior convictions with respect to witnesses other than a criminal defendant. That is, the categorical rules governing the admissibility of such impeachment should be removed, and the matter should be left to the properly guided discretion of the trial judge.

Looked at another way, rule 609 should be repealed, and rule 608 should be narrowed in one respect and broadened in another; the accused-witness should no longer be subject to impeachment under rule 608, but as to other witnesses the court's discretion under that rule should reach to prior convictions as well as to bad acts.

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Other commentators have suggested that impeachment of criminal defendants by proof of their prior convictions should be limited or even eliminated.6 Virtually none, however, have gone so far as this Article in advocating the end of all character impeachment of a criminal defendant,7 by opinion or reputation evidence and by cross-examination concerning prior bad acts, as well as by proof of prior convictions.8 Further, no previous discussions appear to have offered anything close to the two-direction movement proposed here—eliminating character impeachment evidence of criminal defendants, but making the admissibility standards with respect to other witnesses more flexible.

The methodology of this Article, as well as the proposed revision, is unique in the extensive literature on character impeachment. Those who have followed the recent debate about theories of inference in the law of evidence will note a distinct Bayesian cast to the arguments made here.9 Readers with a distaste for symbols, equations, and diagrams need not stop here; nothing of the sort appears in the body of this Article. For those who are interested, the Ap-

6. See, e.g., Beaver & Marques, A Proposal to Modify the Rule on Criminal Conviction Impeachment, 58 TEMP. L.Q. 585, 587 (1985) (concluding "that Federal Rule 609 and the similar rule [sic] in effect in forty-seven states should be revised to exclude all evidence of criminal defendants' prior convictions for virtually any purpose offered."); Glick, Impeachment by Prior Convictions: A Critique of Rule 609 of the Proposed Rules of Evidence for U.S. District Courts, 6 CRIM. L. BULL. 330, 336, 348 (1970) (convictions for crimes of dishonesty are the only ones that should be admissible to impeach an accused); Nichol, Prior Crime Impeachment of Criminal Defendants: A Constitutional Analysis of Rule 609, 82 W. VA. L. REV. 391, 421 (1980) (rule 609 deprives the accused of the right to a fair trial); Ordover, Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a), 38 EMORY L.J. 135, 137–39, 145 (1989) (Because extrinsic crime evidence tends to introduce "the ethos of a presumption of guilt rather than innocence," it should be admissible only upon findings "that the extrinsic crime actually took place and that the defendant committed it more likely than not" and that the evidence has a greater probative value than prejudice and would not be misused by the jury.); Reed, Admission of Other Criminal Act Evidence After Adoption of the Federal Rules of Evidence, 53 U. CIN. L. REV. 113, 169 (1984) (Prosecution should have to inform the defense whenever, under Rules 404(b) or 608(b), it intends to introduce evidence of unindicted criminal acts.).

7. At least one commentator advocates going much further, however, by eliminating all character impeachment evidence in criminal or civil cases. Spector, Rule 609: A Last Plea for Its Withdrawal, 32 OKLA. L. REV. 334, 354 (1979) (Rules 608 and 609 should be abolished because they allow verdicts "based on particular perceived character traits or the lack thereof."). As discussed in Part IV, this proposal is unwise; in some circumstances, character impeachment may be of real value in assessing the credibility of a witness other than an accused.

8. The recent revisions to rule 609 made no changes in this respect.

9. The debate is canvassed in a symposium, Probability and Inference in the Law of Evidence, 66 B.U.L. REV. 377 (1986). For a definition of the term Bayesian, as used in this Article, see infra text accompanying note 56.
pendix provides a diagrammatic presentation, together with a few simple equations. If the arguments here are sound, they demonstrate that a Bayesian approach to evidentiary problems has merit. Legal scholars should stop debating whether or not to use such an approach. Rather, they should get on with using it, and then ask whether it produces useful results. This Article suggests that it does—if the Bayesian approach is used with restraint, understanding, and common sense.

In this case, common sense demands an attempt to understand the psychology of lying. Although other discussions of the law of character impeachment have drawn on psychological premises, they have not explored those premises in depth. Part II of this Article examines with some care the psychological premises that underlie my argument and help inform the Bayesian-style reasoning in Parts III and IV; hence, the somewhat fanciful label “Psycho-Bayesian.”

Typically, arguments for restricting character impeachment evidence are based in part on the premise that prior crimes, at least violent crimes, generally indicate little about a person's veracity. The argument advanced here against character impeachment of criminal defendants does not rely on that premise; in fact, it accepts the premise that prior antisocial behavior, even not involving dishonesty, often does indicate a good deal about a person's general truthtelling inclination. A careful analysis of the situation of the accused on the witness stand—rather than an easy assumption about irrelevance—leads to this Article's broad conclusion that character impeachment evidence of criminal defendants ought to be eliminated. A similar analysis suggests that in some cases character impeachment of other witnesses ought to be allowed.

I. A REVIEW OF THE DOCTRINAL LANDSCAPE

Subject to exceptions, qualifications, and evasions, we do not allow a jury to learn that a person has acted in a given way at a


11. Rule 404(a) provides three exceptions to the general rule on propensity evidence. The first two apply to certain evidence of the character of an accused, under rule 404(a)(1), and of an alleged victim of a crime, under rule 404(a)(2). The third, upon which this Article focuses, applies to certain evidence of the character of a witness. Referred to in rule 404(a)(3), this exception is fully elaborated in rules 608 and 609.
time not the subject of the present litigation if the only probative value of the evidence is that it increases the probability that he acted in a similar way at a material time. 14 Probably the most important application of this rule is the prohibition against proving prior crimes committed by a criminal defendant to show that the defendant had a criminal propensity. This prohibition may be based in part on fear that the jury will overvalue the evidence. 15 But much character evidence is highly material; a jury according it great weight would be acting perfectly rationally.

A more persuasive rationale, perhaps, is that we wish to avoid having a judicial system that, either in fact or in appearance, judges a person’s character rather than what he has done in the case in question. A jury that learns that an accused is a “bad person,” even irrespective of how he acted in the case being tried, may effectively increase the value that it attaches to punishing him if he is guilty and decrease (or perhaps eliminate) the harm it attaches to punishing him if he is innocent. This shift of interests would cause the jury, in effect, to lower the burden of persuasion that the law imposes on the prosecution.

In any event, the prohibition against propensity evidence is deeply engrained. Given the prohibition, a violation of it must be considered prejudicial without regard to whether, in determining

12. See rule 406, which allows “[e]vidence of the habit of a person . . . to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit . . . .” FED. R. EVID. 406.

13. See, e.g., Ordover, supra note 6, at 157 (“[E]vidence of an unconnected prior crime is always evidence of propensity and never evidence of a specific intent to commit the crime charged.”); cf., e.g., United States v. Watford, 894 F.2d 665, 671 (4th Cir. 1990) (prosecution for mail fraud scheme in which prisoners altered money orders and arranged for persons outside to cash them; testimony of defendant’s mother [I] that two years earlier the defendant had asked her to participate in a similar plan held admissible to prove defendant’s “knowledge of the scheme and to show the existence of a common plan or scheme.”); United States v. Rubio-Estrada, 857 F.2d 845 (1st Cir. 1988) (prosecution for possession of cocaine; proof of prior conviction for same crime is admissible to counter defense that the defendant did not know the cocaine was in the house and lacked the intent to distribute it); United States v. Kopituk, 690 F.2d 1289, 1335 (11th Cir. 1982) (proof of racketeering conviction admitted to prove intent because government’s other proof of intent was “not strong”); United States v. Lea, 618 F.2d 426, 431–32 (7th Cir. 1980) (prosecution of meat buyer for taking kickbacks from meat brokers; testimony that ten or twelve years earlier defendant had solicited kickbacks from another broker held admissible as proving defendant’s “motive and intent,” because it showed that he “had previously sought to establish a relationship with another meat broker similar to” the one at issue).

14. E.g., FED. R. EVID. 404(a).

the facts, the jury likely relied more on the evidence than would be rational; any reliance at all is deemed improper. And because the propensity evidence is likely to affect the jury powerfully, both in guiding its factfinding and in altering the effective burden of proof, the prejudice is often extreme.

Nevertheless, evidentiary rulemakers have concluded that, because the jury is so dependent on the testimony of witnesses, it must have a relatively full base of information on which to assess their credibility. Thus, notwithstanding the general prohibition against propensity evidence, a party may impeach a witness, including a criminal defendant who takes the stand, by showing in any of three ways that the witness has a poor character for truthfulness.

First, the party may call another witness to present a general assessment that the primary witness has an untruthful character. Under rule 608(a), the character witness may do this by testifying either as to her own opinion of the primary witness's character for truthfulness or as to her understanding of the first witness's reputation for truthfulness.

Second, the impeaching party, in the discretion of the trial judge, may cross-examine the primary witness concerning any prior acts of the witness that suggest she has a bad character for truthfulness. Truthtelling inclination is, however, a “collateral” issue, one that ordinarily should not be allowed to bog down a trial. Thus, when the only relevance of the prior bad act is to the witness’s general character for truthfulness, the inquiry is limited to the witness’s own testimony; “extrinsic” evidence is not allowed.

Third, in certain cases, the impeacher may prove that the witness has been convicted of one or more crimes. Sometimes the conviction is for a dishonest deed that would itself be admissible for its bearing on the witness’s truthfulness. But, under the Federal Rules of Evidence and in most American jurisdictions, that does not exhaust the list of crimes that may be admitted for impeach-

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16. See, e.g., State v. Duke, 100 N.H. 292, 293, 123 A.2d 745, 746 (1956) (“No sufficient reason appears why the jury should not be informed what sort of person is asking them to take his word. In transactions of everyday life this is probably the first thing that they would wish to know.”).


18. E.g., Fed. R. Evid. 608(b).

19. E.g., Fed. R. Evid. 609(b).

20. E.g., Fed. R. Evid. 609(a).

21. E.g., Fed. R. Evid. 609(a)(2) (providing that evidence that a witness has been convicted of a crime “shall be admitted” to attack the witness’s credibility if the crime “involved dishonesty or false statement, regardless of the punishment.”).
ment. Serious crimes are sometimes deemed to bear sufficiently on a witness's sense of social responsibility, and so on her truthtelling ability to warrant admission. For example, rule 609(a)(1), as recently amended, allows proof of a crime that "was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted" if the evidence passes a prescribed balancing test: For a witness other than an accused, the test is the general one of rule 403, under which evidence may be excluded if its probative value is "substantially outweighed" by the danger of "unfair prejudice" and other factors; for an accused, the rule's thumb presses on the other side of the scales, allowing proof of the conviction only if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." 

The rationale for allowing proof of prior convictions, rather than merely the testimony of the witness acknowledging the underlying deeds, appears to have at least two parts. First, the fact of a conviction is easy and quick to prove and unlikely to be challenged. Second, a criminal conviction represents a determination by the judicial system, after its most painstaking type of proceeding, that a given fact—the defendant's guilt of a crime—is true. The system has once before relied on that determination, in meting out punishment to the defendant; ordinarily that determination should be usable for what is, at least presumptively, a lesser function, namely as an aid in determining the person's credibility when she takes the stand in a subsequent trial.

When the witness who is being impeached by proof of his bad acts is not merely an observer, but a participant in the story that is the subject of the trial, a serious complication arises: The jury will be sorely tempted, and often quite rationally so, to treat the bad act as evidence making it more probable not only that he is lying from the witness stand but that he acted as alleged in the episode being

22. FED. R. EVID. 609(a)(1).

23. Id. In its pre-amendment form, which has been adopted and remains applicable in several states, see J. WEINSTEIN & M. BERGER, supra note 15, at § 609(12), rule 609(a)(1) would allow the evidence if the trial judge determined that its probative value outweighed "its prejudicial effect to the defendant." In Green v. Bock Laundry Machine Co., 490 U.S. 504 (1989), the Supreme Court held that only prejudice to a criminal defendant must be weighed under this rule; if a crime fitting within rule 609(a)(1) is offered against any other party, admission is mandatory. The 1990 amendment to the rule nullifies this holding for the federal courts in requiring consideration of prejudice to other parties; on the other hand, the split-level standard of the amendment, like Green, reflects an understanding that the use of prior convictions for impeachment raises greater concern when the prejudiced party is an accused than in other contexts.
tried. But this type of inference is impermissible, no matter how rational it may be. The problem arises most frequently in the case of a criminal defendant, and it is in that context that the prejudice is most acute.

As a result, the use of prior convictions to impeach a witness is surrounded by an accumulation of rules addressing not only what types of crime may be used but also such issues as how recent the conviction may be and the effect of a pardon or appeal on the admissibility of the evidence. The rules vary substantially from one jurisdiction to another. One striking aspect of them is that, although prejudice to an accused is a strong underlying concern, in a given jurisdiction the rules are usually similar structurally, or even identical, whether or not the witness being impeached is a criminal defendant. And it is also notable that, at least under the Federal Rules, rulemakers have not found it necessary to prescribe the same level of detail in the general context of impeachment by bad acts as they have in the more particular context of impeachment by convictions.

II. PSYCHOLOGICAL PREMISES

The use of character impeachment evidence depends on the assumption that, because a witness has acted in certain ways in the past, she is more likely to lie in her testimony. Few would challenge the broad proposition that, in some circumstances, how a person acts on one occasion sheds some light on how she is likely to act on

24. See supra note 23 and accompanying text.

25. Under rule 609, as amended in 1990, impeachment of criminal defendants is similar to impeachment of other witnesses in that, assuming admissibility is not precluded by rule 609(b)-(d), the court (1) may, but need not, allow impeachment by crimes fitting within rule 609(a)(1); (2) must allow impeachment by crimes fitting within rule 609(a)(2); and (3) may not allow impeachment by other crimes. The only difference is that the standard used to determine the admissibility of impeachment by a crime fitting within rule 609(a)(1) depends on whether or not the potentially prejudiced party is a criminal defendant; see supra text accompanying note 23. Under the older form of rule 609, as interpreted in Green, the structure was the same except that, for a crime fitting within rule 609(a)(1), the court could not consider prejudice to a party other than an accused.

Several states have adopted analogues to the older form of rule 609 that do not include the "to the defendant" language or any other language suggesting that it is relevant whether or not the witness being impeached, or the party potentially prejudiced by the impeachment, is a criminal defendant. 3 J. WEINSTEIN & N. BERGER, supra note 15, at ¶ 609(12).

Of the states that have modeled their evidentiary law on the Federal Rules, only Hawaii and West Virginia explicitly treat impeachment by prior convictions differently depending on whether or not the witness is a criminal defendant. Id.
another occasion. But it is no simple matter to state more precise propositions that can be useful in assessing the value of character impeachment evidence in particular circumstances.

Part of the problem is that the study of the psychology of deception involves many separate academic literatures, not only that of personality psychology, but also of clinical, developmental, social, and abnormal psychology, psychiatry, and criminology. Thus, to the frustration of professionals in the field, no coherent theory of deception that cuts across the numerous disciplines involved has yet emerged. This Article is clearly not the place to try to create such a theory. Indeed, the objective here is quite the reverse: By applying Occam's Razor to state psychological premises that are as narrow, unoriginal, and uncontroversial as possible and that still support the doctrinal argument to follow.

The psychological and psychiatric literature indicates massive disagreement about the consistency of personality traits. At one extreme are personologist theories, emphasizing the consistency of broad personality traits and treating behavior largely as a function of the individual's personality. At the other extreme are situationist theories, developed in large part in reaction to broad personologism. Situationalism doubts broad intrapersonal consistency and treats behavior largely as a function of environmental or situational factors. In recent years, psychological writing has tended to center around an intermediate position generally known as interactionism. Interactionism emphasizes the relationship of personality

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26. There is also an ethical literature on deception. See S. BOK, LYING: MORAL CHOICES IN PUBLIC AND PRIVATE LIFE (1978).


28. "[T]he . . . principle . . . that for purposes of explanation things not known to exist should not, unless it is absolutely necessary, be postulated as existing." 13 THE OXFORD ENGLISH DICTIONARY 245 (2d ed. 1989).

29. E.g., Bem, Constructing Cross-situational Consistencies in Behavior: Some Thoughts on Alker's Critique of Mischel, 40 J. PERSONALITY 17, 17 (1972) ("For years personality theorizing has been dominated by the 'trait' assumption that there are pervasive cross-situational consistencies in an individual's behavior."); see G. Allport, Personality: A PSYCHOLOGICAL INTERPRETATION 18 (1937); Olweus, A Critical Analysis of the "Modern" Interactionist Position, in PERSONALITY AT THE CROSSROADS 221 (D. Magnusson & N. Endler eds. 1977) (citing Ekehammer, Interactionism in Personality from a Historical Perspective, 81 PSYCHOLOGICAL BULL. 1026, 1026 (1974)).

30. Olweus, supra note 29, at 221 (citing Ekehammer, supra note 29, at 1026). The classic situationalist work is W. MISCHEL, PERSONALITY AND ASSESSMENT (1968); see, e.g., id. at 281–82 ("Although behavior patterns often may be stable, they usually are not highly generalized across situations. . . . [B]ehaviors depend on highly specific events . . . ").
traits and situational factors and treats behavior as a function of both. 31

The value of interactionism as a coherent theory and as a program for research is sometimes challenged, but its basic postulate seems widely accepted. For example, Richard Nisbett, a prominent skeptic of interactionism, denies that "a chief goal of personality research should be to seek for person-situation interactions," and yet he shares the belief that such interactions are "widespread and important." 32

A consensus on that general belief does not answer the difficult questions, of course. For example, suppose that Adam and Eve both have a greater tendency to lie in Situation A than in Situation B (revealing the importance of situation) and that Adam has a greater tendency than Eve does to lie in Situation A (revealing the importance of personality). Will Adam have a greater tendency than Eve to lie in Situation B? The closer Situation A is to Situation B, the more likely the answer is to be affirmative. Researchers differ as to how disparate the situations may be before the correlation between a person's behavior in one situation and in another diminishes to insignificance.

Mercifully, sound analysis of the value of character impeachment evidence does not depend on resolution of this general psychological issue, nor even on a complete understanding of the importance of personality and of situation in determining the likelihood of a person telling the truth. The arguments presented in Parts III and IV of this Article rely on four premises that are intuitively appealing, and at least three of which would find broad consensus among students of personality. The first two, emphasizing

31. See, e.g., Mischel, The Interaction of Person and Situation, in PERSONALITY AT THE CROSSROADS, supra note 29, at 333, 334 (there is "compelling evidence that complex human behavior is regulated by interactions that depend intimately on situational conditions . . ."); see also Magnusson & Endler, Interactional Psychology: Present Status and Future Prospects, in PERSONALITY AT THE CROSSROADS, supra note 29, at 3, 4:

A basic element in the interactionist model . . . is the focus on the ongoing, multidirectional interaction between an individual and his or her environment, especially the situations in which behavior occurs. Persons and situations are regarded as indispensably linked to one another during the process of interaction. Neither the person factors nor the situation factors per se determine behavior in isolation; it is determined by inseparable person by situation interactions. This view has the consequence that research has to focus simultaneously on person factors, situation factors, and the interaction between these two systems.

Id. at 4.

situational factors, have a particular bearing on the analysis in Part III concerning the use of character impeachment evidence against criminal defendants; these are nearly self-evident. The other two premises, emphasizing personal factors, are particularly related to the argument presented in Part IV about character impeachment of other witnesses.

Premise 1: Almost anyone will tell the truth if the consequences of doing so are in the person’s interests.

Premise 2: Most people will be willing to lie if they think they can do so persuasively and the consequences of telling the truth are sufficiently dire.

Clearly a situationalist would find these first two propositions very hospitable; they put almost total emphasis on the situation rather than on differences among persons. But a personologist should also find them easily acceptable. No one seriously contends that people act consistently all the time. Even assuming that some people have a strong tendency to lie, they will not usually do so if it is against their interests: if the truth helps, why avoid it? Thus Premise 1 seems almost indisputable. And Premise 2 seems nearly as strongly founded. How dire the consequences of the truth must be before a person is willing to tell a lie may differ from person to person, but it would be hard to deny that virtually everybody has a tipping point. For many people, and probably for most, the threat of serious criminal punishment is sufficient.

33. Note this conclusion from the classic precursor of situationalism: “Most children will deceive in certain situations and not in others.” H. HARTSHORNE & M. MAY, STUDIES IN THE NATURE OF CHARACTER: STUDIES IN DECEIT 411 (1928).

34. S. SAMENOW, INSIDE THE CRIMINAL MIND (1984), written from a strongly personological orientation, supports both premises. As to Premise 1, Samenow contends that even a delinquent, whose lying “appears to be compulsive,” really has it “totally under his control. He can readily distinguish truth from falsehood and is prepared to tell either, depending on which best serves his purpose.” Id. at 37. And as to Premise 2, Samenow writes that “[a]ll children may lie at one time or another . . . Occasionally they lie to cover up wrongdoing, to save face in an embarrassing situation, to avoid an uncomfortable situation, or to protect their image.” Id. at 36.

35. This is not to deny that in some situations people may lie for the sake of lying, and that some people, perhaps pathologically, do so with some frequency. Cf. J.D. SALINGER, CATCHER IN THE RYE 16 (1951); see infra notes 46–49, and accompanying text. But at least in most situations of importance, most people will not lie if doing so significantly harms their other interests.

36. Cf. infra note 40. It would be essentially impossible to design and implement any kind of realistic experiment, consistent with ethical standards, that would show the prevalence of dishonesty by people facing dire consequences for telling the truth. Further inferential support for Premise 2 is provided by studies showing how widespread dishonesty is in various contexts not involving consequences nearly so dire as the threat of criminal punishment—such as students’ academic work, e.g., Singhal, Factors in Students’ Dishonesty, 51 PSYCHOLOGICAL REP. 775 (1982), sports, e.g., Erffmeyer, Rule-
Premise 3: In the intermediate range, how strong an interest will induce a person to lie will differ from one person to another; some people will tend to lie if the consequences of telling the truth are only moderately averse, whereas others will tend to adhere to the truth at least until it hurts very badly.

In contrast to the first two premises, this one will be most comfortable to personologists; whatever resistance it arouses is likely to come from those who tend towards a situationalist orientation. And yet most situationalists probably would find this premise acceptable.

Despite some caricatures of early situationalist work, few situationalists have ever seriously denied that there is such a thing as personality or that some individuals tend more than others to act in a given way in response to certain situations. Indeed, support for Premise 3 may be found in the work of the pioneering situationalist Walter Mischel. As Mischel maintains, the general question "Are persons or situations more important?" is misleading and unanswerable. Mischel poses a more subtle question: "When are situations most likely to exert powerful effects and, conversely, when are person variables likely to be most influential?" In response, he offers the following construct:

Psychological "situations" (stimuli, treatment) are powerful to the degree that they lead everyone to construe the particular

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*Violating Behavior on the Golf Course*, 59 PERCEPTUAL & MOTOR SKILLS 591 (1984), and returning excess change or "dropped" coins, e.g., Hays, *Honesty Requiring a Self-Initiated Response*, 46 PSYCHOLOGICAL REP. 87 (1980).

Premise 2 is worded in terms of people's inclination to lie if they think they can do so persuasively. The premise is worded in this limited manner because if a defendant is dissuaded from lying on the witness stand by fear that he will make himself worse off if he lies and is exposed than if he does not testify, the supposed need for impeachment evidence never comes into play. Interestingly, the literature supports the proposition that more people would deceive if they felt they could get away with it. Hays, *supra*, at 89 ("Whether or not the individual perceives the chances of being successful in dishonest conduct as highly unlikely determines any resulting behavior."); Singhal, *supra*, at 776 (48% of the respondents in a student survey answered affirmatively to the question: "Does examination monitoring prevent you from cheating?").

37. See, e.g., W. Mischel, *supra* note 30, at 37 ("Consistency coefficients averaging between .30 and .40 . . . can be taken either as evidence for the relative specificity of the particular behaviors, or as support for the presence of underlying generality."); Mischel, *supra* note 31, at 334 ("I know no one who seriously doubts that lives have coherence and that we perceive ourselves and others as relatively stable individuals that have substantial identity and continuity over time, even when our specific actions change."); Mischel, *Toward a Cognitive Social Learning Reconceptualization of Personality*, 80 PSYCHOLOGICAL REV. 252, 254 (1973) ("The position developed in Mischel's (1968) *Personality and Assessment* has been widely misunderstood to imply that people show no consistencies, that individual differences are unimportant, and that 'situations' are the main determinants of behavior.").
events the same way, induce uniform expectancies regarding the most appropriate response pattern... and require skills that everyone has to the same extent... Conversely, situations are weak to the degree that they are not uniformly encoded, do not generate uniform expectancies concerning the desired behavior, do not offer sufficient incentives for its performance, or fail to provide the learning conditions required for successful genesis of the behavior... To the degree that people are exposed to powerful treatments, the role of the individual differences among them are minimized. Conversely, when treatments are weak, ambiguous, or trivial, individual differences in person variables should have the most significant effects.38

In these terms, Premises 1 and 2 address situations at the two poles, in which people are “exposed to powerful treatments.” Just as we expect a uniform response to a green or red traffic light (the example provided by Mischel of a “powerful stimulus”39), we expect the situational factors in these situations to determine most people’s behavior. Premise 3 addresses the weak, intermediate situation—comparable to that of the yellow light—that presents an incentive to lie, but not an overwhelming one. In this intermediate range, “individual differences in person variables” may have a significant impact on behavior.40

38. Mischel, supra note 31, at 346–47 (emphasis in original); see also, e.g., Bowers, Personal Consistency, in PERSONALITY AT THE CROSSROADS, supra note 29, at 70 (“Specific behaviors are not only engendered by specific contexts, they must be understood in terms of the particular context and person under consideration—and such understanding oftentimes requires going beyond the immediate situational and behavioral given.”); id. at 71–73 (In planned or constrained environments the situation appears to have the greatest impact on behavior, but “at the level of more naturalistic observation... personal consistencies begin to emerge.”).


40. H. HARTSHORNE & M. MAY, supra note 33, a famous work studying grade-school children, appears to be the most comprehensive quantitative examination to date of lying. Hartshorne and May concluded that honesty is primarily a function of situational factors rather than of personality characteristics. But their data do provide some support for a finding that personality bears on a person’s inclination to lie; although the behavior of most of the children depended on the exact specifics of the situation, there were groups at each end for whom environmental factors apparently would have to be rather strong to exert significant control over behavior. M. FELDMAN, CRIMINAL BEHAVIOUR: A PSYCHOLOGICAL ANALYSIS 151 (1977). See also Burton, Generality of Honesty Reconsidered, 70 PSYCHOLOGICAL REV. 481 (1963) (reasanalyzing the Hartshorne and May data, and emphasizing the mixed impact of personality and situation); Hays, supra note 36, at 87 (“Several studies... have shown that individuals vary in level of honesty as a function of the situation. It is also well established that individual characteristics are important determiners of honesty...”).

In any event, the Hartshorne and May studies are of limited relevance to understanding lying in adults, because the children were “too young to have achieved the character stages required before consistency in moral behavior properly could be expected.” Block, ADVANCING THE PSYCHOLOGY OF PERSONALITY: PARADIGMATIC SHIFT OR IMPROV...
Certainly the law of evidence has always acted on the assumption that, at least in some situations, a person's individual propensities may say a good deal about her likelihood of lying under oath: if that were not so, then there never would be reason to admit character impeachment evidence. Virtually nobody seriously contends that character impeachment evidence should be altogether foreclosed.41

Premise 3, then, seems eminently sensible and generally acceptable in both the legal and psychological communities. By itself, though, it does not take us far enough. We may know in the abstract that people differ in their readiness to lie. But the practical question that an adjudicative system must answer is how to assess a particular witness's readiness to lie in a given situation. In other words, what past behaviors might rationally lead a factfinder to conclude that this witness is more likely than most people to lie in this situation? One need not offer a comprehensive answer to this question, or even a detailed approach for answering it. Instead, this Article uses only the following premise.

Premise 4: Given that the interest inducing a person to lie is in the intermediate range addressed by Premise 3, an assessment by another of how likely the person is to lie under oath may be rationally affected by information that the person previously has committed antisocial behavior, even if not involving dishonesty, of a type that most people would not commit.

This is the only one of the four premises that might appear controversial. Luckily, the Article does not lean on it heavily. Although Part III contends that Premise 4 provides some unexpected support for the principal argument of this Article, that character impeachment evidence of criminal defendants ought not be allowed, the premise is not at all essential to that argument. It comes into play more directly in Part IV, which argues that in some circumstances impeachment of other witnesses by crimes not involving dishonesty may be appropriate; even there, though, Premise 4 is not critical to the main point, that with respect to witnesses other than criminal defendants the admission of prior convictions ought not be determined by categorical rules.

Those with a situationalist orientation might rebel at the thought that past behavior not even involving dishonesty could in-

41. But see Spector, supra note 7.
dicate very much about whether a person is likely to lie on a given occasion. But Premise 4 is limited to previous "antisocial behavior of a type that most people would not commit." It thus takes us out of the realm of ordinary personality psychology.

Just as, in Mischel's terms, "powerful" situations may have a greater impact than weaker ones on behavior, "powerful" (in the sense of extreme) personal variables may have a greater impact than more common ones. Thus, notwithstanding the "specificity versus consistency" debate in ordinary personality psychology, criminologists seem to be in consensus that various different deviant behaviors are positively correlated. Despite debate over the extent to which different deviant behaviors may be regarded as alternative manifestations of the same general deviant tendency, criminologists seem to agree that such a general tendency accounts for some significant portion of the variance in specific deviant behaviors.

Lying appears to be a particularly difficult type of behavior to study quantitatively—perhaps because it is difficult to detect and is rarely prosecuted, and perhaps because everybody lies occasionally.

Testing Premise 4, moreover, would demand more than a generalized study of lying; obviously, it would be difficult, at best, to design an experiment to show quantitatively that those who have committed serious antisocial behavior tend to commit a given type of dishonest behavior more frequently than do other people.

Nevertheless, nonquantitative learning suggests that lying is closely related to a general deviant tendency. In an exhaustive study conducted over more than a decade at St. Elizabeths Hospital in Washington, D.C., Samuel Yochelson and Stanton Samenow identified a pattern of thinking processes that they labeled as "criminal," not in the legal sense but in contrast to the comparable processes of the "basically responsible person." They concluded that:

Both the criminal and the noncriminal lie, and each knows when he is doing it. For the criminal, however, lying is a way of life.

42. See supra note 38 and accompanying text; M. Feldman, supra note 40, at 151 (For the minority of students who tended to consistent honesty or consistent dishonesty, situational factors would have to be rather powerful to exert significant control over behavior.).


44. For a discussion of the famous Hartshorne and May studies, see supra note 40.


46. Id. at 253.
Without exception, lying is incorporated into every criminal's makeup and is a nutrient of criminal patterns. To choose to be in crime necessitates lying for self-preservation.\(^{47}\) According to Yochelson and Samenow, "[l]ying to achieve specific aims" begins "very early in the criminal's life."\(^{48}\) The criminal "goes by what is right for him at the time . . . . By lying, he merely does what he needs to do to promote himself and achieve his objectives."\(^{49}\)

These criminological findings\(^{50}\) are perfectly in accord with the psychiatric doctrine that some people place significantly less weight than do most on social norms and the welfare of others. In the latest edition of the *Diagnostic and Statistical Manual* ("DSM-III-R"), the American Psychiatric Association describes Antisocial Personality Disorder ("APD"), the "essential feature [of which] is a pattern of irresponsible and antisocial behavior beginning in childhood or early adolescence and continuing into adulthood":

Lying, stealing, truancy, vandalism, initiating fights, running away from home, and physical cruelty are typical childhood signs. In adulthood the antisocial pattern continues . . . . These people fail to conform to social norms and repeatedly perform antisocial acts that are grounds for arrest, such as destroying property, harassing others, stealing, and having an illegal occupation. . . . People with Antisocial Personality Disorder tend to be irritable and aggressive and to get repeatedly into physical fights and assaults, including spouse- or child-beating. . . . [T]hey generally have no remorse about the effects of their behavior on others; they may even feel justified in having hurt or mistreated others.\(^{51}\)

To be diagnosed as having APD, a person must have shown a substantial history of Conduct Disorder—a "junior" form of APD—before age 15, as demonstrated by various forms of conduct,

\(^{47}\) *Id.* at 348; accord *id.* at 23 ("To these men, lying was nearly as essential—indeed, automatic—as breathing.").

\(^{48}\) *Id.* at 351.

\(^{49}\) *Id.* at 356; see also Tuck & Riley, *The Theory of Reasoned Action: A Decision Theory of Crime*, in *THE REASONING CRIMINAL: RATIONAL CHOICE PERSPECTIVES ON OFFENDING* 156 (D. Cornish & R. Clarke eds. 1986). Tuck and Riley find the basic findings of Yochelson and Samenow "convincing," *id.* at 165, and suggest how they might be incorporated into the theory of reasoned action ("TORA"), a broad theory of intentional behavior that Tuck and Riley attempt to apply to criminal conduct. *Id.* at 164–65.

\(^{50}\) See also Bishop, *Legal and Extralegal Barriers to Delinquency*, 22 *Criminology* 403 (1984) ("[I]nternalized normative constraint[s]" have more impact than fear of formal or informal sanctions in restraining delinquency.).

\(^{51}\) *AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 342 (3d ed. rev. 1987).
including initiation of physical fights, use of a weapon, forcing sexual activity, physical cruelty to animals or other people, destruction of property, and frequent lying other than to avoid physical or sexual abuse.\(^{52}\) Furthermore, the person must have displayed a "pattern of irresponsible and antisocial behavior since the age of 15." Among the indicators of such a pattern are that the person

(2) fails to conform to social norms with respect to lawful behavior, as indicated by repeatedly performing antisocial acts that are grounds for arrest (whether arrested or not), e.g., destroying property, harassing others, stealing, pursuing an illegal occupation . . .

(6) has no regard for the truth, as indicated by repeated lying, use of aliases, or "conning" others for personal profit or pleasure

(10) lacks remorse (feels justified in having hurt, mistreated, or stolen from another) . . . \(^{53}\)

In other words, a low regard for one's obligation to tell the truth is often part of a broader pattern in which the person places little weight on social norms or on the welfare of others. It follows that significant previous antisocial activity, even activity not in itself involving dishonesty, may be an indicator—though not necessarily a compelling one—of a heightened readiness to lie.

The point must not be overstated. A person who has committed a significant crime cannot necessarily be characterized as having a general deviant tendency, a criminal personality, or APD. Conversely, a person so characterized will not necessarily lie more readily than other people, and a person not so characterized will not necessarily lie less than others. There are, presumably, honest muggers and gentle perjurers. But the law of evidence cannot afford to demand anything close to certainty. It must content itself with seeking factors that significantly alter probabilities.

This discussion has suggested that there is a correlation between past antisocial behavior and readiness to lie, a correlation significant enough that in some cases evidence of the past behavior may rationally affect—that is, alter incrementally—a factfinder's assessment of how likely the person is to advance his personal interests by lying under oath. This, of course, has a bearing on the question of admissibility. It does not mean, however, that in all cases a prior record of one or more serious crimes has sufficient probative value with respect to the witness' credibility to warrant admissibility.

\(^{52}\) Id. at 344–45, 355.

\(^{53}\) Id. at 345–46.
III. THE CRIMINAL DEFENDANT AS WITNESS

Suppose Defoe is the defendant in a robbery trial. Prosecution witnesses, whom the jury finds quite credible, have identified Defoe as the culprit. The prosecution has rested, and a motion to dismiss the charges has failed. Now Defoe contemplates testifying in his own defense that he was nowhere near the scene. If he does so, the prosecution will seek on cross-examination to elicit Defoe's acknowledgment that the previous year he committed forgery and was convicted for it, and on rebuttal to introduce the testimony of another witness that in her opinion Defoe has a poor character for truthfulness.

This Part analyzes the benefits and dangers of allowing such character impeachment evidence. The analysis is broken into two sections. Section A examines the probative value and prejudicial impact of the evidence itself, apart from the question of how the prospect of impeachment may alter the defendant's courtroom conduct; the analysis assumes that the defendant decides to testify. Section B then examines the dynamic aspect of the problem—the pressure that the impeachment rule puts on the defendant to stay off the stand, and the bearing that this has on the factfinding process.

A. Character Impeachment Evidence of Criminal Defendants: Much Prejudice, Little Value

The probative value of evidence is a relative matter, depending on the extent to which the evidence alters the probability of a material factual proposition.\(^{54}\) Thus, we can determine the probative value of the evidence by comparing how probable that proposition appeared before the evidence was presented with how probable it appears afterwards.\(^{55}\)

This Article uses a Bayesian approach to analyze the determination of probabilities. The term "Bayesian" refers to a framework for quantifying uncertainty according to subjective probability assessments, or degrees of belief, and for revising those assessments in the light of acquired evidence.\(^{56}\) The approach does not assume

\(^{54}\) See Fed. R. Evid. 401.


\(^{56}\) See Fienberg & Schervish, The Relevance of Bayesian Inference for the Presentation of Statistical Evidence and for Legal Decisionmaking, 66 B.U.L. Rev. 771, 771–73 (1986). The term owes its name to Bayes' Theorem, one of its cornerstones, which was first presented by an eighteenth-century English cleric, Thomas Bayes. The theorem is illustrated diagrammatically in the Appendix.
that people actually break down inquiries into discrete probability assessments, or that they ordinarily should do so. Rather, the premise of the approach is that rational factfinders implicitly act consistently with subjective probability assessments applied in accordance with the rules of probability. The Appendix includes a brief diagrammatic presentation of how the Bayesian approach may be applied to evidentiary questions generally, to the evaluation of testimony, and to the issue discussed in this Part.

The Appendix illustrates diagrammatically an argument I have made elsewhere, that, in evaluating the probability of a proposition in light of testimony as to that proposition, the jury in essence must assess three probabilities:

1. The probability of the proposition apart from the testimony.
2. The probability that the witness would give this testimony if it were true.
3. The probability that the witness would give this testimony if it were not true.

The higher the first probability, and the higher the ratio of the second to the third, the higher the probability of the proposition in light of the testimony. Thus, if a defense witness testifies to a given proposition favorable to Defoe, the prosecution ideally would like to show that the first and second probabilities are relatively low and that the third is relatively high. If the prosecution can show that the second and third probabilities are equal—that the witness would be as likely to give this testimony if it were true as she would if it were false—then the testimony itself has no value; it does not alter the probability of the material proposition.

The focus for now is on how character impeachment evidence affects the jury’s evaluation of the defendant’s own testimony to an exculpatory version of the facts. We can analyze this effect by examining the extent to which, legitimately or prejudicially, the impeachment evidence might alter each of the three probability assessments. Although some readers may regard this discussion as overly segmented, breaking up what should be one big picture into many small pieces, the discussion is deliberately analytical. Its intricacy is warranted not only by the demands of logical rigor, but also by the complexity of the evidentiary law being examined.

which prescribes that character impeachment may be considered on one type of issue but not on another.

1. The First Probability Assessment

By definition, the first probability assessment—the probability, as judged apart from the defendant's testimony, of the substantive proposition to which he has testified—is logically unaltered by the defendant's testimony. Accordingly, evidence of the defendant's untruthful character admitted merely to impeach that testimony can have no legitimate effect on this probability assessment.

The evidence very likely will have a highly prejudicial impact on that assessment, however. The jury is likely to conclude that, because the defendant committed a prior bad act, the probability that he committed the crime charged, assessed without taking his testimony into account, is much higher. Rational though such an inference may be, the jury could well draw it too strongly. In any event, the possibility that the jury will draw this inference is precisely the type of consequence that rule 404 and similar rules are meant to prevent. So too is the possibility that the jury will decide that the defendant is a bad person, and thus effectively lower the prosecution's burden of persuasion. A limiting instruction is unlikely to correct these problems. Just how serious this potential prejudice is may be inferred from the fact that, to avoid it, many defendants decline to testify, thus giving up a right of enormous importance and risking that the jury will draw an adverse inference from silence.

2. The Second Probability Assessment

The second probability assessment requires the jury to determine, on the assumption that the substance of the defendant's testimony is accurate, how likely it is that the defendant would give that

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59. See Doob & Kirshenbaum, Some Empirical Evidence on the Effect of s.12 of the Canada Evidence Act Upon an Accused, 15 C RIM. L.Q. 88, 93–95 (1972) (In a jury simulation experiment, “judge's instructions” to use prior convictions only in judging credibility “had no effect whatsoever on the decisions by the subjects.”); Wissler & Saks, On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt, 9 LAW & HUM. BEHAV. 37, 47 (1985) (reporting an empirical study suggesting 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.”). See generally Bruton v. United States, 391 U.S. 123, 129 (1968) (“The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.”) (quoting Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring)).
testimony. In the usual case this probability is very high: An innocent defendant has a strong motive to testify truthfully and no reason to testify falsely, unless he is a pathological liar or has a martyr complex. These factors are not altered in any way by the fact that the defendant has a generally poor character for truthfulness. As Premise 1 suggests, even an inveterate liar will usually tell the truth if it will help save his skin.60

3. The Third Probability Assessment

The third probability assessment requires the jury to determine, on the assumption that the exculpatory rendition to which the defendant has testified is not true, how likely it is that the defendant would give that testimony. In the ordinary case, in other words, it calls for the jury to ask, "Assuming the defendant is guilty, how likely is it that he would testify in this way that he is innocent?" This question might appear to conflict with the presumption of innocence, but it does not; that presumption is satisfied if the jury is instructed, in effect, to begin with a very low assessment of the first probability, before the prosecution has introduced any evidence. On the contrary, this third inquiry is the key question in assessing the credibility of a defendant who takes the stand in his own defense. It requires some care to analyze correctly.

In some cases there may be explanations other than insincerity as to how the accused might have come to give false exculpatory testimony. In particular, he may have misperceived or misremembered some of the events as to which he has testified.61 For present purposes, however, these possibilities can be disregarded because the subject of this Article, impeachment by bad character for truthfulness, has no bearing on them. Instead, we can focus on what is usually the most likely explanation for the variance of an accused's testimony from the truth—lying.

Therefore the jury's key question may be rephrased more narrowly: "Assuming that the accused is guilty, how likely is it that he would lie from the stand in this way?" Further subdividing this question, the jury can ask, on the assumption that the accused committed the crime with which he is charged: (a) How probable is it that the accused would be inclined to lie in his own defense? and (b) How probable is it that the accused, if inclined to lie, would be able

60. See supra notes 33–35 and accompanying text. Of course, even an innocent defendant may not testify at all; this possibility, which for now we have assumed away, is discussed in section B of this Part.

to testify the way he has, in terms of substance and demeanor? To
determine the impact of the character impeachment evidence, we
will want to know how different are the jury’s assessments of these
probabilities before and after introduction of that evidence.

a. Probability of the Accused’s Inclination to Tell
the Self-Serving Lie

Whether a person is inclined to tell a self-serving lie in a given
situation depends on the relative weight of the interests that the lie
would serve and the person’s compunctions about lying. Character
impeachment is unlikely to alter the jury’s view of these factors very
much at all. Surprising as this assertion may seem, it follows easily
from the hypothesis governing this part of the analysis—that the
defendant is guilty of the crime charged. On that hypothesis, a ra-
tional jury usually will conclude, even without character impeach-
ment, that the accused has a strong interest in lying and little
compunction against doing so. Character impeachment evidence is
overkill.

i. The Accused’s Interest in Lying

The personal interest that the accused has at stake—avoiding
criminal punishment—is an extremely powerful one. It is
highly unlikely that this interest will appear materially different if the jury
learns that he has committed a prior crime, or more generally that
he has a bad character for truthfulness. Some former convicts may
have an especially strong interest in avoiding the relatively harsh
treatment accorded repeat offenders; on the other hand, the
stigma and pain of a criminal conviction may be duller the second
time around. But these fine-tuned considerations almost certainly
will not alter the essential truth by very much: a criminal defend-
ant, whatever his character or prior record, has a very strong inter-

ii. The Accused’s Compunctions About Lying

As Premise 2 indicates, many people, probably most, would
tell a lie if they believed it would save their skins, at least if it would
prevent their skins from being sent to prison or suffering other crim-

62. Cf. R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 211
n.54 (1977) (unavailability of relatively lenient plea bargains sometimes induces defend-
ants with prior records to stand trial).
inal punishment. Only those towards the self-abnegatory end of the spectrum will have sufficient compunction that they will not be inclined to tell a lie, if they can, to escape criminal punishment.

By the hypothesis of the question and even without any impeachment, the accused appears not to be one of those people; on the contrary, he already appears to be one of those towards the other end of the spectrum, who is more willing than most people to weigh his own interests over his social responsibilities. According to Premise 4, serious prior misconduct makes it more likely that a person is readily willing to lie for his own interests. And by hypothesis, the accused is not an ordinary person but a criminal; he has committed the crime with which he is now being charged. Thus, for this part of its inquiry, the jury will probably assess the accused's compunction about lying as extremely low, even before the prosecution introduces any character impeachment evidence. This conclusion would not be materially altered if Premise 4 is in fact untrue, because most jurors are likely to believe it is true.

63. See supra text accompanying notes 36 and 40. Note that, "recognizing and tolerating this frequently instinctive desire of the guilty defendant to play the innocent, modern continental systems generally refuse to put the defendant on oath." Damaska, Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study, 121 U. PA. L. REV. 506, 528 (1973). Cf. Dalton v. Evans, 400 U.S. 74, 77 n.7 (defendant in Georgia trial "made a lengthy unsworn statement").

64. One interesting counterexample sheds light on this point rather than undercuts it. According to my colleague Doug Kahn, the late Rep. Otis G. Pike told of conducting his own defense, very vigorously, in a trial involving a minor hunting violation. Pike knew he was guilty, and would not take the stand to perjure himself. One might wonder whether Pike would have taken the same stance had the crime been more serious and he felt that he could have gotten away with a lie. And, of course, if the crime had been more serious, then arguably at least, the Otis Pike who had such scruples would not have committed it.

65. In this case we have assumed that, if the defendant's self-exculpatory statement is a lie, then he is guilty of the crime charged. That is probably most often true, but it is not inevitably so. An innocent defendant could gild his story, lying about a peripheral part of the case. Cf. T. WOLFE, THE BONFIRE OF THE VANITIES 622 (1987). The discussion here, however, focuses on the most important case, in which the truthfulness of the defendant's testimony implies innocence and falsity implies guilt.

66. To the extent that exclusion of an accused's prior convictions is based on fear that the jury will overvalue the evidence in judging the accused's credibility, it reflects a perception that lay people strongly believe Premise 4 to be true. Similarly, to the extent that prior convictions, including convictions for crimes different in nature from the one currently being charged, are excluded to prevent the jury from overvaluing their bearing on the defendant's guilt, see text accompanying note 15, the exclusion represents a perception that lay people will likely rely on the cross-situational propensity theory reflected in Premise 4. Moreover, arguments by courts and other rulemakers favoring the use of character impeachment evidence often rely on variants of Premise 4. See infra note 69 and accompanying text. There is no reason to believe that the perception of jurors is less favorable to Premise 4 than is the perception of the rulemakers in particu-
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This conclusion means that the prosecution has no remaining battle to fight on this part of the case, because it need persuade the jury only that the accused is not towards the high-compunction end of the spectrum. By the governing hypothesis, the jury already has an indication that the accused falls far from that end, and indeed near the other, low-compunction end of the spectrum. The prosecution does not need to introduce evidence further suggesting that the accused falls towards the low-compunction end. Such evidence is overkill in two respects. First, the proposition it tends to prove is a stronger one than the prosecution needs to show. Second, the evidence primarily adds confirmation to what the jury is already assuming hypothetically; thus, it is essentially cumulative and so lacks great probative value.

In particular, proof that the defendant committed a prior crime simply increases from one to two the number of crimes the defendant is assumed to have committed. Courts have recognized that prior convictions offered to prove bad character for truthfulness may be cumulative after a point. But they should also recognize

lar. If Premise 4 is incorrect, there is no good reason to believe that jurors are more likely than rulemakers to recognize its incorrectness. For a good illustration of the popular appeal of Premise 4, note the comment of Sen. John McClellan, opposing in floor debate a version of rule 609 that would have allowed impeachment by convictions only for crimes involving dishonesty or false statement:

Surely a person who has committed a serious crime—a felony—will just as readily lie under oath as someone who has committed a misdemeanor involving lying. Would a convicted rapist, cold-blooded murderer or armed robber really hesitate to lie under oath any more than a person who has previously lied? Would a convicted murderer or robber be more truthful than such a person?

Of course not!


67. See Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967) (suggesting as a possible rule that proof of at most one conviction for a crime similar to that being currently charged be admissible for impeachment), cert. denied, 390 U.S. 1029 (1968); People v. Holt, 37 Cal. 3d 436, 460, 690 P.2d 1207, 1221, 208 Cal. Rptr. 547, 561 (1984) (Bird, C.J., concurring in the result) ("Multiple prior felony convictions carry little, if any, additional probative value in determining the credibility of a witness."); United States ex rel. Marzeno v. Gengler, 574 F.2d 730, 738 (3d Cir. 1978) (No prejudice created by Government when, in questioning its own witness, it elicited four prior felony convictions but ignored three others; "[t]he unrevealed convictions are merely cumulative as to the issue of [the witness's] credibility."); cf Commonwealth v. Reid, 22 Mass. App. Ct. 730, 732, 497 N.E.2d 1107, 1108 (1986) ("Like most cumulative evidence, the marginal value of successive convictions for impeachment purposes tends to diminish. . . ."); rev'd, 400 Mass. 534, 511 N.E. 2d 331 (1987). But see Holt, 37 Cal. 3d at 452–53, 690 P.2d at 1216, 208 Cal. Rptr. at 556 (majority opinion holding that "[a] series of crimes relevant to character for truthfulness is more probative of credibility than a single lapse," but that the trial judge did not sufficiently weigh against this proba-
that in this context cumulativeness begins with the first prior conviction rather than with the second because, by hypothesis, the accused has committed the crime charged.68

There is a large irony here. Arguments favoring the use of character impeachment evidence often rely on variants of Premise 4.69 But in the context of an accused witness, the logic suggests that
tive value the prejudicial effect of admitting more than one conviction) (citation omitted); People v. Woodle, 121 Mich. App. 336, 334, 328 N.W.2d 412, 416 (1982) (Evidence of several armed robberies held “very probative of credibility,” but too prejudicial because defendant on trial for felony murder with armed robbery as the underlying felony; at retrial, proof of only one prior conviction to be allowed for impeachment.)

68. At some point, prejudicial impact might also become cumulative. Recall the nature of the prejudice threatened by character impeachment evidence. It may increase the jury’s first probability assessment listed above—the probability of guilt, assessed apart from the accused’s own testimony—by suggesting that the accused is a bad person who would be disposed to commit the crime. See text preceding supra note 59. Past a point, additional evidence of bad character may increase the force of this view only slightly, and so have only slight incremental prejudice. But ordinarily this type of cumulativeness does not begin until evidence of the second prior bad act, at the earliest. Cf. Commonwealth v. Reid, 22 Mass. App. Ct. 730, 732, 497 N.E.2d 1107, 1108 (1986) (when “successive convictions for impeachment purposes” are presented, “the danger paradoxically increases that the jury will conclude that the defendant is an incurable criminal from whom society deserves protection regardless of any doubts they might have concerning his guilt of the particular offense charged.”), rev’d, 400 Mass. 534, 511 N.E. 2d 331 (1987). The first probability assessment, unlike the third, does not assume hypothetically that the accused committed the crime. Absent character evidence, therefore, the jury makes that first assessment, of the probability that the accused committed the crime charged, against an assumed background of a blameless past; proof of prior misconduct substantially alters that background. Note the contrast with the third probability assessment. That assessment requires the jury to determine the probability that the defendant would commit one type of misconduct—perjury in the case being tried—assuming that he had previously committed another—the crime charged.

69. See, e.g., Gertz v. Fitchburg R.R., 137 Mass. 77, 78 (1884) (Holmes, J.), quoted in Green v. Bock Laundry Mach. Co., 490 U.S. 504, 506 n.4 (1989) (prior conviction may suggest that a witness “is of bad character and unworthy of credit” because of “the general readiness to do evil which the conviction may be supposed to show.”); State v. Duke, 100 N.H. 292, 293–94, 123 A.2d 745, 746 (1956) (“Lack of trustworthiness may be evinced by [a defendant-witness’s] abiding and repeated contempt for laws which he is legally and morally bound to obey, . . . though the violations are not concerned solely with crimes involving ‘dishonesty and false statement’ ”); State v. Sheffield, 676 S.W.2d 542, 549 (Tenn. 1984) (Crimes “involving disregard of legal and moral rules of civilized society and serious enough to be punishable by imprisonment in excess of one year” may have sufficient bearing on credibility to warrant admissibility even though they have “nothing to do with dishonesty or false statement.”); 120 CONG. REC. 2380 (Feb. 6, 1974) (Rep. Hogan) (“You simply cannot get away from the fact that, if a thief or perjurer is unworthy of belief, one might be even less inclined to believe a murderer, or assassin, or drug trafficker, or white slaver, or saboteur or what have you.”); id. at 2381 (Rep. Lott) (“Obviously, the character of a witness is material circumstantial evidence on the question of the veracity of testimony of the witness. Prior criminal conduct, including all prior felony convictions, is relevant evidence of such character.”); 120 CONG. REC. S. 19909 (comment of Sens. Hart, Hruska, and Thurmond); supra note 66
this proposition may point in the exact opposite direction. That is, the argument for total exclusion of character impeachment evidence may actually be more powerful if, as Premise 4 suggests, very anti-social behavior—even behavior not involving dishonesty—strongly implies probable willingness to commit perjury in one's own defense.

In answering the key credibility question, the jury is already assuming that the predicate to that implication is true; that is, the question assumes hypothetically that the defendant has committed the crime charged. Thus, if the implication is a strong one, the jury can rely on it even absent evidence that the accused has a poor character for truthfulness; evidence will therefore be of negligible incremental assistance in answering the key credibility question. That incremental assistance will be all the more negligible if the impeachment evidence is of a prior crime no more suggestive of untruthfulness than the one now being charged. But even in the strongest case favoring impeachment—in which the impeachment evidence clearly involved dishonesty, but the currently charged crime did not—the same basic point holds, albeit less strongly: To the extent that commission of one crime, including the one currently charged, tends to suggest willingness to commit perjury in one's own behalf, any incremental value of the impeachment evidence—already presumably very slight—is diminished.70

iii. Summary: Considering the Accused's Interest and Compunctions Together

A simple illustration may help make the discussion of the preceding paragraphs more vivid. Evidence that the accused has an untruthful character could substantially alter a rational jury's assessment of his inclination to lie only if the jury followed a train of thought something like the one presented at the beginning of this Article:

(comment of Sen. McClellan). Part IV relies on Premise 4 in favoring the discretionary use of character evidence to impeach witnesses other than criminal defendants.

70. Perhaps a defender of character impeachment evidence of criminal defendants would argue that in fact evidence of an earlier crime has great probative value because two crimes (counting the assumed commission of the crime being charged) tend to suggest a "pattern," whereas one does not. See supra notes 50–53 and accompanying text. The argument is not persuasive. For one thing, given high recidivism rates, the assumption that a person who has committed one crime suggests a high probability that he has committed, or will commit, at least one more. Moreover, even if one criminal act does not strongly suggest that the accused is a particularly low-compunction person, it does drastically reduce the probability that he is a high-compunction person, and that is all that is really needed.
At first I thought it was very unlikely that, if Defoe committed robbery, he would be willing to lie about it. But now that I know he committed forgery a year before, that possibility seems substantially more likely.

The statement carries its own refutation. A jury, acting for the moment on the assumption that the accused committed the robbery with which he is charged, most likely will assess as very high the probability that he would be willing to lie about the crime to save himself. If so, that assessment will not have room to go much higher. And it is extremely unlikely to be increased substantially by proof that the defendant has a bad character for truthfulness or that at some previous time the defendant committed another crime, even a crime of dishonesty like forgery.

b. Probability of the Accused's Ability to Bring the Lie Off

The notion that a hypothetically guilty defendant will be perceived as strongly inclined to lie in his self-defense does not necessarily rob his testimony of probative value. The jury might be impressed with the accused's ability to bring the story off. The jury might say in effect, "If he were guilty, he probably wouldn't be able to testify this way, in substance or demeanor. Therefore, the fact that he has testified this way suggests that he is not guilty."

The guilty defendant's ability to bring off a lie depends on the substantive plausibility of the particular lie and his ability to lie with a persuasive demeanor. The jury's assessment of either factor is not likely to be rationally affected by proof that the defendant has prior convictions or has an untruthful character.

The guilty defendant who takes the stand in his own defense not only has to lie; he has to come up with a particular lie to tell. If he takes the stand and tells a story that appears plausible even after cross-examination and careful analysis of all the evidence in the case, he may provide very important assistance to his case. The jury might say, "If he were guilty, he couldn't have come up with a story like that, managing to avoid all the danger spots that the prosecution put in his path."71 On the other hand, if he twists himself into contortions trying to explain apparent inconsistencies, he may be worse off than before he testified, when the jury could only spec-

71. In some cases, it is not difficult to come up with a plausible lie. For example, if the crime is assault and the prosecution's case rests entirely on the victim's identification of the accused, it is often easy enough for the accused to come up with a plausible story, such as that he was home alone in bed. But for that very reason, the jury may be inclined to give less weight to such a story.
ulate that he had no good story to tell; the jury might now think, "This is just the type of implausible story we would expect him to tell if he were guilty." But in either case the issue is the probability, on the assumptions that the accused is guilty of the crime charged and inclined to lie in his defense, that the accused would tell this particular story. In assessing that probability, the fact that the accused was previously convicted of crime, or more generally that he has a bad character for truthfulness, will usually have little or no bearing.

Even if the guilty defendant is inclined to lie in his defense, and even if he has a plausible story to tell, his testimony may not be successful if he lacks a persuasive demeanor in lying. Conceivably, one with a bad character for truthfulness will tend to be an experienced liar, and so better able to lie persuasively; the argument, then, would be that prior misconduct or a general assessment of untruthful character is useful to the jury in assessing what appears to be a persuasive demeanor, making more likely the hypothesis that the defendant lied without giving any outward manifestation of dishonesty. But this argument is far too shaky to support substantial reliance.

For one thing, the argument would have little or no force as applied to bad acts not involving dishonesty. Whatever bearing such acts have on the defendant's inclination to lie, they convey very little information about his ability as a liar.

Even as applied to proof of misconduct involving dishonesty or of a generally untruthful character, the argument is very dubious. It would require a juror to follow logic something like this: "I didn't think he would be able to bring it off, but then I found that he was an experienced liar—as evidenced by the fact that he got caught once—so now I think that he appeared so smooth because he's got experience, and the conviction was just a slip." Perhaps a tip-of-the-iceberg argument is possible: "If the defendant got caught once or twice in a bad act of dishonesty, it's probably because he commits them a lot, and if he does that he probably has gotten pretty good at it." But it takes quite a leap of faith to accept this argument. At least equally plausible, it would appear, is an argument that the defendant's failure to cover a significant act of dishonesty shows that he is a poor liar. In any event, it seems clear that the

72. S. SAMENOW, supra note 34, at 37 (delinquent children who will later be criminals develop the ability to lie.). Cf. 1 S. YOCHELSON & S. SAMENOW, supra note 45, at 349 ("The criminal gets away with more lies than those for which he is held accountable.").
defendant's prior history yields no strong generalization that he is able to lie convincingly. The argument based on the demeanor of the accused offers insufficient support to warrant the admission of highly prejudicial evidence.

B. The Dynamic Effect of Character Impeachment of Criminal Defendants

Section A assumed that the prosecution's use of character impeachment evidence did not alter the defendant's in-court conduct in any way. In reality, of course, a rule allowing such evidence only if the defendant testifies necessarily changes the defendant's incentives to testify.

Some defendants who would otherwise take the stand do not do so because they do not want to face character impeachment evidence. That is a great loss, because the right to testify in one's own defense, although of far more recent vintage than some other rights of a criminal defendant, must now be considered as one of the most fundamental in our jurisprudence. Perhaps to the extent that defendants are in fact guilty we can be complacent about pressuring them to forgo this right; the right to lie in one's own defense, though presumably of some worth in giving the defendant a sense that he has received a full hearing, does not rank high on the list of values that our system protects. But some of the defendants who decline to take the stand because of the prospect of character impeachment are not in fact guilty. And in some cases that failure to take the stand is utterly disastrous, spelling the difference between conviction and acquittal.

The harm to the accused from failure to testify may be broken down into two components. Take as a baseline the jury's assessment, made at the conclusion of the prosecution's case, of the probability that the accused is guilty. First, failure to testify sacrifices a crucial opportunity to lower that baseline assessment. Had the accused testified he might have provided the jurors with exculpatory information that they would receive in no other way. Or he

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73. In 1859, Maine became the first state to declare the accused's competence to testify. Bradley, Havens, Jenkins and Salvucci and the Defendant's "Right" to Testify, 18 Am. Crim. L. Rev. 419, 420 (1981) [hereinafter Bradley]. For discussions of the development of the accused's right to testify, see id. at 420–23; see also 2 J. Wigmore, Evidence § 579 (J. Chadbourn rev. ed. 1979).


75. Cf. People v. Allen, 429 Mich. 558, 672–73 n.6, 420 N.W.2d 499, 550–51 n.6 (1988) (Boyle, J., dissenting) (excluding impeachment by prior conviction makes it easier for a guilty defendant to present a credible defense to the jury.).
might have impressed the jury with his demeanor, persuading them that he could not have spoken so self-confidently had he been lying.

Perhaps more importantly, the accused's failure to testify affirmatively raises the jurors' probability assessment of guilt from the baseline level. No matter how vigorously the court instructs the jurors not to take into account that failure to testify, they are almost certain to do so. This proposition is hardly novel, but it warrants close examination. Jurors consider the failure to testify not merely because they might lack the sophistication to follow the judicial instruction, or even because they are disposed to ignore the instruction so that they can implement their own sense of justice. Rather, careful Bayesian analysis shows that jurors tend to disregard the instruction because it is virtually incoherent.

The jury's decision as to whether the prosecution has proven its version of events beyond a reasonable doubt cannot be made in the abstract, without considering the possibility of alternative versions. To say that there is no reasonable doubt is to conclude, at the very least, that the prosecution has proven its version to be far more probable than any possible account—whether presented through defense evidence or not—consistent with the defendant's innocence. In deciding the relative probability of the "Guilty" version and a "Not Guilty" version, the jury will rationally ask which version was more likely to yield the evidence that has been presented in court, and by how much.

But the rational jury cannot consider only the evidence actually presented to it. The absence of and limitations on evidence also have significance, and may be analyzed in much the same way as evidence itself. Suppose, for example, that a proposition disproving a "Not Guilty" version would, if true, be provable by the prosecution, and that the prosecution would have no substantial reason for withholding such proof. If the prosecution fails to present such proof, the jury may infer that the proposition is not true. This is part of a more general missing evidence principle, that failure to produce evidence apparently within a party's control may warrant an inference that the withheld evidence was unfavorable to that

76. See Beaver & Marques, supra note 6, at 609:

Jurors expect innocent defendants to respond to false criminal accusations. From silence jurors draw an inference of guilt. The defendant who appears to withhold relevant information is likely to be viewed as guilty. No one can reasonably expect the jury to set aside the mental presumption of guilt created by the defendant's silence simply because the court gives it instructions to do so.

See generally supra note 59.
party. A rational jury will want to apply the same principle to the defendant: a version of the facts consistent with innocence will appear less probable if the defendant fails to testify to it, unless it appears to the jury that he would be as likely to stay off the stand if he were innocent as if he were guilty.

Thus, the instruction not to take into account the defendant's failure to testify poses a far greater problem for the jury than does an instruction to put certain evidence out of mind altogether or with respect to a given issue or set of issues. An instruction to disregard evidence might be unrealistic enough, asking jurors to discipline themselves by disregarding probative information. But at least its command to the jurors is clear and coherent: "Do not use this evidence in your thinking or deliberations; act as if you never heard it." By contrast, the instruction regarding failure to testify is not subject to any such rendering. Obviously, it cannot be deemed to ask that the jury act as if the defendant did testify, hypothesizing what his testimony would have been and how he would have delivered it. The only way to make sense of the instruction is to treat it as a charge to assume that, whether innocent or guilty, the defendant was equally likely to decline to testify. But, especially if the case against the defendant appears strong, so that an innocent defendant would be likely to testify, this assumption is contrary to the realities of the situation, and even more contrary to the jury's understanding of the situation. Thus, the jury can hardly help but ignore the instruction.

Putting aside for the moment the prospect of character impeachment, there are, of course, substantial reasons why an innocent defendant might decline to testify. Perhaps he would be an unsympathetic witness, or so unpersuasive that he would be worse off if the jury heard his testimony than if the jury wondered what it would be. Or perhaps the defense feels that the prosecution's case is sufficiently weak so that it is wiser to rely on an argument stressing the presumption of innocence than to give the prosecution


78. "Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass [the defendant] to such a degree as to increase rather than remove prejudices against him." Wilson v. United States, 149 U.S. 60, 66 (1892), quoted in Griffin v. California, 380 U.S. 609, 613 (1965); see also A. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 390 (4th student ed. 1984).
a chance to build its case through cross-examination. But the jury may be unaware of these or other possibilities, or count them lightly. If the jury does take these arguments fully into account, it will probably recognize that they also apply to a guilty defendant.

Indeed, whether or not the jury understands why an innocent defendant might decline to take the stand, it will correctly understand one powerful reason why a guilty defendant might: A guilty defendant, or his lawyer, might be afraid that he would not be able to bring the testimony off, and that by testifying to an implausible story he would worsen his position. A jury will be acting rationally if it recognizes—again, putting aside the possible impact of prospective character impeachment—that a guilty defendant is more likely to stay off the stand than is an innocent one. This means that the jury is likely to regard the accused's failure to take the stand as indicative of guilt, even if in fact it was only a means of preventing the character impeachment.

There remains the possibility that we temporarily put aside—that the jury understands it may have been the prospect of character impeachment that kept the accused off the stand. In fact that possi-

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79. See Glaberson, The 'Wrong' Court?, N.Y. Times, Jul. 3, 1990, at B3, col. 5 (No witnesses called in defense of Imelda Marcos; "[i]nstead of fighting the prosecution's case, [counsel] seemed sometimes to be riding it, letting the weaknesses of the case expose themselves.").

80. Attacks on the defendant's character are not the only form of impeachment evidence that may dissuade the accused from taking the stand. He may, for example, fear impeachment by evidence that would be otherwise inadmissible under the exclusionary rule because it was illegally obtained. A. AMSTERDAM, supra note 78, at § 390(H); see United States v. Havens, 446 U.S. 620, 626–28 (1980); Walder v. United States, 347 U.S. 62, 65 (1954). He may also fear impeachment by a statement that he made without receiving proper Miranda warnings. Harris v. New York, 401 U.S. 222, 225–26 (1971). Further, although his testimony at a hearing to suppress evidence would not be admissible if he does not testify, it might be if he does. See United States v. Salvucci, 448 U.S. 83, 93–94, (1980); id. at 96 (Marshall, J., dissenting) (noting that the Court has given "broad hints" that it will so decide). Finally, the defendant might fear that the prosecution might have evidence that, although not favorable to its case-in-chief, would so impeach the defendant's exculpatory story that he would be worse off than if he had not testified at all; this might be the case, for example, if the defendant previously gave an alibi inconsistent with the one to which he is prepared to testify. Anderson v. Charles, 447 U.S. 404, 408 (1980); cf. Jenkins v. Anderson, 447 U.S. 231, 240 (1980) (impeachment by proof of silence before Miranda warnings); Bradley, supra note 73, 435–36; see also, A. AMSTERDAM, supra note 78, at § 390(G).

81. There are other conceivable explanations as well that would account for the failure of a guilty defendant, but not an innocent defendant, to take the stand. First, the defendant might have been unwilling on moral grounds to lie in his own defense; for the reasons stated in section A, this usually appears rather improbable. Second, if his lawyer recognized that if he took the stand he would perjure himself, she might refuse to put him on.
bility appears rather slim; most jurors probably do not have enough familiarity with the law of evidence to know that often an accused who decides to testify pays a penalty by opening the door to character impeachment. To the extent that jurors do recognize this proposition, the impeachment rule works great havoc. It means that any time a defendant stays off the stand and substantial evidence of an unsavory past is not admitted for another purpose, the knowing juror will suspect that it was the prospect of character impeachment that kept him off. There is no good use to which the juror can put that information; she cannot use the information to evaluate the credibility of a person who did not testify. The only use to which she can put the suspicion is a prejudicial one, by assuming that the defendant was likely to act in accordance with his inferred evil propensities. Thus, an advocate of allowing character impeachment of criminal defendants had best assume that jurors are unaware of the rule.

C. Three Spurious Defenses of the Rule

Section A of this Part showed that character impeachment evidence of an accused has substantial prejudicial impact, but virtually no probative value. Section B showed that by declining to take the stand—the only way an accused who is subject to character impeachment may avoid that evidence—the accused acts in a way that a jury will tend rationally to associate strongly with guilt.

An advocate of the rule allowing some character impeachment evidence of an accused might accept all these conclusions, but still refuse to yield. This section will raise and dispute three arguments that such an advocate might make even after conceding that character impeachment evidence offers little new information about an accused’s willingness or ability to lie in his own defense. Advocates of the rule rarely, if ever, make these arguments explicitly. They are presented here in part to make a “due diligence” search for possible justifications for the rule. Moreover, at least some of these argu-

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82. The accused may be subject to impeachment even without taking the stand if under an exception to the hearsay rule he offers his own prior declarations. See FED. R. EVID. 806. But in that case, the impeachment evidence would be admitted openly; there would be no occasion for the knowing juror to speculate surreptitiously on its existence and significance.

83. If the defendant does testify, the knowing juror might draw the corresponding inference that the defendant had an exemplary past and therefore was unlikely to commit the crime being tried. This inference is also improper, absent the defendant’s decision to place his character in issue and give the prosecution a chance to respond. Cf. FED. R. EVID 404(a)(1).
ments probably underlie the rule implicitly; they may largely account for the tenacity it has exhibited, notwithstanding its lack of logical force.

1. The Probability of Guilt

The advocate might first argue that, at least with respect to impeachment by prior convictions or serious misconduct suggesting an untruthful character, very few criminal defendants who are subject to character impeachment are in fact innocent. The rule therefore only very rarely does harm, but it often does good by inducing many guilty defendants to stay off the stand, where they would commit perjury. When a guilty defendant takes the stand, the prejudicial impact of the impeachment evidence is arguably beneficial because it leads the jury to the right result, albeit for the wrong reasons.

This argument cannot be dismissed out of hand by a mere invocation of the presumption of innocence. Suppose, for example, we were convinced that only once out of the last ten years had a defendant subject to impeachment by prior convictions or serious misconduct actually been innocent. We might then be persuaded that the losses created by the rule are minuscule and well worth the benefits of keeping thousands of perjuring guilty defendants off the stand.

The argument would be valid, however, only if the proportion of defendants subject to such impeachment who are in fact guilty is not only merely high, but really quite sincerely high, much higher than the proportion of all defendants who are guilty. Assume, as may well be the case, that most defendants whose cases actually go to trial are guilty. Nevertheless, we would not accept a rule that barred an accused from testifying on the ground that he is probably guilty and so his testimony would probably be perjured. A more modest rule, burdening the decision to testify (say, by opening the door to otherwise inadmissible, irrelevant but highly prejudicial evidence), would presumably fare no better. But that more modest rule exactly describes the doctrine allowing impeachment by convictions or prior misconduct. Burdening the accused's ability to

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84. See, e.g., People v. Allen, 429 Mich. 558, 669, 420 N.W.2d 499, 549 (1988) (Boyle, J., dissenting) ("[T]he safeguards in the system assure us of that which every trial judge and lawyer knows, that 'the preponderant majority' of defendants are guilty of the charged offense or a lesser or related offense.") (quoting in part Frankel, The Search for Truth: An Umpireal View, 123 U. PA. L. REV. 1031, 1037 (1975)).
present his case 'cannot be justified merely on the ground that most defendants are guilty.

Can we, then, have confidence that defendants who have committed, or been convicted for, serious misconduct are far more likely than other defendants to be guilty? It appears not. We may concede readily that a person who has committed bad acts in the past is more likely to commit a given crime; propensity theories do, after all, have a good deal of force. But this does not tell us whether, of persons who are accused of crime (and whose cases go to trial), the proportion of false accusations is lower among those who are subject to impeachment based on their prior history than among those who are not. In fact, because investigation of crimes must often begin by focusing on those "usual suspects" already known to law enforcement officials, it may well be that a defendant with a prior record is more likely than one without a record to have been falsely accused.\textsuperscript{85} Cases in which a person with a shady past is tried for a crime he did not commit are not all that rare.\textsuperscript{86} We should not make the mistake of thinking that the force of the char-

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\textsuperscript{85}. For a careful analysis, see R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 216–18 (2d ed. 1982). It is even conceivable that a conviction-hungry prosecutor would tend more readily to bring a weak case against a person with a prior record because the character impeachment rule would make it harder for such a defendant to defend himself.

Here are two pieces of anecdotal evidence to support the vulnerability of prior convicts to prosecution. Paul Carrington has told me of a case in which he sat as a juror and in which the prosecution presented strong police testimony that the defendant had begun an altercation at home. In retrospect, Carrington wonders whether the defendant's long prior record accounts for the police's supposed presence in the defendant's living room.

The second story arises from a case I handled on appeal. The defendant was accused of robbing two gold chains from a man observing a three-card monte game near Times Square in New York City. I am persuaded that, in fact, the defendant was the dealer, and that the supposed victim had really bet and lost his chains and claimed theft only when the police arrived on the scene and he realized he might have a chance to recover his property. The defendant did not take the stand—apparently for fear that his numerous convictions (almost all of which were for gambling) would be held against him. He did present his version of the facts through another witness, but she probably ruined his chances of acquittal. She denied knowing him, but the prosecution presented strong evidence that she was in fact his common law wife. The defendant would have been better served if he had testified himself, admitted readily to all of his prior convictions, and then argued that the Times Square police were tired of arresting him for small gambling offenses and eager to have him convicted of a felony. (The defendant eventually escaped from prison, forfeiting the appeal.).

\textsuperscript{86}. See Gross, Loss of Innocence: Eyewitness Identification and Proof of Guilt, 16 J. LEGAL STUD. 395, 416 (1987) ("In some of these cases [in which a person was misidentified as the perpetrator of a crime] the suspect would not have been identified but for some fact that made him an object of attention; typically the fact that he had been arrested or convicted of a crime."); see also supra note 85.
acter impeachment rule is felt almost exclusively by guilty defendants.

2. Differential Impact on the Innocent and the Guilty

The first argument assumed that innocent defendants are less likely than guilty ones to be subject to character impeachment. The second argument focuses on defendants who are subject to such evidence, and assumes as a predicate that guilty ones are far more likely than innocent ones to stay off the stand because of the prospect of the impeachment. If this is true, and if staying off the stand tends rationally to suggest guilt, then the rule helps to sort out guilty defendants from the innocent.

This argument might have some logical force if the predicate were true, but that proposition is dubious at best. It is by no means clear that a guilty defendant subject to character impeachment is at all more likely than an innocent one to stay off the stand because of the rule. Guilty defendants in general are more likely to stay off the stand than innocent ones, but that is beside the present point: whether a guilty defendant who otherwise would have testified is more likely than an innocent one to be dissuaded by the rule from doing so is unclear.

In any event, whatever “sorting out” benefits the rule might have under this argument come at a frightful price. If an innocent defendant stays off the stand because of the rule, he taints himself by acting in a manner that, as the argument acknowledges, suggests guilt. And if he testifies, he exposes himself to the prejudicial impact of the character evidence.

Beyond this, there is a terrible irony to the “sorting out” argument: to the extent that fear of character impeachment keeps guilty defendants off the stand more than innocent ones, when character impeachment evidence is presented it suggests innocence rather than guilt. Perhaps defense counsel could take advantage of this irony: “Ladies and gentlemen, Mr. Defoe took the stand to testify

87. See supra text accompanying notes 73–83.

88. This might not hold true if there is a very high correlation between guilt of the crime charged and exposure to character impeachment evidence. Suppose, for example, notwithstanding the doubts raised in the previous subsection, that the overwhelming majority of innocent defendants are not subject to character impeachment evidence and that the great majority of guilty defendants are. It might then be possible that, even if the sorting out effect is strong—that is, even if the threat of character impeachment tends to keep the guilty off the stand more than the innocent—the proportion of guilt will be higher among those defendants who testify and are impeached by character evidence than among those who testify and are not so impeached. But that first propor-
even though he knew that if he did so the prosecutor would throw his entire criminal record in his face, and in yours.” But defense counsel would rather not have the opportunity to make such an argument.

3. Neutralizing the Benefits of the Accused’s Testimony

The two arguments just considered are based on benefits perceived in keeping defendants off the stand. The final argument that one advocating character impeachment of criminal defendants might make is focused on the consequences if the accused does testify. A defendant who presents himself in the best possible light on the witness stand, who looks respectable and sounds gentle, gains two important advantages, even apart from the persuasive force of his testimony. Character impeachment can neutralize both these benefits.

First, the accused essentially may be asking the jury to believe that he is not the type of person who would likely have committed the crime charged. Thus, the advocate might argue, character impeachment assists in determining the bottom line—not whether in court the accused lied from the witness stand, but whether out of court he acted criminally as charged. Presumably the impeachment evidence would not have been admissible for this purpose had the accused not taken the stand, because if it would have been, there would be no need to resort to the character impeachment rule. But, the argument runs, by taking the stand himself the accused has placed his character in issue as effectively as if he had put a character witness on the stand to testify to his law-abiding nature. Had he done that, the prosecutor would have been allowed to cross-examine evidence to the contrary. Thus, the argument concludes, a similar remedy is appropriate when the accused is, in effect, his own character witness.

Second, if an accused has a sympathetic demeanor on the witness stand, the jurors may not only conclude that he was unlikely to have committed the crime; they may also find it harder to condemn him to criminal punishment, and so they may effectively raise the prosecution’s burden of proof. The defendant who testifies person-

89. The phrase “character in issue” is used here in the loose sense, meaning that character is a subject of litigation, rather than in the strict sense in which character is “an essential element of a charge, claim, or defense.” Fed. R. Evid. 405(b).
alizes himself by talking to the jurors. No longer is he a mysteri-
ous, incomplete figure; now he has a voice, and with it he has made
a connection with the jurors. They know him and may have some
human sympathy for him. Character impeachment, the advocate
might argue, can nullify that sympathy, lowering the burden of
proof to the proper level.

There may be some force to these fears. But the defendant has
persuasive responses. First, although the defendant had a right to
introduce evidence bearing on his character, he chose not to do so.
By making that choice, he relied on the rule that the defendant’s
character is an issue in the case only if he decides to make it one.
At the same time, the defendant invoked his right to testify. He did
not intend, by doing so, to waive his right to prevent his character
from being an issue. Given that he testified, he had to testify with
some demeanor, and naturally he did his best; it would not make
sense to hold that the testifying defendant could prevent his charac-
ter from being placed in issue only by mumbling and shifting his
eyes, or by trying to appear so bland that his demeanor would have
no effect on the jury.

A similar argument responds to fear of jury sympathy. A de-
fendant ought to be able to take the stand without automatically
being deemed to have effectively made a plea for mercy. Moreover,
extreme caution is necessary here; as the interests supporting the
“beyond a reasonable doubt” standard suggest, the system should
expect, and be willing to tolerate, far more errors in favor of than
against the defendant. Thus, a court should make fine-tuned in-
terventions on the prosecution’s behalf only, if at all, when neces-
sary to correct a very strong pro-defendant distortion by the jury.
Such a distortion does not seem probable here. Perhaps the sympa-
thy that jurors feel with a defendant who has connected personally
with them does cause them effectively to raise the prosecution’s bur-

90. Cf. Kadish & Brofman, Trial Strategy and Tactics in 1 CRIMINAL DEFENSE
TECHNIQUES 1A.07 (R. Cipes ed. 1989):

§ 1A.07 HUMANIZING THE DEFENDANT

With regard to the defendant himself, it is extremely important that
he be portrayed as a human being who has the same attributes and frail-
ties of the jurors. Utilize every opportunity to overcome the psychologi-
cal edge of dislike (caused by the mere fact that the defendant is charged
with a crime) the jury is likely to feel toward the defendant . . . .

It seems increasingly important in criminal cases to have the client
testify.

91. See FED. R. EVID. 404(a)(1).

92. See Kaplan, Decision Theory and the Factfinding Process, 20 STAN. L. REV.
1065 (1968).
den of proof, but whether it is raised to an excessive level is hard to say. A fortiori, it is difficult to determine with any confidence that this sympathy-affected burden is significantly further from the ideal than is the insufficient burden that a juror might impose on the prosecution when the defendant has not established a communicative link with her. And even if testimony by the accused does distort the burden of proof in favor of the defendant, the "cure" of allowing character impeachment evidence would very often be excessive, because learning a history of bad acts will likely cause the jury to lower the burden of persuasion very significantly. In any event, criminal penalties are more acceptable if they are imposed in a system that comports with ideals of human dignity and, by leaving room for consideration of the defendant's human quality, minimizes room for doubt when he is found guilty.

It may be that no rule is ideal. The first alternative—allowing a defendant to take the stand without opening the door to character impeachment—may indeed give him gratuitous benefits, both by leading the jury to believe that his character makes him unlikely to have committed the crime and by raising the effective burden of persuasion. But the second alternative requires the defendant, in effect, to elect between the right to testify and the right to prevent the jury from using propensity evidence. The first alternative is clearly preferable.

The situation would be far different, of course, if we took a more hospitable attitude towards propensity evidence on the merits. And in truth, such an attitude might account for a good deal of the

93. The question of the extent to which it is appropriate for jurors to give weight to their sympathy for the accused has recently gained substantial judicial attention. See, e.g., California v. Brown, 479 U.S. 538, 542 (1987) (instruction at penalty phase of trial not to be swayed by, inter alia, "mere sympathy" held constitutionally acceptable as construed to be "a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during" that phase); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion) (improper to "exclude[] from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."); State v. Hunt, 115 N.J. 330, 401, 558 A.2d 1259, 1295-96 (1989) (Handler, J., dissenting) ("Notions of jury nullification are appropriately implicated in our recognition that a jury in a capital-murder prosecution may indeed be allowed to consider sympathy for the defendant."); State v. Ramseur, 106 N.J. 123, 297, 524 A.2d 188, 276 (1987) (no constitutional violation because, "[a]s in California v. Brown, the instructions here did not preclude the jury from considering all possible mitigating circumstances and such sympathy as those circumstances might inspire.") (citation omitted)).

94. See supra text accompanying note 59.
heartiness of the character impeachment rule. Some courts have made rather glaring end runs around the general ban on propensity evidence, exercising specious creativity in their efforts to find some other theory on which bad-act evidence might be admitted. Courts' receptivity to character impeachment evidence may similarly reflect another way around the propensity ban.

The propensity ban is not too restrictive. But if it were, the proper response would be to ease the ban candidly, widening the very narrow circumstances in which, irrespective of whether the defendant testifies, bad-act evidence currently may be admitted on a propensity theory. The Department of Justice would take this approach to an extreme, allowing the "uniform admission" of defendants' prior convictions. The Department recognizes that the proper response is not to penalize any defendant who has previously committed acts suggesting dishonesty for exercising his right to testify. Even assuming that it is beneficial, not harmful, for the jury to consider propensity evidence in determining guilt, character impeachment evidence offers only part of the benefit: such evidence comes in only if the defendant takes the stand, and in some cases it may bear only tenuously on the defendant's propensity to commit the particular crime alleged. And allowing character impeachment works mischief by inducing defendants to stay off the stand.

95. Note, for example, the revealing language used by Justice Boyle, dissenting in People v. Allen, 429 Mich. 558, 420 N.W.2d 499 (1988), from the creation of a bright line rule that excludes much prior conviction evidence, and complaining that the rule would, for example, categorically prevent an accused drug seller from being impeached with evidence of prior convictions of the sale of drugs, and a defendant accused of sexual offenses from being impeached with prior convictions of sexual offenses. As a result, the majority's limitation of trial-judge discretion will multiply the opportunity for even the guilty defendant to escape punishment and make the discovery of truth more difficult. Id. at 660, 420 N.W.2d at 545.

96. See supra note 13.

97. In some cases, in which the pattern of activity (most often a particular type of sex crime) is highly unusual and can be very narrowly defined, courts have admitted the evidence on what appears to be a straight propensity theory. See, e.g., State v. McFarlin, 110 Ariz. 225, 517 P.2d 87 (1973); State v. McDaniel, 80 Ariz. 381, 298 P.2d 798 (1956); Brackens v. State, 480 N.E.2d 536 (Ind. 1985); contra, Commonwealth v. Shively, 492 Pa. 411, 424 A.2d 1257 (1981).


99. Id. at 741.
D. A Summary and a Possible Corollary: Implications for the Criminal Defendant as Witness

The conclusion thus far is simple: Character impeachment evidence of an accused has virtually no probative value with respect to credibility, but its availability has tremendous prejudicial impact. Its use encourages the jury to implement a propensity theory that the law refuses to accept, and the mere threat of its use inhibits criminal defendants from exercising their right to testify. Therefore, such impeachment of an accused should not be allowed.\textsuperscript{100}

If the simple prohibition proposed here were adopted, another change, one \textit{in favor of} the prosecution, might be appropriate. So long as the law more readily allows use of prior convictions against an accused if he takes the stand than if he does not, the rule of \textit{Griffin v. California} \textsuperscript{101}—that a prosecutor is constitutionally barred from commenting on the accused's failure to testify—seems almost inevitable. It is not acceptable to allow a prosecutor to encourage a jury to think that the accused stayed off the stand because he could not give credible exculpatory evidence when, in fact, the defendant was intimidated from testifying by the threat that doing so would open up his prior criminal record or otherwise expose him to character impeachment.\textsuperscript{102} If that intimidating factor were removed, the situation would be far different.

Absent the threat of character impeachment, some defendants would still decline to take the stand, but most often only out of fear of providing evidence, in substance or demeanor, that the jury might reasonably and legitimately regard as supporting the prosecu-

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\textsuperscript{100} At most, admissibility should be allowed only on a showing of extraordinary circumstances that, notwithstanding the arguments presented here, render the evidence highly probative with respect to the defendant's credibility. Conceivably, there are some circumstances in which the probative value outweighs the prejudice; if so, they must be extremely rare, not frequent enough or important enough to justify muddying up the law.

\textsuperscript{101} 380 U.S. 609, 615 (1965).

\textsuperscript{102} \textit{Id.} at 615. Perhaps the rule of \textit{Griffin} could be limited to situations in which the defendant actually had prior convictions, but that would tip off knowledgeable jurors, who would know that, when the prosecutor did not comment on the defendant's failure to testify, the defendant almost certainly had prior convictions. Moreover, this modified rule would give defendants with prior convictions an advantage, the ability to stay off the stand without fear of prosecutorial comment, that a defendant without a record would not have. Finally, limiting the rule in this way would not take care of the situation in which the defendant, while not having prior convictions, was still intimidated from taking the stand by fear of other forms of character impeachment; the alternative of applying the rule only if the defendant had some form of character impeachment evidence to fear would probably either be very vague or virtually restore the full \textit{Griffin} rule.
tation's case.103 The defendant's failure to take the stand would therefore be an example of the common case in which a party's failure to present a given type of evidence in itself has probative value, and so may legitimately give rise to an argument by the opposition and an adverse inference by the jury.104 Indeed, even given the current character impeachment rules, juries seem to draw the inference frequently;105 if the defendant requests, the jury must be instructed not to do so,106 but courts do not have any effective method of enforcement.107 Barring character impeachment evidence of defendants may not nullify all the reasons supporting the Griffin rule,108

103. See supra notes 78–80 and accompanying text. For example, the accused may fear that his demeanor would be unpersuasive or unsympathetic, or that testifying would expose him to cross-examination by an inconsistent prior alibi; if so, the jury's consideration of these types of demeanor evidence in evaluating his testimony would be perfectly proper.

104. See supra note 77 and accompanying text.

105. See supra note 76 and following text.


107. See Griffin v. California, 380 U.S. 609, 614 (1965) ("What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another."); United States v. Monaghan, 741 F.2d 1434, 1444 (D.C. Cir. 1984) (Edwards, J., dissenting) (construes prosecutorial comment as improperly relating to defendant's failure to testify, but acknowledges: "[F]or the most part . . . jurors are free to draw whatever conclusions they will from the defendant's silence, and the defendant has no means to know what conclusions jurors have reached, or to challenge them."), cert. denied, 470 U.S. 1085 (1985); Stout v. United States, 227 F. 799, 804 (8th Cir. 1915) (refusing to allow verdict to be impeached by juror's testimony that jury discussed defendant's failure to testify), cert. denied, 241 U.S. 664 (1916).

108. The Griffin Court based its result largely on the proposition that "comment on the refusal to testify . . . is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." 380 U.S. at 614. But any persuasive prosecution evidence or argument makes it costly to refuse to testify. See Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 37 U. Cinn. L. Rev. 671, 700 (1968) (criticizing Griffin: "presenting an unpleasant consequence is not compulsion unless the unpleasantness is so great as in effect to deprive of choice"). That the accused has a constitutional right not to testify does not necessarily mean (though it might, depending on the nature of the right) that he is entitled to be insulated from the consequences of exercising his option.

Another argument for the Griffin rule that would survive the abolition of character impeachment of the criminal defendant is that sometimes an accused declines to take the stand because doing so opens him up to impeachment by improperly obtained evidence that the jurors might, notwithstanding an instruction, use on the merits. See supra note 80. The argument against allowing prosecutorial comment is much stronger in such cases than when the accused stays off the stand for fear of legitimately obtained evidence that might hurt his position. See supra note 103. Cases involving improperly obtained evidence do not, however, provide much support for retaining the Griffin rule in the vast majority of cases, which do not fit this mold.
but it would surely make prosecutorial comment on the failure to testify far more palatable.

Ironically, the Department of Justice also argues that removal of the disincentive to testify created by the character impeachment rules would make it easier to overrule Griffin, a result much desired by the Department. The Justice Department would remove most of that incentive by making the defendant's prior convictions admissible even if he does not testify. This Article favors a move in the opposite direction. It accepts the general rule barring propensity evidence offered against an accused, and, given that rule, has argued that character impeachment of an accused should be eliminated. If a consequence of that change is to cut down the main rationale underlying Griffin, so be it.

IV. OTHER WITNESSES—AND A PROPOSAL FOR CHANGE

Part III examined the case of the criminal defendant who testifies in his own defense. The case is vastly different when anyone else is the witness against whom character impeachment evidence is offered; the full extent of the difference depends on the circumstances of the particular case. The analysis presented here starts with a hypothetical near the opposite pole from that of the criminal defendant on the stand.

Suppose that Wendy Whitney was a passenger in a car driven by her wealthy neighbor Dollar when Dollar got into an accident with Poor. Poor is now suing Dollar. Whitney has testified for Dollar that Poor was contributorily negligent. Poor now wants to impeach with proof of Whitney's prior conviction for petty larceny.

Whitney's credibility with respect to the proposition that the plaintiff was negligent is in dispute. Recall from Part III that the credibility of a witness with respect to a particular proposition depends on the ratio between two probabilities: The probability that the witness would give this testimony if it were true, and the probability that the witness would give this testimony if it were not true. In attempting to undercut Whitney's credibility with respect to Poor's negligence, Poor is arguing, in essence, that this ra-

110. Id. at 1013.
111. See id. at 1084; supra note 98 and accompanying text.
112. See supra text following note 58.
Character Impeachment Evidence

In other words, Whitney would be no more likely, or hardly more likely, to testify to Poor's negligence if it were true than if it were false. This argument might be broken down into two parts, one attempting to minimize the first probability and the other, more important, one attempting to maximize the second. Whitney's general character for truthfulness might have substantial relevance to each of these arguments.

First, Poor might want to argue that Whitney would not necessarily testify to Poor's negligence if it were true. If Whitney is a pathological liar, then she might have been unwilling to testify that Poor was negligent even though that were true. This argument might be counterproductive, however. Whitney might be unlikely to lie in favor of Poor unless she had some interest, such as jealousy of Dollar, pushing her in that direction; emphasizing that possibility might undercut Poor's second, and more important, argument.

The second argument is that Whitney might very plausibly testify that Poor was negligent even though Poor was not. Important to this argument, perhaps even essential to it, is a showing that Whitney has some interest, perhaps a desire to ingratiate herself with her wealthy neighbor, encouraging her to lie in favor of Dollar. Poor can strengthen the argument by showing that Whitney has a poor character for truthfulness, making her more willing than other people to favor her personal interest over her obligation to tell the truth. If significant antisocial behavior suggests a willingness to override that obligation, the proof of such behavior will have substantial probative value.

Two important factors make the probative value of this evidence greater here than in the case of criminal defendant Defoe. First, the interest that potentially would encourage the witness to give this testimony even though it were untrue is much weaker in Whitney's case than in Defoe's. As argued in Part III, many people, probably most, would lie to save themselves from criminal liability. In contending that Defoe is not one of those relatively few

113. If Whitney had no affiliation with Dollar or other interest in lying for Dollar, then the importance of the character evidence would probably be small: even if Poor could show that Whitney had a poor character for truthfulness, that would avail Poor little absent some suggestion of why Whitney might tell this particular lie. See supra text accompanying notes 39-40 (suggesting that the gap in willingness to tell a lie between upright people and people of untruthful character may be small when self-interest is negligible, may widen when self-interest is moderate, and may narrow again when self-interest is very high). Thus, the value of character impeachment evidence may be smallest when the witness has at stake either all or nothing at all.
people with so pristine a character that they would resist this temptation, it is overkill to show that he is one of those relatively few with a particularly poor character for truthfulness.\textsuperscript{114} In Whitney's case, by contrast, her interest in lying in Dollar's favor does not appear so strong that most people in her position would perjure themselves. As suggested by Premise 3, the gap between different people's willingness to lie depends in large part on the magnitude of the interest at stake;\textsuperscript{115} the gap will be narrow if there is no interest (or an overpowering one) at stake, and greater if the interest lies in an intermediate range. Because Whitney's case is an intermediate one, or at least one not at the overpowering end of the situational spectrum, it therefore may be critical to show that Whitney's character for truthfulness is at the weak end of the personal spectrum, suggesting that she is particularly vulnerable to temptation.

Second, although in each case the critical question is structurally the same—how likely is it that the witness would give this testimony even if it were false—the premise of the question in Defoe's case has a crucial implication that is absent in Whitney's. Recall that in Defoe's case, the premise that the testimony is false implies that Defoe has committed the crime charged in this case. In answering the key credibility question, Defoe's jurors do not view him as an unblemished character; they hypothetically assume that he is a criminal. In Whitney's case, though, the jurors do not make that assumption. Instead, the critical credibility question is: "Assuming hypothetically that Poor was not contributorily negligent, how likely is it that Whitney would nevertheless testify that he was?" In this case, the hypothetical premise of the question—that Poor was not in fact negligent—has nothing whatever to do with Whitney, and in particular suggests no wrongdoing by Whitney. Character impeachment evidence therefore would have substantial probative value, by informing the jurors of a weakness in Whitney's character that they would otherwise have no basis to assume in making the key credibility evaluation.

Not only does the character impeachment evidence have more probative value in Whitney's case than in Defoe's, but it also poses a far less significant threat of prejudice. Recall the two aspects of prejudice: (a) bias against the person, leading the jury in effect to alter the burden of persuasion in an attempt to mete out punishment for past misdeeds, or at least in tolerance of such further pun-

\textsuperscript{114} See supra text accompanying notes 63–70.
\textsuperscript{115} See supra text accompanying notes 39–40.
ishment, and (b) the possibility that the jury will overvalue the significance of the past conduct.116 Both concerns are significant in Defoe's case; neither is nearly as significant in Whitney's.

As to bias, if the jurors learn of Whitney's former conviction, they will probably not be inclined to punish her, because there is no charge that she has done anything wrong in the present case. And even if the jurors wanted to punish her, they would not be able to, for the simple reason that she is not a party to the case.117 As to the threat of overevaluation, unlike the situation with Defoe, the only material conduct of Whitney is her conduct in testifying from the witness stand. Thus, unlike the criminal case, there is no danger that in attempting to reconstruct the historical events the jury will improperly use character impeachment evidence and will overrate its bearing on the likely conduct of one of the actors in those events. Any evidence is subject to jury overevaluation, and perhaps the jury will overevaluate the significance of this evidence with respect to Whitney's conduct on the witness stand. But the potential prejudice goes no further.

Moreover, even to the extent that the character impeachment evidence does pose a threat of prejudice, the potential harm is probably not as great as in the criminal case. Dollar can preclude the impeachment by keeping Whitney off the stand. However crucial her testimony might be to Dollar's case, the jury will usually not expect it as strongly as it does the testimony of a criminal defendant who is sitting in the courtroom throughout the trial. Thus, the absence of her testimony will probably not be as deflating to Dollar's case as Defoe's failure to testify in his own behalf is to his. Finally, even if the prejudice leads to an incorrect outcome, either by causing the jury to overevaluate the taint on Whitney's credibility or by inducing Dollar to keep Whitney off the stand, the loss is not as troubling as the wrongful conviction of an innocent criminal defendant.

Whitney's case and Defoe's are virtually polar opposites, far different in many material respects. Whitney's is a particularly strong one for admitting proof of previous misconduct suggesting

116. See supra text accompanying notes 15, 59.

117. Conceivably the jury might attempt to punish Whitney by finding against Dollar, the party for whom she testified. But at best that is likely to be a crude and attenuated form of punishment. Indeed, even if Whitney is a very biased witness, it might be no punishment at all. Whitney's interest may be in appearing supportive of Dollar, rather than in the outcome of the case. If so, a finding against Dollar would not trouble Whitney at all.
that the witness is willing, for even modest personal interests, to lie under oath. A review of the material differences between the two cases will help show the factors that a court should consider in deciding whether to admit evidence of a witness’s prior bad acts.

(A) In Whitney’s case, unlike Defoe’s, the witness being impeached is not a party and, moreover, does not have a strong affiliation with a party. Thus, the jury would be much less inclined in Whitney’s case to assume, absent impeachment evidence, that the witness would be disposed to lie under oath.118 Therefore, character impeachment evidence suggesting that the witness might actually be willing to perjure herself for even slight personal benefit has greater potential probative value in Whitney’s case. Moreover, if the anticipation of such impeachment keeps Whitney off the stand, that is not as great a loss as if a party, especially a criminal defendant, is inhibited from testifying.

(B) In Whitney’s case, unlike Defoe’s, the witness’s testimony is not offered to deny a charge that her own conduct was wrongful. Thus, in assessing the probability that is crucial to judging the witness’s credibility—the probability that the witness would testify as she has if the truth were otherwise—the jury does not assume hypothetically that she has committed wrongdoing, specifically a wrong charged in this case. Absent the character impeachment evidence, the critical credibility question would be decided by Defoe’s jury on the assumptions that Defoe has committed a crime before taking the witness stand, but by Dollar’s jury on the assumption that Whitney has not. Consequently, in Whitney’s case, unlike in Defoe’s, proof of prior misconduct will not be cumulative in answering that question.

(C) In Whitney’s case, unlike Defoe’s, how the witness acted, and in particular whether she acted wrongfully, before taking the witness stand is not at issue at all. Thus, Whitney’s case does not present an opportunity for prejudice of the type in which the jury uses prior misconduct for a forbidden purpose, to assess a person’s propensity to act wrongfully in a substantive (that is, non-testimonial) manner.

118. Interestingly, until well into the 19th century the common law rendered incompetent the testimony of parties to a lawsuit and of all persons having a direct pecuniary or proprietary interest in the outcome; the justification was to prevent self-interested perjury. The dead man statutes that still apply in some states are a remnant of this old rule. C. McCormick, McCormick on Evidence 159 (E. Cleary lawyer’s ed. 3d ed. 1984 & Supp. 1987). And, as mentioned above, see supra note 63, modern continental systems still generally refuse to put the criminal defendant on oath.
(D) In Whitney's case, unlike Defoe's, the party who put the witness now being impeached on the stand is not a criminal defendant. Thus, the potential harm that character impeachment evidence could do is much less in Whitney's case than in Defoe's.

(E) In Whitney's case, unlike Defoe's, the nature of the previous crimes differs. Here the difference cuts the other way: Defoe's prior crime is more strongly indicative of dishonesty than Whitney's. This factor should be considered in deciding whether to admit the testimony of a witness other than a criminal defendant; some misdeeds are more indicative of readiness to lie than are others. If Premise 4 is correct, though, even a crime such as larceny, which does not necessarily involve dishonesty, may be useful in certain circumstances in evaluating the witness's inclination to tell the truth.

The hypotheticals have been set up in this way, with Defoe's prior crime more strongly indicative of dishonesty than Whitney's, to show that this factor should not be overemphasized. When a criminal defendant takes the witness stand, all of the first four factors always or virtually always count against admissibility of the character impeachment evidence—so heavily, in the aggregate, as to justify a per se rule of exclusion. If the witness is anyone else, a strong pro-admissibility score on the first four factors might be sufficient even if the prior crime has a less clear bearing on credibility. Each of these five factors can vary in a particular case, and may be present in a wide variety of combinations. Consider the following series of variations on Poor v. Dollar.

(1) Alter the case only by hypothesizing that Whitney is the owner of the car Dollar was driving and is herself a defendant in the action. For several reasons, this raises the harmful potential of the character impeachment evidence. If Whitney testifies, the character impeachment may prejudice the jury against her; in contrast to other witnesses, parties are subject to punishment by the jury. If Whitney does not testify, the jury will be more likely to draw an adverse inference than it would if a nonparty potential witness failed to testify. And, like many parties, Whitney may be her most valuable witness; forgoing her own testimony would be a particularly large loss.

Furthermore, the fact that Whitney is a party may diminish the value of the character impeachment evidence significantly, because her interest is so obvious. It does not necessarily nullify that value altogether, however. Whitney's interest is probably not as powerful and obvious as that of the criminal defendant; presumably
most people are less likely to be willing to perjure themselves to gain a civil victory than to save themselves from criminal punishment. Thus, this may still be a case in the intermediate range, and character impeachment evidence may yield some valuable information in attempting to assess Whitney's willingness to lie on her own behalf.119

(2) Now alter the original Dollar case by changing just one other fact instead: Rather than being a purely passive witness, Whitney may also have been a participant in the events. Suppose that Poor is contending that Whitney encouraged Dollar to drive at an excessive speed. Would Whitney's prior conviction then pose sufficient prejudicial potential to justify its exclusion because it might unduly affect the jury's assessment of the likelihood that she was acting recklessly in the event in question? Probably it would not, though the case could plausibly be argued either way.

(3) Next, ratchet hypothetical (2) up one more notch by supposing that Dollar, rather than being involved in a civil suit, is on trial for criminal negligence. This does not raise the prejudicial potential so much as it raises our concern about the danger of that potential. Is the effect enough to exclude proof of Whitney's prior conviction? Again, the case is arguable either way. If, on the other hand, Whitney were a witness for the prosecution, we would probably have less concern about the prejudicial potential of the prior conviction evidence, and so be more willing than in a civil case to allow the evidence in.

(4) The next notch: Assume as in hypothetical (3) that Whitney is testifying for Dollar in a criminal case. But now assume that the witness's alleged misconduct was more serious, amounting to criminal recklessness, though she is not a party in this action. Arguably, that fact severely undercuts the probative value of the prior conviction, because in evaluating the key credibility question—"Would Dollar have testified this way even if it weren't true?"—the jury will already assume that she has committed one act of criminal misconduct.

(5) Next, assume that the facts are as in hypothetical (4) except that Whitney is Dollar's wife. The probative value of the character impeachment evidence diminishes even further, because the

119. It is plausible to hypothesize that civil defendants, especially those who have acted wrongfully, tend to lie more readily to get out of difficulty improperly than plaintiffs do to make improper gains, and that juries intuitively believe this to be so. This Article offers no proof of these hypotheses, which if true would probably suggest a greater need for character impeachment of civil plaintiffs than of civil defendants.
jury will likely assume, even without such evidence, that Whitney would be inclined to lie to protect Dollar.\textsuperscript{120}

Note that we are now just one small step removed from the ordinary case of the criminal defendant on the stand. Hypotheticals (2), (3), (4), and (5) create a progression, providing a link between the original Dollar case—a civil case in which the arguments for admissibility of character impeachment evidence appear strong—and the classic criminal case, as to which Part III has argued that a per se rule of exclusion ought to apply. Naturally, not all cases will fit so neatly along this continuum. There may be different combinations of the listed factors (hypothetical (1), for example, is a civil case in which the witness is a party), and other factors besides the ones discussed in this progression—such as the nature of the character impeachment evidence, its resemblance to any alleged activity of the witness in the current case, and the possibility of its overvaluation—may enter into the calculation.\textsuperscript{121}

\textbf{Conclusion}

Sometimes character impeachment evidence is beneficial overall and sometimes it is not, depending on the particular circumstances of the case, only one of which is the nature of the witness's prior misconduct. When the witness is a criminal defendant, those other circumstances justify a per se exclusionary rule, but in other contexts, no categorical rule seems appropriate; at least none is eas-

\textsuperscript{120} Indeed, although Premise 2 posits that most people would be willing to lie to save themselves from criminal punishment, it may be that even more would lie to save a loved one.

\textsuperscript{121} In Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989), a products liability plaintiff, whose arm was torn off when he reached inside a dryer, testified that he had been instructed inadequately concerning the machine's operation and dangerous character. The Court held that impeachment by evidence of his prior felony convictions for burglary and conspiracy to commit burglary was allowable under the pre-1990 form of rule 609, without considering prejudice to him. Under the approach presented here, admissibility would be supported by the facts that the case was civil and that jurors would be unlikely to draw any inference about Green's behavior from his prior record, and perhaps by a conclusion that theft crimes have some bearing on truthtelling inclination. See People v. Allen, 429 Mich. 558, 595–96, 420 N.W.2d 499, 517 (1988). Exclusion would be supported by the fact that Green was a party—albeit a plaintiff, which might be significant. In United States v. Lipscomb, 702 F.2d 1049, 1072–73 (D.C. Cir. 1983), disapproved, Luce v. United States, 469 U.S. 38 (1984) The government was allowed to impeach three defense witnesses with prior convictions. All three were passive witnesses in the current case, and their own conduct was not at issue. Under the approach presented by this Article, most of the factors in \textit{Lipscomb} point to admissibility, except that the party disadvantaged and potentially prejudiced was a criminal defendant, and the interest of the witnesses, who were his friends, may have been sufficiently clear to minimize the need for character impeachment.
ily articulable. Certainly a rule that works primarily by categorizing the nature of the prior misconduct puts the emphasis in the wrong place.

Under current law, rules such as rule 608 do give trial judges discretion to admit or exclude cross-examination of the witness concerning prior conduct suggesting untruthfulness, whether the witness is a criminal defendant or anyone else. That discretion, however, does not extend to prior criminal convictions, which are treated separately by categorical rules such as rule 609. Rule 608 and similar rules should be narrowed in one respect, excluding character impeachment of criminal defendants who testify, and broadened in another respect, extending the trial judge's discretion, in the case of other witnesses, to cover prior criminal convictions as well as "[s]pecific instances of conduct" not resulting in conviction.122 Furthermore, rule 609 and similar categorical rules regarding prior convictions should be abrogated: To the extent that such rules apply to criminal defendants, they are inappropriate because all character impeachment evidence of criminal defendants who take the witness stand should be excluded; to the extent that such rules apply to other witnesses, they would be rendered moot by the broader scope of the discretionary rules.123

122. FED. R. EVID. 608(b). The 1990 amendments to rule 609 removed the widely-disregarded limitation that evidence of a prior conviction could only be admitted "if elicited from the witness or established by public record during cross-examination." See Committee Note, 129 F.R.D. 347, 353 (1990). The proposal here would not reinstate this limitation.

123. This proposal clearly creates an asymmetry in that prosecution witnesses may be subject to character impeachment evidence whereas the criminal defendant may not. Concerns that such an asymmetry "would skew the decisional process" led the court in People v. Allen, 429 Mich. 558, 420 N.W.2d 550 (1988) to apply virtually the same rules to accused-witnesses and other witnesses.

The proposal made here results in asymmetry because the situation is asymmetrical; the burden of this Article has been to show that the impact of character impeachment is far different depending on whether or not the witness is a criminal defendant. Indeed, the Allen court recognized that "perfect symmetry cannot be attained" because the criminal defendant is in a different position from that of other witnesses. 429 Mich. at 607, 420 N.W.2d at 522. But even if the asymmetry of treating a criminal defendant differently from other witnesses raises concern, that concern applies only in criminal cases, and then only if the defendant and one or more prosecution witnesses are subject to character impeachment evidence. Even within that situation, symmetry is a dubious concern: criminal trials are filled with asymmetrical rules that favor the accused, including the presumption of innocence, the privilege against self-incrimination, and the choice of whether to place in issue character traits bearing on his likeliness to commit the crime.

Moreover, if the asymmetry, where it exists, were deemed to be a significant problem, the problem could be addressed by means short of automatically exposing the accused to character impeachment if he takes the stand. For instance, the rule could be
To crystallize this proposal, this Article closes by presenting it in the form of suggested amendments to the Federal Rules of Evidence. Material in brackets is to be deleted; italicized material is to be added.

1. Amend rule 404(a) as follows:
   (a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: * * *
   (3) Character of witness. Evidence of the character of a witness, as provided in rules 607[ ,] and 608[ , and 609].

2. Amend rule 608 as follows:
   Rule 608. Evidence of Character and Conduct of Witness
   (a) Opinion and reputation evidence of character. The credibility of a witness other than an accused may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. 124
   (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of [attacking or supporting the witness' credibility] proving that the witness has a good or poor character for truthfulness,125 other than conviction of crime as provided that if the accused uses character impeachment evidence against prosecution witnesses (or perhaps only those prosecution witnesses involved in a head-to-head credibility battle with the accused), he opens the door to character impeachment by the prosecution. Alternatively, the rule could be that in such a case the accused is put to a choice of either opening the door to character impeachment by the prosecution or allowing an instruction that, having heard character impeachment of the prosecution witness, the jury should not speculate whether or not the accused committed any prior acts that bear on his character for truthfulness.

124. This rule, of course, states only circumstances in which the character of a person as witness may be examined; neither in its current form nor with the proposed amendment does it have anything to say about any other purpose for which the character of a person may become a subject of inquiry. In particular, the purpose behind this amendment is not to alter Federal Rule of Evidence 404(a)(1), which allows a criminal defendant to offer evidence of a pertinent trait of his character and the prosecution to rebut such evidence.

125. This change is related only indirectly to the issues on which this Article focuses. The italicized form of words, rather than the current form referring to the witness's "credibility," is a more accurate statement of the law. In fact, extrinsic evidence of the witness's prior conduct may be offered for purposes of attacking credibility (and, once that door has been opened, for the purpose of supporting credibility) if the evidence is on a non-collateral matter. Bias, for example, may be shown by extrinsic evi-
in [rule 609] the last sentence of this paragraph, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if sufficiently probative of truthfulness or untruthfulness to withstand objection under rule 403, be inquired into on cross-examination of the witness (1) concerning the [witness'] character of the witness, if other than an accused, for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. Evidence that a witness other than an accused has been convicted of a crime may similarly be admitted in the discretion of the court, if sufficiently probative of truthfulness to withstand objection under rule 403.

The giving of testimony[, whether by an accused or] by any [other] witness[,] does not operate as a waiver of the [accused's or the] witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility by showing that the witness has a good or poor character for truthfulness.

dence, as may a prior inconsistent statement on a non-collateral matter, all for the purpose of showing that the witness's testimony is not credible. See, e.g., C. McCORMICK, supra note 118, at 77, 89. It is only when the purpose of the impeaching party is the more collateral one of showing the witness's general character regarding truthfulness that the bar against extrinsic evidence applies. See id. at 110–12.

126. This form of words is intended to make very clear that bare probativeness is not enough; the trial judge must weigh the evidence against the danger of prejudice and the other factors listed in rule 403.

127. This sentence takes much of its language from rule 609, as amended in 1990. Like amended rule 609, this proposal does not prescribe how the conviction may be proved. As the Advisory Committee noted in commenting on the 1990 amendment, a written record is often the most satisfactory method of proof, but testimony may be satisfactory. 129 F.R.D. 347, 353 (1990).

128. The proposed amendment makes two changes to this paragraph. First, it deletes references to an accused. Second, it limits the scope of the paragraph to matters that not only relate to credibility but do so by bearing on the witness's character for truthfulness. The following explanation is offered with the caveat that if it is not persuasive I will not be terribly disturbed, because this clause of the rule is obviously peripheral to the concerns of this Article.

The first change is made to avoid confusion. Under the proposal, a criminal accused should not be subject to examination on matters relating only to credibility by exploring his character for truthfulness; references to the consequences of such an examination might be misleading. The sentence could be rephrased to apply to witnesses other than a criminal accused, but that might carry an unintended connotation that an accused is intended to be less favored than other witnesses.

The second change supplements, rather than replaces, the "credibility" language of the current rule by "character for truthfulness" language because both have a role. An accused charged with a crime involving dishonesty may choose to place his character for truthfulness in issue, not to show his credibility as a witness, but to take advantage of the option offered by rule 404(a)(1) of showing a "pertinent trait of character." If he chooses to do so, he presumably should be held to have waived his privilege concerning
3. Delete rule 609.

matters that bear on that character trait; thus, the reference to credibility serves a purpose. But, as with respect to the first paragraph of the proposed new rule 608(b), that reference does not suffice. See supra note 125. Giving testimony ought not be considered a waiver of the witness's privilege against incriminating himself with respect to matters that are unrelated to the case except insofar as they tend to prove that he is not credible because he has a poor character for truthfulness. But if the matter has a closer bearing on his testimony—if, for example, it tends to show bias—it probably ought to be considered fair matter for cross-examination.
APPENDIX

Figure 1 presents a simple illustration of a Bayesian approach to analyzing an evidentiary problem. This is a map showing the roads connecting five towns, O, EXCULP, NOT-EXCULP, TEST(EXCULP), and NOT-TEST(EXCULP). Traffic moves only from left to right. It will soon be apparent why the lines to NOT-TEST(EXCULP) are broken.

Suppose that an observer, after watching the traffic leave O for some time, assesses the probability that a given car at O will go to EXCULP to be .3 on a scale of 0 to 1, with 1 representing certainty. Because a car leaving O and not going to EXCULP must be going to NOT-EXCULP, it follows that the probability that the car will go to NOT-EXCULP is .7. This first probability assessment may be expressed formally as

\[ P(\text{EXCULP}|O) = .3, \]

or, “The probability of EXCULP given O is .3,” and the corollary as

\[ P(\text{NOT-EXCULP}|O) = .7. \]

Now our observer moves to EXCULP and observes the cars traveling to TEST(EXCULP) and NOT-TEST(EXCULP). Six of ten go to TEST(EXCULP) and the rest to NOT-TEST(EXCULP). We can express this second probability assessment by saying that

\[ P(\text{TEST(EXCULP)}|O, \text{EXCULP}) = .6, \]

with the corollary that

\[ P(\text{NOT-TEST(EXCULP)}|O, \text{EXCULP}) = .4. \]

Finally, the observer moves to NOT-EXCULP and observes the cars traveling from there to TEST(EXCULP) and NOT-TEST(EXCULP). Only two of ten go to TEST(EXCULP) and the rest to NOT-TEST(EXCULP). This third probability assessment is expressed as

\[ P(\text{TEST(EXCULP)}|O, \text{NOT-EXCULP}) = .2, \]

with the corollary that

\[ P(\text{NOT-TEST(EXCULP)}|O, \text{EXCULP}) = .8. \]

Now we can ask a question that, in structure, resembles one that often confronts adjudicative factfinders and judges determining the admissibility of evidence. Suppose we know that a car has left O and that we then learn that it has arrived at TEST(EXCULP). How great, if at all, is the probative value of this new piece of information? That is, what is the probability of EXCULP given TEST(EXCULP) and O, and to what extent does it differ from the “prior” probability of EXCULP, assessed without learning of TEST(EXCULP)? Or, using symbols, how great is

\[ P(\text{EXCULP} \mid \text{TEST(EXCULP)}, O), \]

and how much does it differ from

\[ P(\text{EXCULP} \mid O)? \]

There is a simple way, nothing more than an application of Bayes' Theorem, to answer that question. Note that there are two routes to TEST(EXCULP), through EXCULP and through NOT-EXCULP. Now it is evident why the lines to NOT-TEST(EXCULP) are broken; once we have learned that the car in question has gone to TEST(EXCULP), we can focus solely on cars that go there, and disregard those that go to NOT-TEST(EXCULP).

Of every 100 cars leaving O, an average of 30 will go to EXCULP. Of those 30, an average of 60%, or 18 in all, will go on to TEST(EXCULP). Similarly, of every 100 cars leaving O, an average of 70 will go to NOT-
EXCULP. Of those 70, an average of 20%, or 14 in all, will go on to TEST(EXCULP). Thus, of 32 cars leaving O and eventually arriving at TEST(EXCULP), 18 will have gone via the EXCULP route and the remaining 14 via the NOT-EXCULP route. It follows that the probability of EXCULP given TEST(EXCULP) and O is 18/32, or .5625. This probability differs very substantially from the probability of EXCULP assessed without learning of TEST(EXCULP), which was assessed at the outset as .3. In other words, the evidence of TEST(EXCULP) has significant probative value in determining the probability of EXCULP.

Of course, if we changed any of the three basic probability assessments, the calculated probability of EXCULP given TEST(EXCULP) and O would change as well. It can be readily seen that, all other things being equal:

- the higher $P(\text{EXCULP} | O)$ is, the higher $P(\text{EXCULP} | \text{TEST(EXCULP)}, O)$ will be;
- the higher $P(\text{TEST(EXCULP)} | O, \text{EXCULP})$ is, the higher $P(\text{EXCULP} | \text{TEST(EXCULP)}, O)$ will be; and
- the higher $P(\text{TEST(EXCULP)} | O, \text{NOT-EXCULP})$ is, the lower $P(\text{EXCULP} | \text{TEST(EXCULP)}, O)$ will be.

Now we can transform this roadmap illustration into a real litigation problem. Suppose that EXCULP represents a disputed proposition—an account exculpating the accused in a criminal prosecution—and NOT-EXCULP represents its negation. O represents all the evidence that the jury knows apart from the testimony of the accused. TEST(EXCULP) represents the new evidence that the jury receives—knowledge that the accused has given exculpatory evidence, testifying to EXCULP and has done so with a given demeanor. We can leave NOT-TEST(EXCULP) in the shadows because we know that the witness has in fact testified to EXCULP. The jury's problem now becomes, as in the roadmap case, to determine the probability of proposition EXCULP given the new information as well as the old, TEST(EXCULP) and O. And, as in the roadmap case, this probability will depend on each of the three basic assessments: (1) the prior probability of EXCULP, assessed in the absence of the accused's testimony; (2) the probability that the accused would testify to EXCULP if EXCULP were true; and (3) the probability that the accused would testify to EXCULP if NOT-EXCULP were true.

Figure 2 is an altered diagram representing aspects of the argument offered in Part III(A) of this Article. As in Figure 1, this diagram is drawn on the assumption that the defendant has testified to an exculpatory story. Figure 2 is drawn from the viewpoint of a rational juror unaware of the character impeachment rule. (Recall that an advocate of allowing character impeachment of criminal defendants had best make this assumption of ignorance.129) The diagram helps analyze the probative value of the defendant's exculpatory testimony, first on the assumption that the character impeachment evidence is not admitted and then on the assumption that it is.

129. See supra notes 81–83 and accompanying text.
Three differences between Figures 1 and 2 warrant explanation. First, instead of showing broken lines to nodes that are known not to be true, such as \text{NOT-TEST(EXCULP)}\text{,} those nodes, and the linkages to them, are simply not represented at all in Figure 2.

Second, Figure 2 breaks down the routes from \text{EXCULP} and \text{NOT-EXCULP} to \text{TEST(EXCULP)} into two parts each. It does this by placing across those routes a new node, \text{WILLTEST(EXCULP)}, representing the proposition that the defendant is willing to testify to the exculpatory story if doing so appears beneficial to his defense. This node is drawn in two sections, one that can be reached only if \text{EXCULP} is true, and the other that can be reached only if \text{NOT-EXCULP} is true. Thus, the top half of the node may be considered to represent the conjunction \text{EXCULP \& WILLTEST(EXCULP)} and the bottom half the conjunction \text{NOT-EXCULP \& WILLTEST(EXCULP)}\text{.} The node is sectioned in this way because the probability of \text{TEST(EXCULP)} given \text{EXCULP} and \text{WILLTEST(EXCULP)} is assumed to be different from the probability of \text{TEST(EXCULP)} given \text{NOT-EXCULP} and \text{WILLTEST(EXCULP)}; thus, arrows to \text{TEST(EXCULP)} lead from each of the two sections of the \text{WILLTEST(EXCULP)} node, representing different probabilities. No \text{NOT-WILLTEST(EXCULP)} node is shown because the fact that the defendant testified to the exculpatory story demonstrates that he was willing to do so.

Third, the thickness of the arrows represents, in very rough terms, assumptions as to the probability of each link. The arrows leading from \text{O} to \text{EXCULP} and \text{NOT-EXCULP} are the same thickness, indicating that the prior probabilities of these propositions are assumed hypothetically to be equal. This assumption of course varies from case to case; in some cases the prior probability of \text{EXCULP} may be very high and in others very low. The other assumptions will also vary from one case to another, but because they are based in part on psychological generalizations they will tend to fall into a discernable pattern. The arrow from \text{EXCULP} to \text{WILLTEST(EXCULP)} is drawn very heavily, indicating a probability close to certainty that if the defendant is innocent he will be willing to testify to his innocence if he thinks that will help. The arrow from the \text{EXCULP} section of the \text{WILLTEST(EXCULP)} node to \text{TEST(EXCULP)} is also heavy, though not as heavy. In the view of our rational juror, unaware of the inhibiting effect of potential character impeachment evidence, most innocent defendants who are willing to testify to an exculpatory story (that is, most innocent defendants) will actually do so; on the other hand, fear of being a bad witness, or belief that the prose-

\begin{enumerate}
\item The node comprising the two sections represents the disjunction of the two conjunctions—that is \text{EXCULP \& WILLTEST(EXCULP)} or \text{NOT-EXCULP \& WILLTEST(EXCULP)}. This disjunction is equivalent to \text{EXCULP or NOT-EXCULP} \text{ and WILLTEST(EXCULP)}\text{.} And, because \text{EXCULP or NOT-EXCULP} is a tautology, this is equivalent to \text{WILLTEST(EXCULP)}\text{.} Thus, the entire node represents \text{WILLTEST(EXCULP)}\text{.}
\item Multiple-section nodes are further discussed in Friedman, supra note 57, at 612-15.
\end{enumerate}
cution has failed to prevent persuasive evidence, might keep an innocent defendant off the stand.

The arrow from NOT-EXCULP to WILLTEST(EXCULP) is drawn as heavily as that from EXCULP to WILLTEST(EXCULP), indicating that a guilty defendant will be strongly inclined to tell an exculpatory story if he thinks it will help his defense. The arrow from the NOT-EXCULP section of the WILLTEST(EXCULP) node to TEST(EXCULP) is not heavy, however: If the defendant were guilty and willing to lie in his own defense, he might still have found it inadvisable to do so, for fear that a failed attempt would leave him worse off than before; moreover, even if he did testify, he might not have been able to do so as in fact he did, telling the particular exculpatory story, and testifying with the demeanor that he did.

Figure 2 thus suggests that the probative value of the accused's exculpatory testimony does not arise from a perception that he is more likely to be willing to testify to an exculpatory account if he is innocent than if he is guilty; rather, the innocent defendant is more likely able than the guilty one to bring off the testimony successfully.

Now, how does the situation change if character impeachment evidence, such as proof of a prior conviction, is offered against the accused? As argued in Part IV(A)(1), the evidence should not properly alter the first probability assessment, of the relative probabilities of EXCULP and NOT-EXCULP as assessed without considering the accused's testimony, because the evidence is offered only for credibility purposes. If, as is likely, the evidence does in fact alter that assessment, this effect must be considered prejudicial.

As argued in Part III(A)(2), the second probability assessment, of the probability of TEST(EXCULP) given EXCULP probably will not be significantly altered by the character impeachment evidence. An innocent defendant with a prior criminal record is presumably no less willing than one without to tell a truthful exculpatory story. And (again recalling the assumption of the juror's ignorance), such an innocent defendant is probably not significantly less likely to bring off the testimony successfully than is the one with the blameless past.

The key probability question is the third, the probability of TEXT(EXCULP) given NOT-EXCULP. Part III(A)(3)(a) analyzes the link between NOT-EXCULP and WILLTEST(EXCULP). It concludes that a defendant who has committed the crime being tried is not substantially more likely to be willing to lie in his own defense if he has also committed other misdeeds in the past. Finally, Part III(A)(3)(b) analyzes the link between the NOT-EXCULP section of the WILLTEST(EXCULP) node and TEST(EXCULP). It concludes that the fact that the accused has a bad character for truthfulness usually has little or no bearing on the question of whether, assuming he is guilty of the crime charged and inclined to lie in his defense, he would tell the exculpatory story and display the demeanor, that he has.

In sum, the character impeachment evidence offers the juror very little assistance in evaluating the accused's credibility, but poses serious potential prejudice.