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## The Liar's Mark: Character and Forfeiture in Federal Rule of Evidence 609(a)(2)

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## NOTE

### THE LIAR'S MARK: CHARACTER AND FORFEITURE IN FEDERAL RULE OF EVIDENCE 609(A)(2)

Jesse Schupack\*

*Rule 609(a)(2) of the Federal Rules of Evidence is an outlier. The Rule mandates admission of impeaching evidence of a witness's past convictions for crimes of dishonesty. It is the only place in the Rules where judges are denied their usual discretion to exclude evidence on the grounds that its admission would be more prejudicial than probative. This Note analyzes three assumptions underlying this unusual Rule: (1) that there is a coherently definable category of crimes of dishonesty, (2) that convictions for crimes of dishonesty are uniquely probative of a person's character, and (3) that an assessment of moral character based on past convictions will be suitably predictive of a person's reliability as a witness. These assumptions are false and so do not justify the mandatory admission of convictions under the Rule. The final Part of this Note argues that Rule 609(a)(2) is better understood as operating on an implicit principle of forfeiture. Recognizing this and modifying the structure of the Rule accordingly cures some of its current defects. But these revisions still leave something deeply concerning about Rule 609(a)(2). The logic of forfeiture substitutes a normative judgment about a particular class of people in place of an evidentiary judgment about the probative value of a certain kind of information. This Note concludes that this substitution is unprincipled and unjust, and that therefore Rule 609(a)(2) should be eliminated.*

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## INTRODUCTION

Rule 609(a)(2) of the Federal Rules of Evidence is unique in dictating that a certain kind of evidence must be admitted. While 609(a)(1) permits admission of prior felony convictions for witness impeachment subject to a balancing test,<sup>1</sup> section (a)(2) *requires* admission of evidence of past convictions “if the court can readily determine that establishing the elements of the crime required proving—or the witness’s admitting—a dishonest act or false statement.”<sup>2</sup> It is the only Federal Rule of Evidence that denies judges the discretion to exclude a kind of evidence on the grounds that its admission would be more prejudicial than probative.<sup>3</sup> This Note explores and critiques

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1. See FED. R. EVID. 609(a)(1); see also *United States v. Estrada*, 430 F.3d 606, 615–16 (2d Cir. 2005) (“[D]istrict courts, under Rule 609(a)(1), may admit evidence of a witness’s felony convictions that do not constitute *crimen falsi*, subject to balancing pursuant to Rule 403.” (footnote omitted)).

2. FED. R. EVID. 609(a)(2). This Note uses “crime of dishonesty” as a gloss on this language, which incorporates into the Rule the historical category of *crimen falsi*. See *infra* Section I.C. See generally Stuart P. Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of Crimen Falsi*, 90 J. CRIM. L. & CRIMINOLOGY 1087 (2000) (providing an overview of history of special treatment for *crimen falsi* in the context of various approaches to the taxonomy of crimes).

3. See Jennifer L. Mnookin, *Atomism, Holism, and the Judicial Assessment of Evidence*, 60 UCLA L. REV. 1524, 1551–52 (2013). The phrase “must be admitted” occurs only in Rule 609. The only other Rule that says that a judge “must” take some action to admit something into the record is Rule 201, which states that the court “must take judicial notice” of a noticeable fact if a party so moves and supplies the judge with the relevant information. FED. R. EVID. 201(c)(2). Absent specification to the contrary, all other rules of admissibility are conditioned on a balancing test under Rule 403, which serves as “an envelope wrapped around all the other

the rationales and assumptions underpinning the Rule. The final Part considers an amended construction of Rule 609 that better comports with its underlying justification. Because even this reformulation is untenable, 609(a)(2) should be eliminated.

The stakes here are high.<sup>4</sup> Well over half of criminal defendants who testify are impeached under Rule 609,<sup>5</sup> and many more witnesses choose not to testify because they know they face the threat of impeachment.<sup>6</sup> This silencing is one strand in a larger web of rules within the criminal justice system that prevent parties from having a voice in their own defense.<sup>7</sup> A rule that carries such a substantial effect should have a cogent justification. But though Rule 609 as a whole is one of the most contentious in the Rules of Evidence,<sup>8</sup> almost all of that controversy centers on section (a)(1) and practically no scrutiny has been leveled at section (a)(2).<sup>9</sup> The reason for this discrepancy is initially intuitive. Objections to section (a)(1) tend to focus on the lack of justification for treating a past felony conviction—no matter its nature—as probative of a witness’s current likelihood of lying on the stand.<sup>10</sup> Section (a)(2), by contrast, has a clear logic: people who have proven themselves to be liars are not trustworthy.<sup>11</sup> Thus, even those who are harshly crit-

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rules” and which allows judges, at their discretion, to exclude otherwise admissible evidence where it poses a risk of undue prejudice relative to its probative value. Mnookin, *supra* at 1552. See also *United States v. Jefferson*, 623 F.3d 227 (5th Cir. 2010) (holding the trial court to have abused its discretion in barring admission of evidence within the scope of Rule 609(a)(2)).

4. See *United States v. Cook*, 608 F.2d 1175, 1183 (9th Cir. 1979) (en banc) (“The effect of the preliminary [Rule 609] ruling can substantially change the course of the trial . . .”).

5. See Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1461 (2005). Where this Note refers to “Rule 609,” the claim is meant to apply to the Rule as a whole and not only to section (a)(2).

6. Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 291 (2008).

7. See Natapoff, *supra* note 5, *passim*.

8. Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2295–96 (1994) (“No provision of the Federal Rules of Evidence has sparked more controversy than Rule 609, which deals with the admissibility of convictions to impeach a witness.” (citation omitted)).

9. See Green, *supra* note 2, at 1114 (noting that, though there was a vigorous floor debate over 609(a) as a whole, “there appears to have been virtually no discussion of the underlying premise that a person who has been convicted of either a crime of deceit or some other serious crime is unworthy of belief”).

10. See, e.g., Julia Simon-Kerr, *Credibility by Proxy*, 85 GEO. WASH. L. REV. 152, 160 (2017) (describing impeachment jurisprudence as being “mired in both technical and substantive confusion”); Bellin, *supra* note 6, at 295 (“The controversy stems from the fact that, while the rationale behind the practice is far from compelling, all sides agree that it has a devastating effect on defendants who testify . . .”); Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563 (2014) (offering a useful overview of the ways in which scholars have criticized Rule 609(a)(1)).

11. Cf. H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar’s Tale*, 42 DUKE L.J. 776, 811 (1993) (“One of the mysteries lurking beneath

ical of Rule 609 tend to propose amendments that modify or strike section (a)(1) while leaving (a)(2) mostly or wholly intact.<sup>12</sup>

This Note contributes to the ongoing debate by showing that Rule 609(a)(2)'s justification is not cogent. Part I describes the Rule's structure and its rationale, which turns on both a view of the nature of character and a view about the probabilistic value of certain kinds of character evidence. Part II argues that Rule 609(a)(2)'s theory of moral character and model of probabilistic reasoning do not withstand scrutiny and are inconsistent with the Rules' general avoidance of the risk of undue prejudice. Part III hypothesizes that Rule 609(a)(2) is actually underwritten by an unstated principle of forfeiture. Section (a)(2) would be sounder, more easily and consistently applied, and better aligned with the rest of the Rules if it were restructured to reflect this underlying forfeiture logic. This modification does not, however, face up to a more fundamental question: If the Rule's ultimate rationale is the logic of forfeiture, is that in fact *just*? This Note argues, in conclusion, that the irremediable unfairness of the Rule's forfeiture logic makes even an amended version of the Rule unsatisfactory and that therefore the Rule should be eliminated.

#### I. THE STRUCTURE, RATIONALE, AND HISTORY OF RULE 609(A)(2)

Rule 609(a)(2) is distinctive in its mandatory-admissibility requirement. This requirement lacks justification, a problem that becomes apparent when contrasting the Advisory Committee's rationale for it with the norms governing the rest of the Rules of Evidence.<sup>13</sup> Section I.A outlines the ways in which the admission of character evidence under Rule 609(a)(2) diverges from the Rules' otherwise careful attention to the need for balancing the

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the surface of Rule 609(a)[(1)] is that if these prior felony convictions involve no dishonesty . . . then wherein lies their probative value?"

12. See, e.g., Timothy R. Rice, *Restoring Justice: Purging Evil from Federal Rule of Evidence 609*, 89 TEMP. L. REV. 683 (2017) (arguing for a substantial overhaul of Rule 609 in accordance with the principles of restorative justice while still retaining the structure of the section (a)(2) exception for crimes of dishonesty); Ric Simmons, *An Empirical Study of Rule 609 and Suggestions for Practical Reform*, 59 B.C. L. REV. 993, 998 (2018) (arguing that "a more modest reform of Rule 609 may be in order"); Tarleton David Williams, Jr., Comment, *Witness Impeachment by Evidence of Prior Felony Convictions: The Time Has Come for the Federal Rules of Evidence to Put on the New Man and Forgive the Felon*, 65 TEMP. L. REV. 893 (1992) (taking a critical stance toward Rule 609 as a whole while still endorsing the advisory committee's justification for section (a)(2)).

13. The Advisory Committee initiates changes to the Rules, which then pass through many other stages of review before final approval by the Supreme Court and enactment by Congress. The exact status of Rules Advisory Committee notes is the subject of some disagreement among both courts and commentators. But though principles for resolving textual ambiguity are subject to debate, commentators and judges often accord the notes decisive weight, and they are generally treated as authoritative both for the purpose of describing the Rules' function and for resolving interpretive ambiguities. See generally Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099 (2002).

probative value and prejudicial effect of potential evidence. Section I.B explores the Advisory Committee's justification for the categorical admission of convictions for crimes of dishonesty, which turns on the specific kind of character trait that Rule 609(a)(2) allows a party to prove—a character for dishonesty. Section I.C turns to the category of crimes of dishonesty (also called *crimen falsi*) that is used in Rule 609(a)(2) and explores the origins of the taxonomy used to justify the Rule.

#### A. *The Structure of Rule 609(a)(2)*

Much of the Federal Rules of Evidence is devoted to protecting parties from the introduction of unfairly prejudicial evidence. Understanding these protections underscores both the oddity of Rule 609(a)(2)'s outlier status and the oddity of the justification for abrogating the restrictions that ordinarily curb the risk of unfair prejudice.

The basic condition for a piece of evidence to be admitted is that it be *relevant*.<sup>14</sup> This condition is enormously forgiving.<sup>15</sup> A piece of evidence is relevant if it would make even the smallest incremental difference in establishing the point for which it is offered.<sup>16</sup> But this loose standard of relevance is counterbalanced by Rule 403, which bars otherwise admissible evidence when “its probative value is substantially outweighed by a danger of . . . unfair prejudice.”<sup>17</sup> Rule 403's limits are then extended by additional restrictions in the remainder of the Rules.<sup>18</sup>

Among the most important of these restrictions is Rule 404's presumptive prohibition of character evidence,<sup>19</sup> which is defined as evidence to prove “that on a particular occasion [a] person acted in accordance with [a] character or trait.”<sup>20</sup> Rules 607–609 carve out a series of exceptions to this ban,<sup>21</sup> allowing evidence to prove a witness's character for truthfulness.<sup>22</sup>

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14. See FED. R. EVID. 401.

15. See *Old Chief v. United States*, 519 U.S. 172, 178–79 (1997).

16. See *id.*

17. FED. R. EVID. 403.

18. The most obvious example is the rule against hearsay in FED. R. EVID. 802, but there are also more discrete limitations, such as the prohibition on the use of subsequent remedial measures as proof of responsibility in FED. R. EVID. 407.

19. See FED. R. EVID. 404 advisory committee's note to 2006 amendment (echoing Rule 403's language in stating that “circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice, confusion and delay”).

20. FED. R. EVID. 404(a)(1).

21. See FED. R. EVID. 607 (establishing that any party to a case may present evidence to impeach any witness); FED. R. EVID. 608 (allowing impeachment by testimony offering opinions about a witness's character for truthfulness); FED. R. EVID. 609 (allowing impeachment by evidence of a witness's past convictions).

22. Commentators generally take for granted that the evidence allowed for under Rule 609 is effectively character evidence of the very sort that is disallowed in Rule 404. See, e.g., Montré D. Carodine, “*The Mis-Characterization of the Negro*”: A Race Critique of the Prior Conviction Impeachment Rule, 84 IND. L.J. 521, 538 (2009) (describing Rule 609 as an “express

Rule 609 governs the admissibility of a particular kind of impeaching character evidence—past convictions. Section (a)(1) applies only to past felony convictions,<sup>23</sup> conditioning their admission on a balancing of probative value and prejudicial effect.<sup>24</sup> Section (a)(2), however, is keyed to the *type* of crime for which the witness was previously convicted<sup>25</sup>—crimes of dishonesty, or *crimen falsi*<sup>26</sup>—and makes their admission mandatory.<sup>27</sup> Section (a)(2)'s standard of admissibility is thus directly tied to the category of crime that it names.<sup>28</sup> This makes Rule 609(a)(2) triply distinctive: it is one of the few rules exempted from the bar on character evidence, it is keyed to a particular category of past criminal offense, and it is the only Rule in the Federal Rules of Evidence that requires evidence to be admitted.

### B. Rule 609(a)(2)'s Theory of Character

The Advisory Committee's justification for Rule 609(a)(2) assumes a particular thesis about the nature of character and how it predicts action: there are people who are intrinsically dishonest, their dishonesty is reliably

exception" to the general ban on character evidence); Alan D. Hornstein, *Between Rock and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 VILL. L. REV. 1, 34 (1997).

23. See FED. R. EVID. 609 (applying only to a crime that "was punishable by death or by imprisonment for more than one year").

24. See, e.g., *Tabron v. Grace*, 898 F. Supp. 293, 295 (M.D. Pa. 1995) ("The inclusion of this balancing standard into Rule 609(a)(1) was deliberate . . . Its significance is underscored by a comparison to Rule 609(a)(2), which mandates that evidence of convictions for crimes of dishonesty or false statement also shall be admitted, but contains no Rule 403 qualification."). Rule 609(a)(1)(A) applies the Rule 403 test to civil cases and nondefendant witnesses in criminal cases. Section (a)(1)(B) applies to criminal defendants and requires application of a "reverse 403" test. See, e.g., Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants*, 118 COLUM. L. REV. 769, 821 n.277 (2018). The reverse-403 test requires that the probative value outweigh the risk of prejudice, whereas the standard 403 test allows evidence so long as the probative value is not "substantially outweighed." FED. R. EVID. 403.

25. Only the recent additions of rules specific to sex offenses parallel this distinctive treatment of an offense on the basis of its *kind* as opposed to its severity. See FED. R. EVID. 412–415 (modifying the kinds of evidence that may be presented and the contexts in which it may be presented in the case of sexual assault (Rules 413, 415) and child molestation (Rules 414, 415)).

26. Green, *supra* note 2, at 1090–91.

27. Where it can be determined that the underlying crime "required proving—or the witness's admitting—a dishonest act or false statement" evidence of the crime "must be admitted." FED. R. EVID. 609(a)(2). Federal courts of appeals that have considered challenges to this interpretation of Rule 609(a)(2) are unanimous in reading it as categorically requiring admission without balancing the evidence's potentially prejudicial effects. See *United States v. Wong*, 703 F.2d 65 (3d Cir. 1983); *United States v. Leyva*, 659 F.2d 118 (9th Cir. 1981); *United States v. Kiendra*, 663 F.2d 349 (1st Cir. 1981); *United States v. Toney*, 615 F.2d 277 (5th Cir. 1980). *Wong* convincingly shows, through an examination of the legislative history, that alternative constructions of 609(a) that would have left the admission of convictions of crimes of dishonesty subject to discretion were deliberately rejected. 703 F.2d at 67–68.

28. See *Tabron*, 898 F. Supp. at 297.

indicated by a conviction for a crime of dishonesty, and having a character for dishonesty is uniquely predictive of a person's trustworthiness as a witness. This Section both shows that Rule 609(a)(2) relies on these assumptions and provides an overview of how the Advisory Committee justifies them.

All of the impeachment rules share the assumption that people have stable and discernible character traits.<sup>29</sup> Rule 404's prohibition on character evidence is premised on the view that evidence as to a person's character is generally unduly prejudicial and not on the view that there *is* no such thing as a person's character.<sup>30</sup> Exceptions to the prohibition on character evidence also take this point for granted. Rule 404 presumes the existence of a "trait of peacefulness,"<sup>31</sup> and Rule 405 describes the means by which character may generally be proven.<sup>32</sup> Because of the ban on character evidence in Rule 404, however, proof of character by reference to specific conduct is normally allowed only when the relevant trait is essential to the charge, claim, or defense at issue.<sup>33</sup> This background assumption about character traits is left consciously unsupported in the Advisory Committee's notes, having "history and experience [more than] logic as underlying justification."<sup>34</sup>

The logic of Rule 609(a)(2) further requires that a character trait can be accurately determined by way of a relatively small number of data points,<sup>35</sup> and that a factfinder presented with these data points will be able to use them to predict which witnesses can be trusted and which witnesses cannot be trusted.<sup>36</sup> These views are neither obviously provable<sup>37</sup> nor even points of general consensus,<sup>38</sup> but they are treated as axiomatic in the construction of the Rules.<sup>39</sup> The underlying justification for all of Rule 609 is the premise that evidence of a past conviction "tell[s] the fact-finder something about the type of person on the stand."<sup>40</sup> Even convictions for crimes that do not in themselves involve dishonest conduct are treated as indicative of the witness's willingness to ignore social norms in pursuit of some gain. In Oliver

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29. See Daniel D. Blinka, *Character, Liberalism, and the Protean Culture of Evidence Law*, 37 SEATTLE U. L. REV. 87, 108 (2013).

30. See *supra* note 22 and accompanying text.

31. FED. R. EVID. 404(a)(2)(C).

32. The Rule states that such evidence may be proved by "testimony about the person's reputation or by testimony in the form of an opinion." FED. R. EVID. 405(a).

33. FED. R. EVID. 405(b).

34. FED. R. EVID. 404 advisory committee's note.

35. See Gold, *supra* note 8, at 2311.

36. *Id.* at 2311–12.

37. *Id.*

38. David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 52 (1986–1987).

39. See FED. R. EVID. 404 advisory committee's note ("[T]he criminal rule is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence.").

40. Simon-Kerr, *supra* note 10, at 155.



Wendell Holmes's famous dictum, a person convicted of a crime is treated as having displayed a "general readiness to do evil . . . [from which] the jury is asked to infer a readiness to lie in the particular case."<sup>41</sup> Section (a)(2), however, turns on the narrower claim that there are some crimes that are uniquely telling of a person's character for dishonesty—so uniquely telling that it would be justifiable to present evidence of convictions for these crimes to jurors in circumstances in which other character evidence might not be allowed.<sup>42</sup> Whether this is fair depends on whether a person's character and the category of crimes of dishonesty are as meaningfully related as the Rules suppose.

### C. *The Origins of Crimen Falsi*

The scope of Rule 609(a)(2) is keyed to the category of *crimen falsi*, a taxonomy with a long pedigree.<sup>43</sup> Beyond the core crimes of fraud and perjury, there is little agreement as to the scope of *crimen falsi*.<sup>44</sup> Attempts to provide grand unified theories tend to be inconsistent or arbitrary, a consequence of the fact that the same categorization has served a variety of orthogonal purposes.

The category of *crimen falsi* initially defined the jurisdiction of Roman courts that dealt with forgery and counterfeiting.<sup>45</sup> When taken up by the Spanish civil code, *crimen falsi* grew more expansive.<sup>46</sup> And when the English common law system adopted the taxonomy, it was no longer used to organize the court system but was instead a principle of witness impeachment.<sup>47</sup> The category then became entangled in the legal system's equivocation between trustworthiness and various markers of social rank, treating social "status as a proxy for credibility."<sup>48</sup> What began as a bureaucratic administrative tool became a way of entrenching the social and moral norms of a particular time and place into an evidentiary rule. As John Henry Wigmore characterized the view embodied in this evolution of the category, "a usually bad man will usually lie and a usually good man will usually tell the truth."<sup>49</sup> From this point of view, in other words, a witness was deemed believable to the extent that he fit into the cultural mold of a "good man" or

41. *Gertz v. Fitchburg R.R.*, 137 Mass. 77, 78 (1884).

42. A misdemeanor fraud conviction, for example, would be mandatorily admissible under Rule 609(a)(2) even though misdemeanor convictions to prove a character trait are otherwise barred by the general bar on character evidence and do not fall under the exception in Rule 609(a)(1).

43. See FED. R. EVID. 609(a)(2) advisory committee's note to 2006 amendment.

44. Green, *supra* note 2, at 1092.

45. *Id.* at 1096.

46. *Id.* at 1100–02.

47. *Id.* at 1109.

48. Simon-Kerr, *supra* note 10, at 154–55.

49. 2 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 921 (1904).

“bad man” based on culturally constructed ideas of moral integrity or honor.<sup>50</sup> Thus, “a search for lies” became “a search for liars,” singled out not so much by having committed overt acts of dishonesty as by having committed acts that triggered a certain degree of social disapprobation.<sup>51</sup>

This history calls into question whether the origins and development of the category of *crimen falsi* fit the use to which the category is put in Rule 609(a)(2). The treatment of *crimen falsi* convictions as specially probative is made more suspect when the category is itself a shaggy agglomeration of principles with an organizing logic that is in no way oriented toward the kind of inferential step licensed by section (a)(2). Part II takes up this point and argues that neither the principles underwriting Rule 609(a)(2) nor the inferential steps from those principles to the actual substance of the Rule hold up under scrutiny.

## II. THE FLAWED LOGIC OF RULE 609(A)(2)

The previous Part’s overview of Rule 609(a)(2) identifies the three interconnected elements of the Rule that make it distinctive: (1) its mandatory admissibility provision is keyed to (2) a particular kind of criminal conviction on the basis of (3) the assumption that people have a discernible character for honesty. This Part argues that each of these elements exposes the Rule to serious objections. Section II.A shows that the Rule’s mandatory-admissibility requirement is premised on an error in probabilistic reasoning that violates the basic norms of fairness operative elsewhere in the Rules. Section II.B argues that the category *crimen falsi* lacks the conceptual unity necessary to support the inference to a witness’s untrustworthiness that Rule 609(a)(2) encourages. This theoretical objection is strengthened by case law. Courts struggle to make sense of what does and does not count as a crime of dishonesty. Section II.C argues that Rule 609(a)(2) is further undermined because it relies on an implausible view of character.

### A. *The Error in Rule 609(a)(2)’s Probabilistic Premise*

Rule 609(a)(2) relies on the assumption that conviction for a crime of dishonesty is so probative as to justify abrogating Rule 404’s prohibition of character evidence.<sup>52</sup> This assumption, however, ignores an insight widely recognized elsewhere in evidence law: that whether evidence ought to be admissible is a function of both its evidentiary value *and* the risk that it will cause prejudice that outweighs its evidentiary value.<sup>53</sup> Evidence that is both probative and excessively prejudicial risks inducing *overcorrection*, whereby

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50. Simon-Kerr, *supra* note 10, at 160.

51. *Id.* at 155.

52. See *supra* notes 19–28 and accompanying text.

53. See, e.g., FED. R. EVID. 403.

jurors are so swayed by a particular piece of evidence that they accord it undue weight.

The Rules structure the requirements for evidence to be admissible relative to a subjective assignment of probabilities. This means that the Rules condition the probability of an occurrence or fact on the basis of the information that is known, updating a factfinder's subjective probability when they learn new information that is relevant to their prior assignments.<sup>54</sup> For example, Lee might think it likely, before checking the news, that Jones won yesterday's election. If, however, she were told that there was a late-breaking and widely publicized story about Jones's involvement in a scandal, she ought to revise her "priors"—that is, to revise the background assumptions underwriting her belief that Jones probably won the election—and to settle on a new, lower estimation of Jones's likelihood of victory.

Though it might, on a subjective assignment of probabilities, be more likely that someone who has acted negligently in the past also acted negligently on some later occasion, the Rules operate on the principle that the introduction of such evidence is nearly always impermissibly prejudicial to the relevant party's interests<sup>55</sup>—its probative value is outweighed by the risk that the finder of fact will overcorrect to account for the new evidence.<sup>56</sup> For example, suppose that a juror might reasonably think there is a 50 percent chance that the defendant stole the bicycle, and that the addition of the relevant character evidence makes it reasonable for them to revise their estimation to 60 percent. If, however, the character evidence would prejudice a juror to the point of assigning a 90 percent likelihood, the evidence, though relevant, would have moved them further from an accurate assessment of the probabilities. As the jury's assessment of the probabilities becomes less accurate, the defendant's chances of a fair trial are increasingly jeopardized.

Given the Rules' attentiveness to the threat of overcorrection in the context of character evidence, Rule 609(a)(2)'s exception is all the more significant. The common law origin of the Rule dates to *Luck v. United States*,<sup>57</sup> where the D.C. Circuit held that admission of evidence of the defendant's

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54. See generally Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637 (1991) (characterizing the Rules as following a Bayesian analysis of subjective probabilities).

55. See, e.g., *Michelson v. United States*, 335 U.S. 469, 475–76 (1948) (“The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them . . . .” (footnote omitted)).

56. *Michelson* uses the language of “overpersuasion” in gesturing toward this same worry, see *id.* at 476, but the concern can be more precisely stated in terms of *credence*. The issue is not merely whether jurors settle on the correct outcome but also to what extent their subjective assignments of witness credibility are incrementally affected by the inappropriate introduction of certain kinds of evidence. See Elizabeth Grace Jackson, *Belief and Credence: Why the Attitude-Type Matters*, 176 PHIL. STUD. 2477, 2477–78 (2019) (describing “belief” as certainty that a proposition is true and “credence” as a subjective degree of confidence in a proposition’s truth).

57. Williams, *supra* note 12, at 899.

past conviction for grand larceny was justified.<sup>58</sup> The court explained this decision with reference to ample historical precedent affirming the relevance of such evidence.<sup>59</sup> The 1975 Conference Report justifies the incorporation of the *Luck* common law principle into the Federal Rules with the bald assertion of the value of such evidence, claiming *crimen falsi* convictions to be “peculiarly probative of credibility,” which in turn is offered to justify eliminating the discretion judges are allowed with respect to felony convictions under section (a)(1).<sup>60</sup>

The evidentiary judgment guiding Rule 609 as a whole is made even more doubtful when framed as the view that a person convicted of a crime of dishonesty with an incentive to lie will lie so substantially more often than a person without such a conviction—but with equal incentive—that the blanket admissibility under Rule 609(a)(2) is justifiable. As Richard Uviller argues, “nearly all people choose to lie on the witness stand according to two determinants: the importance to them of having a falsehood believed and their confidence that their false testimony will achieve that end with minimal risk.”<sup>61</sup> Thus, convictions under section (a)(2) often just serve as grounds for a prejudicial judgment over and above jurors’ reasoning about the likelihood that the witness is a liar. A juror may already have decided whether Boris is telling the truth, and the additional information that he has a five-year-old conviction for kiting checks might simply encourage generally discriminatory attitudes that would unfairly harm the party on whose behalf Boris is testifying.<sup>62</sup>

Richard Friedman, in a critique of the rules governing character evidence, joins together these points. As he argues, for section (a)(2) to make sense, one would have to expect jurors *reliably* to make something like the following inference: “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.”<sup>63</sup> As Friedman concludes, it is exceedingly unlikely that any reasonable juror would adopt this line of thought.<sup>64</sup>

The discontinuity between the justification offered for Rule 609(a)(2)’s treatment of past convictions and the Rules’ normal care to avoid undue

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58. 348 F.2d 763, 767–69 (D.C. Cir. 1965).

59. *Luck*, 348 F.2d at 763, 768 nn.7–8, 769 n.9.

60. H.R. REP. NO. 93-1597 (1974) (Conf. Rep.).

61. Uviller, *supra* note 11, at 813.

62. An innocent defendant—or any party whose litigating position is favored by the truth—will probably already have the incentive to give honest testimony. *See id.* Similarly, Anna Roberts has argued that the stakes of the case and the would-be liar’s odds of executing a successful deception are far more probative of the person’s reliability as a witness than their past convictions. Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 1996 (2016).

63. Richard D. Friedman, Comment, *Character Impeachment Evidence: The Asymmetrical Interaction Between Personality and Situation*, 43 DUKE L.J. 816, 824–25 (1994).

64. *Id.*

prejudice is stark. The risk of overcorrection remains substantial even when a kind of evidence is especially probative. There is one qualification to this claim: if a particular piece of evidence rendered a conclusion an effective certainty, there would not then be the risk of overcorrection. To take the example above, if character evidence made it reasonable for a juror to update their belief that the defendant stole the bicycle from a 60 percent chance to a 95 percent chance, then there would be no risk of overcorrection. But in order for section (a)(2) to be justified on these grounds, a conviction for a crime of dishonesty would have to be uniformly extremely telling of a person's character, such that a person could *always* be justified in inferring the convict's high likelihood of lying on the stand.<sup>65</sup> The plausibility of section (a)(2) thus turns on the conceptual coherence of the category of crimes of dishonesty.

### B. Rule 609(a)(2)'s Reliance on a Confused Taxonomy

The mandatory admissibility of convictions under section (a)(2) purports to be a purely evidentiary judgment about the probative value of convictions for *crimen falsi*. But this Section argues that a closer examination of the category reveals that it lacks the kind of conceptual unity necessary to justify the Rule.

#### 1. The Conceptual Inadequacy of *Crimen Falsi*

The conceptual incoherence of the category of crimes of dishonesty is evident in two respects. First, it is not possible to sort crimes into those that categorically do and categorically do not involve dishonesty in any nonarbitrary way. Moreover, the myriad ways *crimen falsi* has been defined highlight the category's lack of conceptual unity.

In 2006, Rule 609(a)(2) was amended to clarify that courts should look at the facts underlying a conviction to determine if the crime involved a "dishonest act."<sup>66</sup> The earlier construction left ambiguous whether a court could inquire into the particular facts underlying a conviction to determine whether the crime was committed in a way that involved dishonesty, or whether the witness must have been convicted of a crime with a statutory element that necessarily involved dishonesty.<sup>67</sup> The amended Rule explicitly allows for an inquiry into the facts underlying a conviction, seeking to avoid an overly rigid scheme in which a determination is made on the basis of how particular crimes are categorized at a high level of generality.<sup>68</sup> The coarse-

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65. Why *always*? Because otherwise the mandatory admissibility would be unjustified.

66. FED. R. EVID. 609(a)(2) advisory committee's notes to 2006 amendment.

67. George Edward Spencer, Comment, *Interpreting the New Rule 609(a)(2)*, 57 CASE W. RESV. L. REV. 717, 719–21 (2007) (providing an overview of the revisions to Rule 609(a)(2)).

68. On the categorical understanding of the Rule, a court would neither inquire into the particular details of crimes to determine if they involved dishonest acts, nor look into the question of whether the commission of a crime that is nominally a crime of dishonesty was com-

grainedness of this approach would achieve efficiency at the cost of undermining any claim that the Rule is finely attuned to just those crimes that are highly probative of character.

But the amended form of the Rule comes with costs of its own. Allowing an inquiry into the underlying facts of a conviction produces intolerable vagueness because “a large majority of criminal acts do involve some form of deception.”<sup>69</sup> Thus, for a very wide array of crimes, there is at least a plausible argument to be made that some stage of the commission of the crime involved the kind of dishonesty that would make the conviction admissible under (a)(2).<sup>70</sup>

In short, without inquiry into the underlying facts, the Rule would be excessively rigid, making crimes categorically admissible on the basis of a very coarse-grained sorting process. *With* inquiry into the underlying facts, however, the opposite problem presents itself. The Rule becomes overly flexible, making it difficult to cleanly sort crimes into those that do and those that do not involve dishonesty. The fact that either interpretation leads to substantial difficulties in application suggests that Rule 609(a)(2)’s theoretical foundation is unsound.

A further problem with the use of the category of *crimen falsi* is that no reason is ever provided for thinking that such a meaningfully distinct category exists. The Advisory Committee justifies section (a)(2) on the grounds that the crimes included are specially probative of truthfulness, but it does not specify how to determine which crimes are covered by the Rule.<sup>71</sup> The Conference Report on the Rule provides a short list of crimes likely to qualify under section (a)(2) but then adds a catchall category, indicating that section (a)(2) reaches whatever crimes are specially probative.<sup>72</sup> These two brief statements form a tight circle—the justification is that the crimes eligible under the Rule are specially probative of honesty, and the scope of the Rule is then defined as being whatever crimes are specially probative of honesty; but nowhere is any evidence offered that there actually *are* crimes that meet that description, nor is any guidance given as to how a court might make such a determination. It is as though the category of especially probative crimes of dishonesty has simply been wished into existence.

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mitted without any actual deceit. *See, e.g.,* *Lustiger v. United States*, 386 F.2d 132, 138 (9th Cir. 1967). *See also* Green, *supra* note 2, at 1121–22 (noting the similarity between this approach and the Supreme Court’s interpretation of the Double Jeopardy Clause); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE* 632 (1995) (noting with approval the “formalistic” quality of this approach).

69. Green, *supra* note 2, at 1122.

70. *See id.*

71. *See supra* Section I.C.

72. H.R. Rep. No. 93-1597 (1974) (Conf. Rep.) (listing crimes such as “perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused’s propensity to testify truthfully”).

Finally, the integrity of the Rule is undermined because it is keyed to a category of offense that is the product of a long social evolutionary process that integrated dated and troubling moral judgments into criminal procedure and substantive criminal law. This in itself casts serious doubt on the procedural<sup>73</sup> and substantive<sup>74</sup> fairness of the Rule. One example is the well-documented history of courts treating evidence of “unchaste” behavior as indicative of lack of credibility on the part of female witnesses.<sup>75</sup> Whatever it means for a person to be “unchaste,” it is not actually relevant to the determination of whether she ought to be believed when serving as a witness in a trial. This is but one example of a nominally neutral procedural rule that, in realizing an underlying discriminatory prejudice, serves only to compromise the integrity of any trial in which it is used.<sup>76</sup> Rule 609(a)(2) thus risks further entrenching a dated and unjust legal order that has been unreflectively absorbed into (a)(2)’s category of crimes of dishonesty.<sup>77</sup>

## 2. The Unworkability of Crimen Falsi

Theoretical worries about the category of crimes of dishonesty are borne out by pervasive confusion and inconsistency in how courts determine whether particular convictions fall under Rule 609(a)(2). Federal courts have been able to reach consensus on a few issues—for one, the position that crimes of violence and theft are not probative of honesty in the way required

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73. See Hornstein, *supra* note 22, at 13–14 (“The probativity of the evidence of the prior conviction can be no stronger than the weakest link in that inferential chain. Indeed, the probative value of the evidence of prior conviction is the product of the probabilities of each inference necessary to support the conclusion, and that product is perforce lower than the lowest probability of each of the several inferences to be drawn.”).

74. See Leonard, *supra* note 38, at 41 (“[S]atisfaction is achieved both from the belief that rational rules will be applied and from the court’s willingness to hear intuitively valid evidence.”); Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381 (1999) (arguing that an underlying presumption of fairness and communal integrity is involved in their evolution and current form).

75. See Julia Simon-Kerr, Note, *Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment*, 117 YALE L.J. 1854, 1893–94 (2008).

76. See Anna Roberts, *Reclaiming the Importance of the Defendant’s Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 836–37 (2016) (“A recent study of DNA exonerees revealed that, despite their factual innocence, 91 percent of those with prior convictions waived their right to testify at trial. The most common reason given by their counsel was the fear of the impact of impeachment by prior conviction. That fear was justified.”).

77. See *supra* Section II.C.

for inclusion under (a)(2).<sup>78</sup> But outside of those narrow exceptions, there is a troubling degree of inconsistency.<sup>79</sup>

Surveying courts' interpretations of section (a)(2) show that the Rule has not latched onto a meaningfully distinct category of crimes. The Ninth Circuit has held that smuggling drugs is not probative of dishonesty for the purposes of (a)(2),<sup>80</sup> while the Eighth Circuit has held that transporting forged securities does fall within its ambit.<sup>81</sup> Striking a balance between these cases, the Second Circuit has held that a conviction for cocaine importation is neither categorically admissible *nor* categorically inadmissible under section (a)(2). Instead, the court held that where such importation involved, for example, "false written or oral statements . . . on customs forms," the conviction would satisfy (a)(2).<sup>82</sup>

Tax evasion has also received inconsistent treatment. The Eleventh Circuit<sup>83</sup> adopted the Fourth Circuit's finding<sup>84</sup> that willful failure to file federal taxes is a crime of dishonesty under section (a)(2). The Fourth Circuit supported this judgment because tax evasion is "sufficiently reprehensible,"<sup>85</sup> a standard that does not obviously bear any relationship to the actual language of Rule 609. The Third Circuit, in turn, held convictions under the same statute not to be crimes of dishonesty under section (a)(2) because the statute did not require intent.<sup>86</sup> None of the above rulings are themselves especially implausible interpretations of section (a)(2). Collectively, however, they paint a picture of a Rule with such diverse interpretations that it is only natural to conclude that it is not predicated on a genuinely distinct category of offense.<sup>87</sup>

A similar confusion infects the decisions of state courts that have interpreted state rules of evidence that parrot the language of 609(a)(2). The Col-

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78. *United States v. Glenn*, 667 F.2d 1269, 1273 (9th Cir. 1982); *see, e.g., United States v. Cook*, 608 F.2d 1175, 1185 n.9 (9th Cir. 1979) (en banc) (holding prior robbery conviction not to be a crime of dishonesty); *United States v. Ashley*, 569 F.2d 975, 979 (5th Cir. 1978) (holding conviction for shoplifting not to be a crime of dishonesty); *United States v. Fearwell*, 595 F.2d 771, 776 (D.C. Cir. 1978) (holding petit larceny not to be a crime of dishonesty).

79. *See Uviller, supra* note 11, at 823 (finding from a survey of federal judges that "one is forced to conclude that in the courtrooms a fundamental interpretation of the compass of a basic rule of impeachment is far from settled").

80. *United States v. Mehrmanesh*, 689 F.2d 822, 833 (9th Cir. 1982).

81. *United States v. Jackson*, 680 F.2d 561, 564 (8th Cir. 1982).

82. *United States v. Hayes*, 553 F.2d 824, 827-28 (2d Cir. 1977).

83. *United States v. Gellman*, 677 F.2d 65, 66 (11th Cir. 1982).

84. *Zukowski v. Dunton*, 650 F.2d 30, 34 (4th Cir. 1981).

85. *Id.*

86. *Cree v. Hatcher*, 969 F.2d 34 (3d Cir. 1992).

87. *See, e.g., Altobello v. Borden Confectionary Prods., Inc.*, 872 F.2d 215, 216-17 (7th Cir. 1989) (holding that a witness's having helped several McDonald's locations tamper with their utility meters constituted a crime of dishonesty under Rule 609(a)(2)). *See generally* Simon-Kerr, *supra* note 75 (arguing that the link between a trait of "dishonesty" and the actual substance of convictions used to infer that trait has historically often been tenuous and largely reflective of prejudice).



orado Supreme Court, for example, acknowledged the federal circuit courts' consensus that theft is not a crime of dishonesty but ruled that "common experience informs us that a person who takes the property of another for her own benefit is acting in an untruthful or dishonest way."<sup>88</sup> The Florida Supreme Court has also held that theft is a crime of dishonesty within the meaning of its evidentiary rules, on the strength of *Webster's* definition of "dishonesty."<sup>89</sup> If courts across the board are so clearly unable to find a consistent and rigorous way to sort crimes according to a taxonomy, the best explanation is that the taxonomy itself is the issue.

These interpretive difficulties would not be troubling if one assumed that any illegal act is evidence of a more general willingness to violate prohibitions—including lying on the stand.<sup>90</sup> Though it might be true that all crimes involve at least some degree of willful violation of social norms, it does not follow that section (a)(2) ought to be given a broad scope. The sounder argument is to reason backward: section (a)(1) of Rule 609 reflects the clear-eyed judgment that impeachment can have devastating consequences for a witness's effectiveness, the more so when the impeaching evidence is a witness's criminal record.<sup>91</sup> If the effect of section (a)(2) is to gravitate toward making a broader range of crimes automatically admissible for impeachment, then something has gone badly wrong.

### C. *What the Rules Get Wrong About Character*

Beyond Rule 609(a)(2)'s definitional inadequacy, it also relies on an implausible understanding of human character. It assumes there to be such a thing as a "character for truthfulness" and assumes that the trait that leads one to commit a crime of dishonesty is the same trait that would lead one to lie on the stand.<sup>92</sup> This Section shows that Rule 609(a)(2)'s view of character is at odds with leading philosophical and psychological research and so fails to justify the Rule.

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88. *People v. Segovia*, 196 P.3d 1126, 1132 (Colo. 2008) (en banc); cf. *Commonwealth v. Vitale*, 664 A.2d 999, 1003 (Pa. Super. Ct. 1995) (observing that Pennsylvania courts treat theft and unauthorized use of a motor vehicle as *crimen falsi*).

89. *State v. Page*, 449 So. 2d 813, 815–16 (Fla. 1984).

90. See *supra* note 41 and accompanying text.

91. See generally Capra & Richter, *supra* note 24.

92. FED. R. EVID. 608(a). Though less directly relevant to the argument here, the Rules make a further assumption: that jurors are reliably capable of detecting honesty and dishonesty. See generally Saul M. Kassin & Christina T. Fong, "I'm Innocent!": *Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 23 LAW & HUM. BEHAV. 499 (1999); Uviller, *supra* note 11, at 791–92.

### 1. Evidence Against the Rules' View of Character

The Advisory Committee justifies section (a)(2) on the grounds that convictions of crimes of dishonesty are “peculiarly probative of credibility.”<sup>93</sup> But even if some people have a character for dishonesty that is consistent over time, section (a)(2)’s mandatory-admission policy is unjustified unless it includes only the sorts of convictions that are indicative of such character. Instead, the Rule’s application leads to results that are both unintuitive and unjustifiable on a theoretical level.

Take, for example, the offenses at issue in three of the cases mentioned above<sup>94</sup>: tax evasion,<sup>95</sup> drug smuggling,<sup>96</sup> and meter tampering.<sup>97</sup> (If you find yourself struggling to remember which were held to be admissible under section (a)(2) and which were not, I can only say: that is the point.) Courts have interpreted the Rule to demand that the meter tamperer have her testimony preemptively discredited in the juror’s minds, even if she is called as a witness in a trial that is entirely unrelated to her crime.<sup>98</sup> On the other hand, if the drug smuggler were to testify in her accomplice’s trial, the question of whether her conviction could be used to impeach her credibility would be subject to the strictures of section (a)(1), and the judge would weigh the value of the evidence against the smuggler’s risk of undue prejudice.<sup>99</sup> The tax evader is perhaps the most interesting of the three cases: whether her testimony would be discredited would depend not on the details of the crime with which she was charged but on whether she were tried in the federal courthouse or across the street in the local superior court.<sup>100</sup> These examples indicate that the Rule’s treatment of the trait of honesty is not as intuitive as the Advisory Committee’s breezy justifications suggest. The Rule presumes that its scope identifies *precisely* the subset of crimes that are indicative of a certain kind of character.

The principle that past behavior has high predictive value is based purely on “a common sense view” of how people behave.<sup>101</sup> The legislative history of the Rule accordingly shows that “both proponents and opponents . . . accepted the psychological assumption upon which Rule 609 is based as so seemingly obvious as to be beyond debate.”<sup>102</sup> But this assump-

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93. FED. R. EVID. 609 advisory committee’s note.

94. See *supra* notes 79–89 and accompanying text.

95. *Cree v. Hatcher*, 969 F.2d 34 (3d Cir. 1992).

96. *United States v. Mehrmanesh*, 689 F.2d 822, 833 (9th Cir. 1982).

97. *Altobello v. Borden Confectionary Prods., Inc.*, 872 F.2d 215, 216–17 (7th Cir. 1989).

98. *Id.* at 215.

99. *Mehrmanesh*, 689 F.2d at 823.

100. *Cree*, 969 F.2d at 35–37.

101. Todd A. Berger, *Politics, Psychology, and the Law: Why Modern Psychology Dictates an Overhaul of Federal Rule of Evidence 609*, 13 U. PA. J.L. & SOC. CHANGE 203, 205 (2009–2010).

102. *Id.*

tion is not only undefended; it also presumes without argument a view that runs contrary to a substantial body of psychological research.

Many psychologists and philosophers argue that, far from having a stable and innate character for truthfulness, people are more plausibly described as having malleable and situation-specific dispositions that manifest in unpredictable ways across diverse settings—a phenomenon known as *situationism*.<sup>103</sup> Researchers in this area observe that “disappointing omissions and appalling actions are *readily* induced through seemingly minor situations. What makes [the] findings so striking is just how *insubstantial* the situational influences that produce troubling moral failures seem to be . . . .”<sup>104</sup>

The view that truthfulness is situationally specific rebuts the core underlying premise of 609(a)(2). Whereas the Rule encourages inferring a character trait from a single conviction for a single ill-advised act, the situationists’ findings suggest that a person does not have to *be* some particular way or *have* some particular character to commit bad acts. A person’s commission of a certain kind of action may be more indicative of the aberrant character of the situation they found themselves in rather than any consistent character traits. And just as a person might easily be triggered to act uncharacteristically dishonestly, so also a person whose background would give a juror no reason to suspect dishonesty might still lie if adequately incentivized to do so by the stakes of the trial.

The point here is not to argue that situationism is true or false but to observe that it is a leading psychological and philosophical theory of personality and character that contradicts the Rules’ background assumption.<sup>105</sup> And if situationism *is* correct, Rule 609(a)(2) commits a form of the fundamental attribution error,<sup>106</sup> assuming that an action in a given situation is traceable to a core character trait rather than being a situationally indexed response to some environmental stimulus.<sup>107</sup>

103. See Teree E. Foster, *Rule 609(a) in the Civil Context: A Recommendation for Reform*, 57 *FORDHAM L. REV.* 1, 29 & n.132 (1988) (arguing that “this trait-oriented theory of behavior was discredited thoroughly by the advent of a counter-theory, termed ‘specificity’ or ‘situationism’”).

104. Maria W. Merritt, John M. Doris & Gilbert Harman, *Character*, in *THE MORAL PSYCHOLOGY HANDBOOK* 355, 357 (John M. Doris et al. eds., 2010).

105. See Roberts, *supra* note 62, at 1992 (describing the rules as resting “not on data but on what one might call ‘junk science at its worst,’ or, more charitably, a series of assumptions . . . [that] are belied by data” (quoting Danyee W. Holley, *Federalism Gone Far Astray from Policy and Constitutional Concerns: The Admission of Convictions to Impeach by State’s Rules—1990-2004*, 2 *TENN. J.L. & POL’Y* 239, 305 (2005))).

106. See Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, 10 *ADVANCES EXPERIMENTAL SOC. PSYCH.* 173, 183 (1977) (defining the “fundamental attribution error” as “the tendency for attributers to underestimate the impact of situational factors and to overestimate the role of dispositional factors in controlling behavior”).

107. Berger, *supra* note 101, at 207–08; see also Merritt et al., *supra* note 104, at 359 (noting connections between situationist theories of character and findings in behavioral psycholo-

The views advanced by opponents of situationism do not clearly support Rule 609(a)(2)'s approach, either. For example, virtue theorists, who defend an understanding of virtues of character as derived from habituated virtuous action, do not suppose that because a stable virtuous character is what one *aims* at, it is therefore also something one generally already *has*.<sup>108</sup> Thus, the virtue theorist and the situationist might even agree, at the empirical level, that a discrete dishonest act is of marginal value in ascertaining a person's ethical dispositions.<sup>109</sup> The situationist would hold this view because she would think that there is no such thing as a stable character for truthfulness, while the virtue theorist would hold this view because she would think that a stable character for truthfulness, while aspirational, is not necessarily the sort of thing that a given person has. Thus, even if this were not the case—even if there *were* such a thing as a robust and discernible character for honesty or dishonesty—Rule 609(a)(2) is ill-suited for governing the use of character evidence in trial proceedings. Its treatment of a broad range of individual past actions as highly predictive of a person's present likelihood of a particular kind of dishonest act relies on a caricatured exaggeration of any plausible view of traits like dishonesty.

The upshot of these considerations is that Rule 609(a)(2) is at odds with situationism, among the most favored understanding of moral character in contemporary psychology. And while situationism has its detractors, such as virtue theorists, even *their* views do not support the Rules' presuppositions. In fact, it is not clear that the Rules' approach to character tracks any of the dominant approaches to moral character in philosophy and psychology.<sup>110</sup>

## 2. The *Falsus in Uno* Doctrine and Rule 609

Rule 609's claim to plausibility is further belied by the overwhelming rejection of a closely related common law evidentiary principle: *falsus in uno*, *falsus in omnibus*. This principle "allows a fact-finder to disbelieve a witness's entire testimony if the witness makes a material and conscious falsehood in one aspect of his testimony."<sup>111</sup> It ranges in application from a mandatory admonition to the finder of fact that *requires* a juror to apply the principle<sup>112</sup> to the mere suggestion of an inference a juror might consider

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gy that show not only behavior but also underlying cognition to be substantively affected by a person's immediate context).

108. See, e.g., Rachana Kamtekar, *Situationism and Virtue Ethics on the Content of Our Character*, 114 ETHICS 458, 460 (2004).

109. See Christian B. Miller, *Empirical Approaches to Moral Character*, STAN. ENCYCLOPEDIA PHIL. (Aug. 3, 2016), <https://plato.stanford.edu/entries/moral-character-empirical> [<https://perma.cc/BNM9-F7H8>].

110. See *generally id.* (describing four dominant approaches to moral character).

111. *Enying Li v. Holder*, 738 F.3d 1160, 1163 (9th Cir. 2013) (emphasis omitted) (describing *falsus in uno* as "a hoary maxim").

112. The mandatory form of the principle is now vanishingly rare. See W.W. Allen, Annotation, *Modern View as to Propriety and Correctness of Instructions Referable to Maxim*

making.<sup>113</sup> Despite the general similarity between the Rule 609(a)(2) exception and the *falsus in uno* doctrine, the two have received substantially different treatment both in courts and in academic literature, and *falsus in uno* is now generally held in low regard.<sup>114</sup> It is thus all the more problematic for Rule 609 that its underwriting assumption is left unsupported by the Advisory Committee,<sup>115</sup> given that *falsus in uno* relies on an effectively identical assumption and yet is widely considered implausible and discredited.

In early evidentiary treatises, scholars justified *falsus in uno* by categorizing witnesses as stable liars or stable truth-tellers. Thomas Starkie explained the basic rationale underlying *falsus in uno* in his 1826 evidence treatise: “The presumption that the witness will declare the truth ceases as soon as it manifestly appears that he is capable of perjury. Faith in a witness’s testimony cannot be partial or fractional . . . .”<sup>116</sup> There is something that seems basically and intuitively right about this thought: it is natural to think that there are, on the one hand, witnesses who are willing to lie and, on the other, witnesses who are not. Beguiling though this intuition is, however, it is easily undermined. A liar can be led to feel the seriousness of her oath and testify honestly, while an otherwise truthful person can, under strain or with adequate incentive, lie on the stand.<sup>117</sup> Denise Johnson, surveying some of the objections that have served to discredit the doctrine, argues that doctrines like it are sometimes a way to promote harmful mythologies in the guise of dispassionate evidentiary judgments.<sup>118</sup> Johnson shows, for example, that

“*Falsus in Uno, Falsus in Omnibus*,” 4 A.L.R.2d 1077 § 3 (1949). Even in the mid-nineteenth century it was already beginning to fall out of favor in its strongest form. *See, e.g., id.* at n.11; *State v. Williams*, 47 N.C. (2 Jones) 257 (1855) (“The maxim ‘*falsum in uno, falsum in omnibus*,’ is, in a common law trial, to be applied by the jury according to their own judgment for the ascertainment of the truth, and is not a rule of law in virtue of which the Judge may withdraw the evidence from their consideration, or direct them to disregard it altogether.”).

113. *See, e.g., Shelton v. United States*, 169 F.2d 665 (D.C. Cir. 1948) (describing the principle as “not an inflexible rule of evidence, nor is it mandatory”). *But see* George Fisher, *The Jury’s Rise as Lie Detector*, 107 YALE L.J. 575, 699–700 (1997) (noting the principle’s invocation, in “only slightly modernized” form, at the trial of O.J. Simpson).

114. *See, e.g., Kadia v. Gonzales*, 501 F.3d 817, 821 (7th Cir. 2007) (Posner, J.) (endorsing Wigmore’s characterization of the doctrine as “primitive psychology” and an “absolutely false maxim of life” (first quoting JOHN H. WIGMORE, A STUDENTS’ TEXTBOOK OF THE LAW OF EVIDENCE 181 (1935); and then quoting 3A JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1008, at 982 (James H. Chadbourn ed., rev. ed. 1970))).

115. *See supra* notes 71–72 and accompanying text.

116. THOMAS STARKIE, A PRACTICAL TREATISE OF THE LAW OF EVIDENCE \*873.

117. One might even think that there are situations in which it would be morally permissible—perhaps even obligatory—to lie under oath. *Cf.* Michael Huemer, *The Duty to Disregard the Law*, 12 CRIM. L. & PHIL. 1 (2018) (arguing that jury nullification might in some cases be morally obligatory, even though it violates a juror’s oath). This claim needs merely to be *plausible* to support the argument that evidence of a person’s having a character for truthfulness or untruthfulness is unreliable as a guide to whether their testimony can be judged true or false on a particular occasion.

118. *See* Denise R. Johnson, *Prior False Allegations of Rape: Falsus in Uno, Falsus in Omnibus?*, 7 YALE J.L. & FEMINISM 243 (1995).

*falsus in uno* has historically provided a convenient rationale to paper over what is at bottom a judgment borne of paranoia over false accusations of rape.<sup>119</sup> On this view, where the Rule purports to be merely an expression of an objective and detached probabilistic judgment, it in fact covertly gives effect to undefended and unjust stereotypes about particular kinds of litigants.

These sorts of observations have been instrumental in the widespread discarding of the *falsus in uno* principle. These same observations, however, apply equally well to the psychology underpinning Rule 609(a)(2), and they are no less damaging to the Rule's assumptions about the nature of character. The Rule presents itself as a dispassionate application to the law of evidence of the (putatively obvious) view that proven liars cannot be trusted.<sup>120</sup> But no substantive reasons are adduced in favor of the Rule's presuppositions, and there are myriad reasons to suspect that it is simply a manifestation of prejudicial attitudes and undisciplined thinking about the nature of character, the relation of character to behavior, and what meaning can fairly be drawn from a person's past convictions.

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Each of the arguments in this Section serves to undercut the probabilistic model of the Rules' structure in the context of (a)(2): even if Rule 609(a)(2) were selecting for acts of dishonesty, even if these acts were probative of future dishonest behavior, and even if jurors were well-positioned to discern all of these things, it *still* would require further argument to justify the Rule's structure of indiscriminate admission of such evidence for impeachment.<sup>121</sup> That a conviction for a particular kind of crime is specially probative does not, in itself, explain why that crime should be exempt from the ordinary balancing test. The next Part explores the possibility that Rule 609(a)(2) is best understood as being derived from a different, unstated justification: the principle of forfeiture.

### III. RULE 609(A)(2) AS A PRINCIPLE OF FORFEITURE

The argument so far has been directed at challenging Rule 609(a)(2) in its existing form, on the grounds that its embedded character thesis is false, its taxonomy of crimes of dishonesty is mired in confusion, and its overall structure is unjustifiably at odds with the Rules' otherwise careful attentiveness to mitigating the risk of undue prejudice. Together, these arguments expose an incoherence at Rule 609(a)(2)'s core. Interpretive charity suggests the need to search for some additional insight that might better explain both

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119. *Id.* at 243–45.

120. See Foster, *supra* note 103, at 47; see also *supra* Section I.B.

121. See, e.g., Foster, *supra* note 103, at 47–48 (“[T]he convicted perjurer, fully aware of the consequences of perjury, is arguably less motivated to lie again under oath than is a person who has not previously experienced conviction.”).

the Rule's origins and its persistence through controversy. The explanation, this Part argues, is that Rule 609(a)(2) is not the implausible instance of probabilistic reasoning that it appears to be because, appearances aside, it does not operate on the basis of probabilistic reasoning at all—it operates on a tacit principle of forfeiture. Section III.A shows how section (a)(2) is best explained as a forfeiture principle. Section III.B provides context for the claim that procedural rules are often at bottom founded on unstated normative judgments. Section III.C uses the unstated logic of forfeiture to restructure the whole of Rule 609 more intelligibly. But Section III.D argues that, even if rewriting the Rule makes its underlying logic clearer and more principled, it does not thereby make the Rule fair. Section III.D ultimately concludes that even the modified form of section (a)(2) should be rejected because the premised theory of forfeiture, while less inferentially dubious, is nevertheless unjust.

#### A. A Forfeiture Theory of Rule 609(a)(2)

Though the Advisory Committee notes to Rule 609 say nothing about forfeiture, one does not need to look far afield to infer that the logic of forfeiture operates in the background of the impeachment rules. Forfeiture means that parties lose procedural rights as a consequence of either their past behavior or their conduct in the course of litigation.<sup>122</sup> In addition to the pervasiveness of forfeiture principles embedded elsewhere in the Rules,<sup>123</sup> the *substance* of Rule 609—which is effectively a branding of inferiority on those who have fallen afoul of the criminal justice system in a specified way—calls for extra scrutiny of the Rule's purported rationale.<sup>124</sup>

The supposition of a policy-oriented basis for Rule 609(a)(2) finds further support in contrasting its structure with the structure of other rules. The Rules generally contain a variety of what might be called “escape valves,” which accommodate the inevitable need for flexibility in the face of exceptional cases.<sup>125</sup> Thus, for example, the presumption that a particular kind of evidence may be admitted is by default subject to Rule 403's requirement

122. See, e.g., *Forfeiture*, BLACK'S LAW DICTIONARY (11th ed. 2019).

123. E.g., FED. R. EVID. 804(b)(6); cf. Richard D. Friedman & Bridget McCormack, *Dial-in Testimony*, 150 U. PA. L. REV. 1171, 1229–30 (2002) (citing forfeiture as a background limitation to which constitutional procedural rights are generally subject).

124. See, e.g., Foster, *supra* note 103, at 5 (“[I]n perpetuating unwarranted emphasis on *who* the litigants are rather than on *what* they have done, Rule 609 redirects the inquiry from the facts of the dispute to the morals of the parties . . .”); Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001, 1040 (noting the American legal system's history of using “fuzz[y]” categories of crime singled out for moral opprobrium in a way “well suited to the purpose of selective disenfranchisement”); Uviller, *supra* note 11, at 831 (“The derivation of the rule of character impeachment, we should remember, is the disqualification of felons, a notion of moral infection we long ago abandoned. The residuum in today's rule of impeachment bears little more credit than its progenitor.”).

125. See GLEN WEISSENBERGER & JAMES J. DUANE, FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY 25–26 (7th ed. 2011).

that evidence not be admitted where it would be unduly prejudicial.<sup>126</sup> Similarly, a presumption that a certain piece of evidence is excluded under Rule 802's prohibition of hearsay might be rebutted by any of the explicit exceptions in Rule 804 or the "residual exception" in Rule 807.<sup>127</sup>

But Rule 609(a)(2) has no escape valves that make it responsive to case-by-case application. This inflexibility suggests that the Rule is not based purely on principles of evidentiary value and instead is meant to implement a kind of policy judgment. If it were an evidentiary principle, it would be amenable to revision where countervailing circumstances called for an exception.<sup>128</sup> Its mandated admission of convictions is a good indication that the Rule is expressing what is actually a normative judgment. The structure of 609(a)(2) thus suggests a logic of desert, in contrast to the standard principles of relevance in both common law and the Federal Rules.<sup>129</sup>

Once framed as a forfeiture principle, the structure of the Rule makes more sense: a person who has committed a crime of dishonesty is deemed to have forfeited a certain kind of right—the right to be treated as a presumptively competent witness. The D.C. Circuit, for example, gave this view emphatic approval in *United States v. Lipscomb*:

[C]onvicted felons are *not* generally permitted to stand pristine before a jury with the same credibility as that of a Mother Superior. Fairness is not a one-way street and in the search for truth it is a legitimate concern that one who testifies should not be allowed to appear as credible when his criminal record of major crimes suggests that he is not.<sup>130</sup>

Understood this way, 609(a)(2) mirrors other places in the Rules where a party may forfeit the right to object to the admission of certain kinds of evidence. The most general example of this is found in the "whole document rule," which requires that if a party introduces only part of a document into evidence, other parts of the document must be allowed into evidence as well where fairness dictates.<sup>131</sup> There are also two closer parallels: if a defendant in a criminal case offers evidence that she has a certain trait, the prosecutor

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126. FED. R. EVID. 403.

127. FED. R. EVID. 802, 804, 807.

128. This is the default structure of the Rules as a whole. See Mnookin, *supra* note 3, at 1552.

129. See *Old Chief v. United States*, 519 U.S. 172, 180 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."); *Michelson v. United States*, 335 U.S. 469, 475–76 (1948) ("[Inquiry into character] is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."); *United States v. Moccia*, 681 F.2d 61, 63 (1st Cir. 1982) ("Although . . . 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance.").

130. 702 F.2d 1049, 1077 (D.C. Cir. 1983).

131. FED. R. EVID. 106.



is then allowed to present evidence that calls the defendant's claim into question;<sup>132</sup> also, in sex-offense cases, a victim arguing that the defendant acted nonconsensually opens the door to otherwise inadmissible evidence of past sexual behavior with the defendant.<sup>133</sup> Both examples have a common feature: where a party chooses to argue "I would never . . .," it becomes the prerogative of the opposing party to call that claim into question. Seen in this way, Rule 609 is another instance of the general principle that a party is allowed to present the kind of evidence necessary to rebut a claim introduced by the opposing party, even where such evidence would not normally be allowed.<sup>134</sup>

The forfeiture theory of Rule 609(a)(2) resolves only some of the issues raised in Part II. It makes the structure of the Rule more intuitive and satisfies the objections made above about the Rule's errors in probabilistic reasoning.<sup>135</sup> But a forfeiture reading does not resolve objections regarding the scope of the category of crimes of dishonesty. Thus, the forfeiture theory obviates the concern that mandatory admissibility is inconsistent with sound evidentiary principles, while leaving intact both the worry that (a)(2) is keyed to a conceptually hazy taxonomy and the concern that the notion of a character for honesty is theoretically dubious.<sup>136</sup> There is, finally, the overarching question of whether the forfeiture theory underwriting (a)(2) is itself just.<sup>137</sup>

### B. *Evidentiary Rules as Normative Judgments*

A useful framework for evaluating a rule like 609(a)(2) takes the Rules as not only articulations of purely evidentiary standards but also expressions of a more general social ethos. David Leonard, for example, argues that when we find a misalignment between the justification and substance of evidentiary rules, that is an indication that the rules are playing a *cathartic* role.<sup>138</sup> Catharsis, Leonard suggests, "is an emotional response, hinging on our sense of satisfaction with the processes of the court."<sup>139</sup> This satisfaction turns on a belief in the rationality of the Rules that is "as much a function of what the society accepts as valid as they are a mirror of developing scientific theo-

132. FED. R. EVID. 404(a)(2)(A).

133. FED. R. EVID. 412(b)(1)(B).

134. A witness's swearing their oath before taking the stand serves as a kind of "I would never . . ." claim that the opposing party is permitted to rebut. A past commercial-fraud conviction serves to rebut this implicit claim only with the aid of the inferential leap that to be the sort of person who commits fraud is to be the sort of person who lies on the stand. A past perjury conviction requires no such premise—it is, plausibly, directly in tension with the witness's present oath to be truthful.

135. See *supra* Section II.A.

136. See *supra* Section II.B.

137. See *infra* Section III.D.

138. Leonard, *supra* note 38, at 61.

139. *Id.* at 41.

ry.”<sup>140</sup> In other words, the Rules can be understood as codifying not the most rigorously honed principles of evidentiary fitness but instead the kinds of guidelines liable to strike people as intuitively correct. On this view, if it seems fitting and appropriate that a certain class of convicts be constrained when serving as witnesses, then that intuitive sense may override strict attention to the kinds of considerations outlined in Part II.

Similarly, Sherman Clark argues that the Rules must be understood in part as carrying out a kind of “social function” through which “we as a community take responsibility for—own up to—inherently problematic judgments regarding the blameworthiness or culpability of our fellow citizens.”<sup>141</sup> Particular evidentiary rules, on this view, may sometimes best be understood as reflections of certain social values.<sup>142</sup> Such “social meaning[s],” he notes, cannot readily be demonstrated and are instead at best something that can be inferred from reflection on the form and content of procedural rules as they develop over time.<sup>143</sup> Together, Clark and Leonard offer a way of understanding how and why 609(a)(2) is structured as it is, and for thinking through the question of whether the Rule in its present form is satisfactory.

### C. A Restructured Rule 609?

Even assessed under a forfeiture theory, section (a)(2)’s scope is too broad. The anomalous categorical treatment of crimes of dishonesty in Rule 609(a)(2) contrasts with a broad array of escape devices and balancing tests that appear throughout the Rules.<sup>144</sup> This contrast violates the principle that like cases should be treated alike, “a central element in the idea of justice.”<sup>145</sup>

A better Rule 609 would retain section (a)(1)’s use of a balancing test for admitting felonies while also expanding its scope to include misdemeanor convictions for crimes of dishonesty. While this would not resolve problems related to the coherence of the category of crimes of dishonesty, allowing judges discretion would avoid the most egregious applications of the Rule. Section (a)(2) could then be given a substantially narrower scope, including only convictions for perjury and obstruction of justice. The justification for the limitation of (a)(2) to these two crimes is consistent with the principle of forfeiture.<sup>146</sup>

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140. *Id.*

141. Clark, *supra* note 74, at 2381–82.

142. See, e.g., Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258, 1259 (2003) (arguing that the Confrontation Clause is as much as an expression of social value as a judgment of evidentiary worth).

143. *Id.* at 1263.

144. See *supra* note 125 and accompanying text.

145. H.L.A. HART, *THE CONCEPT OF LAW* 155 (1961).

146. See *supra* Section III.A.

This revised version of Rule 609 does not resolve worries about the *fairness* of the categorical-admissibility provision of section (a)(2), but it does make the category of crimes to which the provision applies more principled. There is at least a colorable argument that someone who has committed perjury or obstructed justice should in fairness be barred from presenting themselves to a jury as being deserving of trust. It is no great inferential leap to think that someone who has committed perjury in the past might do so again. This is different from the kind of inferential leap that Section II.B argued was illicit. There the contested inference was from a witness's having committed some past criminal act—say, lying on a tax return—to the supposition that because the person had in one context violated one norm, she could not be trusted in this context not to violate the prohibition against lying on the stand. This reasoning relies on an inference from a particular act to the conclusion that the person who committed that act must therefore be a certain kind of person. The revised Rule 609 this Section proposes does not license this inference but rather treats a convicted perjurer's oath to speak the truth with presumptive skepticism given that he is known to have broken that same oath in the past.

The modifications proposed here would still allow for the operation of a forfeiture principle, but with a much more limited domain: only a person who had committed perjury or obstruction of justice would be subject to the mandatory admissibility of that conviction as is presently the case under Rule 609(a)(2). This narrower version of section (a)(2) thus escapes the most problematic of the objections outlined above.

#### D. *Forfeiture as Proxy and Punishment*

What remains is the question of the justness of Rule 609(a)(2)'s implicit forfeiture principle. This Section concludes that what differentiates section (a)(2) from several other forfeiture principles in the Rules of Evidence is its peculiarly human cost. The Whole Document Rule, for example, entails that a party forfeits their procedural right to keep a portion of a document out of evidence if they have entered a misleading excerpt of that same document into evidence.<sup>147</sup> By contrast, section (a)(2) does not merely entail forfeiture of a procedural right—it also means that the witness is treated by the legal system as a fundamentally unequal participant on the basis of conduct external to the proceedings. The witness impeached under section (a)(2) is branded with the state-sanctioned designation that they are a liar, even for crimes for which they have already carried out their sentences. This is a kind of forfeiture that follows the person no matter the context of the trial in which they participate.

Rule 609(a)(2)'s mechanistic approach devalues the perspectives and perceptions of the particular individuals presenting themselves as witnesses in favor of a sterile, rule-oriented determination as to the competence of

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147. See *supra* note 131 and accompanying text.

would-be witnesses on the basis of whether they have run afoul of the legal system in some ill-defined way.<sup>148</sup> Moreover, Rule 609(a)(2)'s formal character belies a messy reality and presents as a sober deduction a principle that is in fact a mere manifestation of prejudice.<sup>149</sup> It does not follow from the presentation of impeaching evidence that anything in particular is true or false; it is merely a legally licensed way for trial proceedings to affect a juror's perceptions of some of the persons involved. This is done under the guise of a "fundamental concern" for factual accuracy—a concern which "has done little more than confer on judges vast powers that have been used to deny some parties the right to tell their own stories."<sup>150</sup>

The idea that certain kinds of convictions merit a loss of some basic rights sits uncomfortably with the otherwise consistent trajectory toward a democratization of witness-competence rules. These competence rules served as a means of controlling the evidence brought before a jury<sup>151</sup> but were also used as a way of demoting some people to a second tier of citizenship and ensuring that certain parties and interests were favored over others.<sup>152</sup> Over time, the rules of witness competency have grown substantially more equitable. The sole default requirement for competency is personal knowledge of the events regarding which the witness is offering testimony.<sup>153</sup> In light of these developments, a residual adherence to the idea that those convicted of certain kinds of crimes ought to be effectively silenced in legal proceedings raises serious questions of basic procedural justice.

Rule 609(a)(2) also naturally lends itself to comparison with felon-disenfranchisement laws. This Note has argued that Rule 609(a)(2) is unjustifiable on evidentiary grounds, and therefore is indefensible as a purely regulatory measure.<sup>154</sup> But the Rule also fares poorly when treated as a

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148. See Kenneth W. Graham, Jr., "There'll Always Be an England": *The Instrumental Ideology of Evidence*, 85 MICH. L. REV. 1204 (1987) (book review). This sterility, Kenneth Graham argues, belies a dogma: that the law of evidence can be made into a science. Under this ideology, a fancifully formalistic method of determining what goes in and what stays out of a trial papers over a miasma of prejudice and undefended and implausible assumptions. The formalism of Anglo-American evidence law thus represents "not the cleansing of values and the elimination of politics . . . but rather the embedding of a particular set of politico-ethical values within the very definition of procedure." *Id.* at 1213–14.

149. See *supra* Sections II.A, II.B.

150. Graham, *supra* note 148, at 1233. See generally Natapoff, *supra* note 5.

151. See, e.g., *Rosen v. United States*, 245 U.S. 467, 470–71 (1918) ("[T]he truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court.").

152. See, e.g., *People v. Hall*, 4 Cal. 399 (1854) (affirming the legitimacy of California's Act Concerning Crime and Punishment and categorizing Chinese immigrants as "black" and therefore ineligible to serve as witnesses against a white defendant).

153. FED. R. EVID. 601, 602.

154. Cf. Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1150–56 (2004) (distinguishing

punishment for the convictions to which it applies, because it lacks the proportionality and procedural safeguards that are commonly taken to be prerequisite to just punishment.<sup>155</sup> Witness impeachment does not plausibly serve the functions of deterrence or rehabilitation; if it is a kind of punishment, then it is best understood as merely retributive punishment. Rule 609(a)(2) thus also incurs one of the central objections to felon-disenfranchisement laws: that it is fundamentally unprincipled, more reflective of prejudice than reason.<sup>156</sup> It should be eliminated.

#### CONCLUSION

Rule 609(a)(2) relies on a set of premises to license an inference from a witness's past conviction to her intrinsically dishonest character. These premises are implausible, the inference relying on them is unsound, and the mandatory admissibility of the kind of convictions at issue stands against many of the most basic principles guiding the Federal Rules. Issues with the structure of Rule 609(a)(2) have also led to its inconsistent and unprincipled application. The Rule thus faces both theoretical and empirical challenges to its coherence, administrability, and fairness.

One possibility for remedying the issues with Rule 609(a)(2) lies in recognizing its underlying forfeiture logic, and correspondingly modifying the Rule so as to align its substance with its rationale by limiting mandatory admissibility to a much narrower and more targeted class of crimes of dishonesty: perjury and obstruction of justice. Though this resolution would escape many of the objections outlined in this Note, it would also dodge the fundamental question at issue: whether it is just for people's ability to give unprejudiced testimony to be subject to forfeiture on the basis of a poorly constructed rule that tracks a gerrymandered category of offense. Given the ways in which convictions for such offenses become proxies for the convict's social status, a forfeiture-based rule of admissibility turns out to be nothing more than punishment masquerading as an evidentiary principle. It is no service to justice to mark some witnesses as presumptively illegitimate participants on the basis of such a rule.

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between regulatory and penal measures and arguing that felon-disenfranchisement laws are best understood as punitive).

155. See, e.g., *Weems v. United States*, 217 U.S. 349, 349–50 (1910) (describing as “a precept of justice” that punishment should be “graduated and proportioned to the offense”).

156. See, e.g., Karlan, *supra* note 154, at 1166–70; Brent Staples, Opinion, *The Racist Origins of Felon Disenfranchisement*, N.Y. TIMES (Nov. 18, 2014), <https://www.nytimes.com/2014/11/19/opinion/the-racist-origins-of-felon-disenfranchisement.html> [<https://perma.cc/4ZGS-M8TR>] (noting the history of the use of taxonomies of crimes to create laws that selectively disenfranchise minority voters); Matt S. Whitt, *Felon Disenfranchisement and Democratic Legitimacy*, 43 SOC. THEORY & PRAC. 283 (2017) (providing an overview of criticisms of felon-disenfranchisement laws).