VICTIMS UNDER ATTACK: NORTH CAROLINA'S FLAWED RULE 609*

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Evidence law in North Carolina senselessly punishes victims of domestic and sexual violence by broadly sanctioning witness impeachment with prior convictions—no matter the implicit prejudice to the witness or how little the conviction bears on credibility. The North Carolina approach is an outlier. Under Rule 609 of the Federal Rules of Evidence, the use of conviction evidence for impeaching witness credibility is confined to felonies and crimes involving dishonest acts or false statements. Their use must also satisfy judicial balancing tests aimed at protecting against unfair prejudice to the witness. The majority of states take a similar or even more restrictive approach. North Carolina's corresponding rule, however, casts a far wider net. It broadly permits parties to impeach witnesses with an array of convictions, including innocuous misdemeanors, and affords no judicial discretion to protect the witness or weigh the potential for juror misuse. The implications are unavoidable. For survivors of domestic and sexual violence, the state's approach to conviction-based impeachment can be especially devastating.

This Article explores one of the most controversial rules of evidence—impeaching a witness with her prior convictions—through the lens of North Carolina's broad impeachment rule. The impact of the rule can no longer be ignored, and this Article argues that change is long overdue. This Article discusses the genesis of conviction-based impeachment and its modern usage. It spotlights how the North Carolina rule enables trial lawyers to levy a barrage of questions at a witness to suggest overtly that the witness is a liar while covertly implying the witness is a person of untoward character. By exposing the rule's impact on victims, particularly

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sexual assault and domestic violence survivors, the Article reveals how impeachment by prior-conviction evidence in North Carolina is used as a pretext for improperly assailing a witness's character. The Article concludes by proposing statutory reforms to limit prior-conviction evidence to its proper purpose while halting the abuses currently sanctioned by the rule.

INTRODUCTION

American jurisprudence is founded on the adversarial system.[1] Civil and criminal trials are waged throughout the nation as a contest between

1. *See* Maryland v. Craig, 497 U.S. 836, 846 (1990) (noting "rigorous adversarial testing" is the "norm of Anglo-American criminal proceedings"); Hickman v. Taylor, 329 U.S. 495, 516 (1947) (Jackson, J., concurring) ("[A] common law trial is and always should be an adversary proceeding."); Stephan A. Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 716 (1983) (chronicling the history of the adversarial system and

two opposing sides.[2] Within this arena, people are haled forth into the contest as witnesses.[3] Their testimony is public, under oath, and exposed to the piercing gaze of the fact-finder.[4] They offer their accounts under the direction of the party who called them to testify. And then cross-examination begins. Witnesses are probed; their biases, relationships, education, perception, demeanor, motives, and more are openly scrutinized.[5] The most controversial tactic within the cross-examination arsenal involves subjecting a witness to questions about her[6] past criminal convictions to imply that now, although removed in time from her former misdeeds, she must be lying on the stand.[7]

Evidentiary rules permitting witness credibility to be impeached with prior-conviction evidence are easily the most criticized within the adversarial system, with scholars and commentators urging reform for

describing the modern adversarial trial process as "highly competitive" and "tend[ing] to promote a win-at-any-cost attitude").

2. United States v. Cronic, 466 U.S. 648, 657 (1984) (describing the trial process envisioned by the Sixth Amendment as a "confrontation between adversaries"). Unquestionably, significant strides are being made in alternative, non-adversarial-based dispute resolution and restorative justice programs in the civil and criminal system. *See* Hadgar Dancig-Rosenberg & Tali Gal, *Restorative Criminal Justice*, 34 CARDOZO L. REV. 2313, 2321 (2013) (noting that "the restorative process is not adversarial" because offenders must take responsibility for their offenses before engaging with victims to address the harm caused); Timothy R. Rice, *Restoring Justice: Purging Evil From Federal Rule of Evidence 609*, 89 TEMP. L. REV. 683, 696–700 (2017) (observing the impact of restorative justice and reentry programs on the traditional adversarial process and how impeachment by prior conviction undermines these efforts). At its core, however, the American justice system is adversarial, particularly in the criminal justice system. *See, e.g.*, Edmonson v. Leesville Concrete Co., 500 U.S. 614, 641 (1991) (O'Connor, J., dissenting) ("Trials in this country are adversarial proceedings."); Wolff v. McDonnell, 418 U.S. 539, 563 (1974) ("[A]dversary proceedings [are] typical of the criminal trial . . . .").

3. Old Chief v. United States, 519 U.S. 172, 187 (1997) (illustrating a trial as a "colorful story with descriptive richness," the narratives of which are told through witnesses).

4. California v. Green, 399 U.S. 149, 157–58 (1970) (detailing the importance of the oath, cross-examination, and demeanor evidence to the truth-finding process for the fact finder).

5. *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 61 (2004) (describing the adversarial method of testing witness testimony as the "crucible of cross-examination"); Davis v. Alaska, 415 U.S. 308, 316 (1974) (noting that a less general and more specific "attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness").

6. The feminine pronoun is used throughout because this Article focuses on the impact that conviction-based impeachment has on victims of sexual and domestic violence. These victims are overwhelmingly female, *see Statistics*, NAT'L COALITION AGAINST DOMESTIC VIOLENCE, https://ncadv.org/statistics [https://perma.cc/S229-PH8L].

7. Montré D. Carodine, *"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 524 (2009) (noting that the federal rule admitting prior-conviction evidence to impeach a witness "is one of the most controversial, if not *the* most controversial of all of the rules of evidence"); Ric Simmons, *An Empirical Study of Rule 609 and Suggestions for Practical Reform*, 59 B.C. L. REV. 993, 995 (2018) (observing that the federal rule permitting impeachment by prior conviction "is perhaps the most maligned of any Federal Rule of Evidence").

decades.[8] The vast majority of this criticism has focused on Rule 609 of the Federal Rules of Evidence[9] and its detrimental impact on the criminally accused.[10] Less criticism has been directed at state rules permitting witness impeachment with prior convictions, despite the fact that most trials occur at the state, not federal, level.[11] Even fewer critiques focus on the impact on victim-witnesses who are subjected to impeachment with their prior convictions.[12] This Article seeks to fill that gap by focusing specifically on

8. As Ric Simmons observes, the critiques are "too numerous to list" in a single footnote. Simmons, *supra* note 7, at 995 n.1. Scholarly critiques have been varied. *See, e.g.*, Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 415–24 (2018) [hereinafter Bellin, *Silence Penalty*] (demonstrating through empirical data the detrimental impact of impeachment with prior-conviction evidence on the accused and the silencing effect such rules have on defendants); Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants With Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 289–90 (2008) [hereinafter Bellin, *Circumventing Congress*] (arguing for judicial reform to the balancing factors courts utilize when considering impeachment by conviction evidence under Rule 609); John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 477 (2008) (arguing for strict limitations on impeaching accused persons with conviction evidence based on empirical evidence showing the silencing effect on innocent defendants); Carodine, *supra* note 7, at 521 (critiquing racial bias within the criminal justice system and the perpetually unreliable convictions that result from employing impeachment by prior conviction); Gene R. Nichol, Jr., *Prior Crime Impeachment of Criminal Defendants: A Constitutional Analysis of Rule 609*, 82 W. VA. L. REV. 391, 409–21 (1980) (arguing Rule 609 violates due process and fair trial constitutional guarantees when applied to the accused); Rice *supra* note 2, at 683–89 (criticizing Rule 609(a) as punitive, stigmatizing, and counter to modern restorative justice approaches to criminal justice); Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 1992–2001, 2018–36 (2016) [hereinafter Roberts, *Impeachment*] (analyzing the flaws perpetuating impeachment by conviction evidence and arguing for reform based on progressive state approaches); Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563, 563–66 (2014) [hereinafter Roberts, *Unreliable Conviction*] (arguing prior convictions must be scrutinized for reliable culpability before consideration as viable impeachment evidence); 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, 835 (2016) [hereinafter Roberts, *Implicit Stereotyping*] (arguing implicit bias and juror stereotyping is perpetuated by judicial standards tending to admit prior convictions for impeaching testifying defendants which tends to silence critical testimony from the accused);.

9. FED. R. EVID. 609.

10. *See, e.g.*, Blume, *supra* note 8, at 477–80; Carodine, *supra* note 7, at 521; James H. Gold, *Sanitizing Prior Impeachment Evidence to Reduce Its Prejudicial Effects*, 27 ARIZ. L. REV. 691, 691–93 (1985); Nichol, *supra* note 8, at 391–95; Rice, *supra* note 2, at 683–89; Roberts, *Impeachment*, *supra* note 8, at 1977–82; Roberts, *Implicit Stereotyping*, *supra* note 8, at 836–40; Roberts, *Unreliable Conviction*, *supra* note 8, at 563–66.

11. *See, e.g.*, Dannye R. Holley, *Judicial Anarchy: The Admission of Convictions to Impeach: State Supreme Courts' Interpretative Standards, 1990-2004*, 2007 MICH. ST. L. REV. 307, 311–15; Ted Sampsell-Jones, *Minnesota's Distortion of Rule 609*, 31 HAMLINE L. REV. 405, 425 (2008); Jeff Welty, *Overcriminalization in North Carolina*, 92 N.C. L. REV. 1935, 1937 (2014) ("[T]he vast majority of criminal prosecutions in the United States happen in state courts.").

12. Several factors may contribute to the lack of victim focus in this area. First, courts may be more lenient in excluding victims' prior convictions when applying balancing tests that gauge

how this impeachment issue is addressed in North Carolina, a state whose evidentiary rules sanctioning witness impeachment with prior criminal convictions rank among the harshest in the nation to victim-witnesses—vastly exceeding federal standards and the overwhelming number of sister states.[13] As this Article demonstrates, the critiques aimed at narrower impeachment standards are amplified when applied to North Carolina's regressive rule that, among its other effects, chills testimony[14] and tends to promote wrongful convictions,[15] racial bias,[16] explicit and implicit stereotyping,[17] and victim blaming.[18]

In theory, prior-conviction evidence is admissible for the single, limited purpose of questioning whether the testifying witness may now be lying given that she was previously convicted of a crime.[19] The evidence is said to be inadmissible for the more obvious suggestion that the witness has a general character bent on criminality, particularly when the witness is the

the viability of the evidence as indicators of untruthfulness against the harm and prejudice that may come from admitting victim convictions. Second, because the prosecution cannot appeal acquittals, fewer records of judicial decisions concerning victim prior convictions may be available. Third, the likelihood of juror misuse and the life and liberty interest impacting the accused has tended to focus attention more on criminal defendants than victims or lay witnesses.

13. *See* N.C. R. EVID. 609; *infra* Part II.

14. State v. Lamb, 321 N.C. 633, 648, 365 S.E.2d 600, 608 (1988) (recognizing the "chilling" impact of prior criminal activity on a defendant's decision to testify); State v. Perkins, 235 N.C. App. 425, 763 S.E.2d 928, 2014 WL 3824261, at *3 (2014) (unpublished table decision) (holding the defendant failed to preserve for appeal his claim that the trial court's ruling allowing conviction impeachment evidence chilled his decision to testify because the defendant did not testify); *see also* Bellin, *Silence Penalty*, *supra* note 8, at 430; *infra* Section III.C.

15. State v. Cotton, 99 N.C. App. 615, 618–19, 394 S.E.2d 456, 458 (1990); Bellin, *Silence Penalty*, *supra* note 8, at 398–99 (detailing the story of Ronald Cotton, a North Carolina man famed for being exonerated by DNA evidence, who was impeached with his prior convictions when he testified to his innocence and observing that "[o]nce a jury learns of a defendant's record, it is more likely to convict"); *see also* Blume, *supra* note 8, at 477–80. *See generally* Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353 (2009) (utilizing empirical evidence to reveal the impact of prior-conviction evidence on a jury's decision to convict in close cases, where the concern for erroneous convictions is greatest).

16. Carodine, *supra* note 7, at 521.

17. Eisenberg & Hans, *supra* note 15, at 1387 (discussing the "negative halo effect" of a prior conviction causing jurors to be unsympathetic toward the defendant); Roberts, *Implicit Stereotyping*, *supra* note 8, at 836–40.

18. *See infra* Section III.A.

19. This presumption has long been criticized as inaccurate and based on a faulty premise. *See generally* 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 (2009) (chronicling and debunking the psychological assumptions on predictive human behavior on which impeachment by prior criminal conviction is based). Recent empirical findings also reveal that jurors do not view prior criminal records as affecting defendant credibility. Eisenberg & Hans, *supra* note 15, at 1353.

defendant.[20] Limiting instructions given by presiding judges to jurors attempt to confine prior-conviction evidence to its narrow, admissible impeachment purpose.[21] The rule wishfully assumes jurors will intellectually compartmentalize the evidence to mere witness credibility and not a propensity to engage in deviant behavior.[22]

Despite such doctrinal platitudes, jurors invariably use prior convictions as evidence of a defendant-witness's guilt and may deem victim-witnesses not just untrustworthy, but as lesser human beings unworthy of protection.[23] The deleterious consequences reverberating from impeachment by prior conviction are inescapable. Jurors are strongly inclined to punish the witnesses for their prior crimes, leading some witnesses to forgo testifying entirely.[24] The rule also effectively promotes negative stereotypes among jurors about victims of sexual assault and domestic violence while enabling the revictimization of victim-witnesses who brave testifying.[25]

North Carolina's rule allowing broad, conviction-based impeachment differs little from the century-old assumption that once a criminal, always a liar.[26] In North Carolina, any witness may be impeached with prior

20. State v. Ross, 329 N.C. 108, 119, 405 S.E.2d 158, 165 (1991) ("[I]t is important to remember that the only legitimate purpose for introducing evidence of past convictions is to *impeach the witness's credibility*."); State v. Wilkerson, 148 N.C. App. 310, 320–21, 559 S.E.2d 5, 12 (2002) (Wynn, J., dissenting), *rev'd per curiam*, 356 N.C. 418, 571 S.E.2d 583 (2002) (relying on Judge Wynn's dissent to reverse the lower court).

21. *See, e.g.*, United States v. Redditt, 381 F.3d 597, 601 (7th Cir. 2004) (noting that the trial court instructed the jury to limit the use of the defendant's prior criminal convictions to the issue of credibility only and concluding, generally, that evidentiary errors from the admission of prior-conviction evidence are considered "harmless if the court provides a curative instruction").

22. United States v. Lipscomb, 702 F.2d 1049, 1062 (D.C. Cir. 1983) ("The jury is told to consider the defendant's prior conviction only on the issue of credibility and not on the overall issue of guilt. But limiting instructions of this type require the jury to perform 'a mental gymnastic which is beyond, not only their powers, but anybody's else [sic].'" (quoting Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932) (Hand, J.))); Roberts, *Impeachment*, *supra* note 8, at 1998 (observing that no empirical evidence supports the concept that jurors are able to "partition their brains" to limit the use of prior-conviction evidence); Simmons, *supra* note 7, at 1014 ("[T]hese instructions have a limited effect.").

23. *See* Irving Younger, *Three Essays on Character and Credibility Under the Federal Rules of Evidence*, 5 HOFSTRA L. REV. 7, 10 (1976) (noting that "[d]octrinal purity then becomes doctrinal corruption" when one recognizes how, theoretically, prior convictions are conceived for use in evaluating witness credibility yet, practically, are used by jurors for the prohibited purpose of evincing the witness's character for criminality). Recent empirical evidence supports this conclusion. *See* Eisenberg & Hans, *supra* note 15, at 1387–89; *see also infra* Section III.A.

24. *See, e.g.*, Bellin, *Silence Penalty*, *supra* note 8, at 400; Blume, *supra* note 8, at 479 (finding that the *primary reason* exonerated innocent defendants did not testify was "the fear of impeachment with their prior convictions."); *see also infra* Section III.C.

25. *See infra* Sections III.A–III.B.

26. At common law, a witness testifying in North Carolina state courts would be subject to impeachment with any and all prior convictions, no matter the type of infraction or how remote in time. Ingle v. Roy Stone Transfer Corp., 271 N.C. 276, 279–81, 156 S.E.2d 265, 268–69 (1967);

convictions ranging from the most violent felonies to common misdemeanors.[27] Unlike the federal rule, which carves out standards for courts to exclude certain criminal convictions of witnesses,[28] including victims, the text of North Carolina Rule of Evidence 609(a) offers no judicial oversight.[29] Moreover, the North Carolina rule fails to distinguish between convictions for felonies, crimes involving dishonesty, and those bearing little or no relationship to veracity whatsoever.[30] A witness can be impeached as a liar for misdemeanor convictions involving injury to personal property or the unauthorized use of a motor vehicle just as vigorously as she can be impeached by felony convictions for embezzlement or perjury.[31]

Further exacerbating the negative impact of North Carolina Rule 609, the state's highest court has declared itself powerless to exclude prior-conviction evidence no matter how extreme the prejudice.[32] The Supreme Court of North Carolina rejected any suggestion that a trial court has

State v. Griffin, 201 N.C. 541, 542–43, 160 S.E. 826, 827 (1931). Today's rule remains largely the same in both form and application. Most convictions within ten years prior to the witness testifying are available to impeach the witness's credibility. N.C. R. EVID. 609(b). More remote convictions are subjected to a strict balancing test. *Id.* However, in application, trial and appellate courts have readily allowed stale convictions, thus making the effect of the rule little different than its common law antecedent. *See, e.g.*, State v. Ross, 329 N.C. 108, 116–19, 405 S.E.2d 158, 163–65 (1991) (finding harmless error in the trial court's decision to admit a nineteen-year-old conviction for sodomy); State v. Joyner, 243 N.C. App. 644, 650, 777 S.E.2d 332, 337 (2015) (finding no error in the trial court's decision to admit five prior convictions, the most recent of which was fourteen years prior, despite the trial court's findings when weighing Rule 609(b) factors).

27. *See* N.C. R. EVID. 609(a); *see also infra* Part II.

28. FED. R. EVID. 609.

29. N.C. R. EVID. 609(a). As currently enacted, North Carolina Rule of Evidence 609(a) states:

> (a) General rule.—For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter.

Id.

30. *Id.* The Federal Rule of Evidence limits prior-conviction evidence to felonies and crimes wherein the elements require proof of "a dishonest act or false statement." FED. R. EVID. 609(a). *See also* 1 KENNETH S. BROUN, RICHARD E. MYERS & JONATHAN E. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 98 (8th ed. 2018) ("Like pre-Rule case law, [North Carolina Rule 609] does not require that the crime have a rational relevance to untruthfulness . . . .").

31. *See* N.C. R. EVID. 609(a); *see also* N.C. GEN. STAT. § 14-72.2 (2017) (categorizing unauthorized use of a motor vehicle as punishable as a Class 1 misdemeanor); *id.* § 14-160 (categorizing willful and wanton injury to personal property as punishable as a Class 2 misdemeanor if damage is less than $200 and punishable as a Class 1 misdemeanor if damage exceeds $200).

32. State v. Brown, 357 N.C. 382, 389, 584 S.E.2d 278, 283 (2003).

discretion to exclude prior-conviction evidence when offered for impeachment, describing the language of Rule 609 as "mandatory."[33] And a recent decision from the North Carolina Court of Appeals appears to preclude any argument that the rule's imposition "chills" testimony.[34] While some states have abolished or greatly curtailed impeachment by prior conviction, or at least provide judicial discretion to protect witnesses, North Carolina has steadfastly maintained a hard line.[35] Even as the federal rule has been amended over the years to protect victims and other witnesses against unfair prejudice,[36] North Carolina's rule has not.[37]

As this Article exposes, the regressive nature of North Carolina's rule deters and demeans victims of domestic and sexual violence who have committed even modest criminal misdeeds. As currently codified and interpreted in North Carolina, impeachment with conviction evidence is broadly permissive—it need not bear any relationship to untruthfulness, cannot be excluded by the trial court no matter the detrimental impact on the victim, exposes the jury to the facts and types of convictions while hoping the jury will limit its use, and widely affords trial counsel the opportunity to inject trait-based character presumptions into the trial. This Article reveals how such a boundless evidentiary rule paves an unobstructed road for defense counsel to attack a victim's personal character as one of questionable repute when she takes the witness stand. By exposing the rule's impact on victim-witnesses, this Article demonstrates how impeachment with prior-conviction evidence may be used as a pretext for improperly assailing a witness's character.

This Article calls for reforming North Carolina Rule of Evidence 609 to halt the abuses that it currently endorses which senselessly punish survivors. Part I examines the history of impeaching witness credibility with prior-conviction evidence, as well as the underlying premises supporting the practice. Part II contrasts North Carolina's broad approach with those of other jurisdictions and then critically examines its breadth and application. Part III explores the impact of prior-conviction impeachment on survivors of sexual and domestic violence to reveal the systemic flaws

33. *Id.* ("The language of Rule 609(a) ('shall be admitted') is mandatory, *leaving no room for the trial court's discretion*." (emphasis added)).

34. State v. Perkins, 235 N.C. App. 425, 763 S.E.2d 928, 2014 WL 3824261, at *3 (2014) (unpublished table decision).

35. N.C. R. EVID. 609; Roberts, *Impeachment*, *supra* note 8, at 2018–32 (highlighting Kansas, Hawaii, and Montana as states that have restricted or abolished prior-conviction evidence to protect against misuse and abuse).

36. *See infra* notes 119–25 and accompanying text.

37. *Brown*, 357 N.C. at 390, 584 S.E.2d at 283 ("[T]he official comments to Rule 609(a) reveal an *unequivocal* intention to diverge from the federal requirement of a balancing test." (emphasis added) (citing N.C. R. EVID. 609 cmt.)).

in North Carolina's rigid rule. Part IV then proposes a revised Rule 609 aimed at curtailing the abuse and misuse of conviction evidence when offered solely for questioning witness credibility.

I. IMPEACHMENT BY PRIOR CONVICTION

Modern rules condoning witness impeachment with prior-conviction evidence trace back several centuries to the wholesale exclusion of witnesses who had been previously convicted of "infamous" crimes.[38] Over time, the categorical exclusion of witness testimony eventually gave way to practical evidentiary concerns and the need for substantive proof.[39] As detailed below, the evolution from strict witness exclusion to broad witness impeachment has raised substantive concerns in today's trial practice that bear on due process and fair trial principles.

A. Origins of Conviction-Based Impeachment

Impeaching witnesses with prior-conviction evidence is rooted in the ancient English common law tradition of disqualifying felons from testifying.[40] Disqualification by prior conviction originated as a consequence of attainder for committing an offense punishable by death.[41] The capital offender lost all proprietary and personal rights, including any notion that such a depraved person could ever again be trusted as a credible witness.[42] The severity of the crime deemed the guilty to be wholly without credit, his reputation permanently stained by the heinous nature of his

38. 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, 1105 (2000) (noting that the exclusion of convicted persons from testifying dates back to at least the seventeenth century).

39. FED. R. EVID. 601 advisory committee's note. The categorical exclusion of witnesses with criminal convictions penalized innocent defendants who needed exculpatory witness testimony. 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 601 app. 102, at 10–12 (Mark S. Brodin & Joseph M. McLaughlin eds., Matthew Bender 2d ed. 2019). State and federal rules declaring witnesses with prior convictions incompetent were eventually abandoned by the mid-twentieth century as irrational and unsound. *Id.*; *see also* Rosen v. United States, 245 U.S. 467, 471 (1918).

40. 4 WILLIAM BLACKSTONE, COMMENTARIES *380–81. Under English common law, the capital offender lost all proprietary and personal rights by "*forfeiture* and *corruption of blood*" based on the nature of his crime, including the competency to testify as a witness in court. *Id.* at *381 (emphasis added).

41. *Id.* at *380. As a result of his heinous crime, "[t]he criminal was then called attaint, *attinctus*, stained, or blackened" by his offense. *Id.*

42. *Id.* at *380–81; 1 FRANCIS WHARTON, A COMMENTARY ON THE LAW OF EVIDENCE § 397, at 354–55 (Philadelphia, Kay & Brother 1877). In fact, for a period of time, individuals accused of capital crimes were prevented from offering testimony at all. 4 WILLIAM BLACKSTONE, COMMENTARIES *380.

offense.[43] The theory held that a crime rendering a person "unworthy to live" also made him "unworthy of belief."[44] A convicted individual being dead in law, but not yet in fact, possessed neither rights nor reputation.[45] Categorical disqualification was therefore a mere extension of devoid status.

By the seventeenth century, testimonial disqualification expanded to include individuals convicted of "infamous" crimes.[46] Crimes of infamy included treason, felonies, and crimen falsi offenses—broadly categorized as crimes wherein an essential element involves lying or deceit, including perjury, subornation of perjury, forgery, cheating, and the like.[47] As with attainder, the loss of testimonial integrity was concomitant with the conviction itself.[48]

The theory supporting testimonial disqualification evolved along with its expansion. It shifted from one underpinned by the severity of capital punishment to a more generalized presumption about the convicted person's untrustworthiness.[49] Conviction of an infamous crime cast the guilty as mendacious by character.[50] In doing so, the expanding definition of infamous crimes focused on the dishonest nature of the offense.[51]

43. 4 WILLIAM BLACKSTONE, COMMENTARIES *380–81; 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 372, at 417 (Boston, Charles C. Little & James Brown 1842) ("The basis of the rule seems to be, that the witness is morally too corrupt to be trusted to testify.").

44. GREENLEAF, *supra* note 43, § 373, at 418 ("[I]t was very natural, that crimes, deemed of so grave a character as to render the offender unworthy to live, should be considered as rendering him unworthy of belief in a court of justice.").

45. *Id.*

46. 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 519, at 725–26 (Chadbourn rev. 1979) (noting the extension of testimonial disqualification to include crimes of "moral turpitude" by the 1600s).

47. GREENLEAF, *supra* note 43, § 373, at 418 (observing that "the extent and meaning of the term, *crimen falsi*, in our law, is nowhere laid down with precision," but that term's origins in Roman law support "every species of fraud and deceit"); RICHARD NEWCOMBE GRESLEY & CHRISTOPHER ALDERSON CALVERT, A TREATISE ON THE LAW OF EVIDENCE IN THE COURTS OF EQUITY 333 (2d ed. Philadelphia, T. & J. W. Johnson 1848); WHARTON, *supra* note 42, § 397, at 354; 2 WIGMORE, *supra* note 46, § 520, at 729–30.

48. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 511 (1989) (noting that conviction-based disqualification was part and parcel to the punishment itself).

49. 2 WIGMORE, *supra* note 46, § 519, at 726.

50. JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (1827), *as reprinted in* 7 THE WORKS OF JEREMY BENTHAM 406 (John Bowring ed., Edinburgh, Simpkin, Marshal & Co. 1843) ("In the case of mendacity it runs thus: He has violated the obligations of morality not only in other sorts of ways, but in this very sort of way, on former occasions; therefore it is more or less probable that so he will on the occasion now in hand.").

51. WHARTON, *supra* note 42, § 397, at 355 n.1 (1877) ("It is the infamy of the crime, and not the nature . . . of the punishment, that destroys competency."); 2 WIGMORE, *supra* note 46, at 726 (noting the evolution of the theory supporting testimonial exclusion from punishment to a theory of morality where "the person is to be excluded because from such a moral nature it is useless to expect the truth").

Notably, disqualification for infamous crimes derived from an assumption of general character rather than any specific connection to the case, the parties, or other basis for incompetency.[52] The witness was not disqualified because he was unworthy to live. Rather, a presumed "insensibility to the obligation of an oath" for the commission of the infamous crime meant the person was "morally too corrupt to be trusted to testify."[53] While the theory evolved, the effect was the same[54]: individuals guilty of infamous crimes were categorically excluded from testifying.[55] No degree of judicial discretion was permitted; testimonial exclusion was absolute.[56]

American common law perpetuated testimonial disqualification by adopting the theory that dishonest character was a by-product of an infamous-crime conviction.[57] As late as the early twentieth century, the categorical exclusion of convicted persons from testifying in American courts operated as a hard, albeit clear, line;[58] however, it was not without significant penalty to the system of justice that imposed the rule. Rigid witness-disqualification rules created deleterious consequences in both civil and criminal trials where innocent third parties suffered the primary impact through the loss of relevant evidence.[59] As a consequence, the theory

52. GRESLEY & CALVERT, *supra* note 47, at 328–29. In fact, the common law recognized numerous testimonial disqualifications based upon classification of persons and interest in the outcome. *Id.* at 330–32. These included classes of persons deemed to "labour under a general incompetency," including those deemed *non compos mentis*, young children, individuals "not influenced by any religious belief," persons guilty of infamous crimes, and, in the courts of Scotland, women. *Id.* at 331–33. The second basis of incompetency derived from the witness's connection to the case, including testimonial disqualification of parties and persons personally or financially interested in the outcome. *Id.* at 336–37.

53. GREENLEAF, *supra* note 43, § 372, at 417. This same mendacious character theory would perpetuate in American common law centuries later with jurists declaring previously convicted individuals of dubious moral character unworthy of belief. *See* Gertz v. Fitchburg R.R., 137 Mass. 77, 78 (1884) (declaring that prior convictions demonstrate a "general readiness to do evil" which supports "the general proposition that he is of bad character and unworthy of credit").

54. John Leroy Jeffers, Comment, *Witnesses—Removal of Conviction of Felony as a Testimonial Disqualification in Texas*, 10 TEX. L. REV. 87, 87 (1931) ("[T]he theory that such exclusion was an incident to the punishment of the crime being early superseded by the idea that the untrustworthy nature of the testimony was the basis for refusing its admission.").

55. GRESLEY & CALVERT, *supra* note 47, at 333 (describing incompetency by infamy as a "bar to the admission of the evidence of the person marked with it").

56. *Id.*

57. 2 WIGMORE, *supra* note 46, § 519, at 725 (concluding that disqualification by criminal conviction was fully established in American jurisprudence by the end of the 1600s); Jeffers, *supra* note 54, at 87.

58. Ralph R. Wood, Comment, *Infamy as a Testimonial Disqualification*, 2 TEX. L. REV. 227, 228 (1924) (criticizing the categorical disqualification of witnesses convicted of infamous crimes as having "only one virtue, its certainty. It operates on just and unjust alike").

59. 2 WIGMORE, *supra* note 46, § 519, at 726 (noting that "whatever degree the disqualification may have been thought of as part of the punishment of the offender himself, it was obvious that this theory *could not of itself justify the incidental punishment of innocent persons who might need the convict's testimony*" (emphasis added)). The rule's effects were

supporting conviction-based disqualification fell under severe criticism for being "illiberal" and "unnecessary."[60] Among the most strident condemnations came from English philosopher and legal scholar, Jeremy Bentham, who proclaimed:

> Exclusion knows no gradations: blind and brainless, it has but one alternative;—shut or open, like a valve, up or down . . . [b]ut a single transgression of this sort,—what does it prove? . . . [T]hat on one assignable occasion the convict has been known to fall into that sort of transgression, which every human adult must also have fallen into . . . .[61]

Eventually, mounting scholarly criticism and the ongoing loss of probative evidence led England to abolish the rule by statute in 1843.[62] American jurisdictions followed suit in the decades thereafter.[63] By the early twentieth century, most had converted rigid disqualification mandates into rules supporting witness testimony subject to impeachment.[64] In *Rosen v. United States*,[65] the Supreme Court summarized the then-prevailing trend jettisoning conviction-based testimonial disqualification in favor of prior crimes bearing on credibility:

sometimes catastrophic. Percipient witnesses who could offer credible accounts of civil transactions or torts were per se excluded. In criminal trials, for example, jurors never heard testimony from witnesses prepared to offer contradictory accounts to those alleged by the prosecution or alibis supporting the accused. *See generally* Green, *supra* note 38, at 1105–06 (describing how testimonial disqualification "penalize[d] innocent defendants"). A complex series of exceptions and conditions evolved within the common law to account for the loss of otherwise relevant, valuable evidence. *See* BENTHAM, *supra* note 50, at 401–06 (describing a variety of exceptions to the disqualification of parties from testifying, including necessity, facts which none but the party would know, and public necessity).

60. 2 WIGMORE, *supra* note 46, § 488, at 647. *See also* Ferguson v. Georgia, 365 U.S. 570, 575 (1961) ("Broadside assaults upon the entire structure of disqualifications, particularly the disqualification of interest, were launched early in the nineteenth century in both England and America."); Vance v. State, 68 S.W. 37, 42–43 (Ark. 1902) (chastising disqualification by prior conviction as having "no valid reason" that "not only suppress[es] evidence" but operates in such a way that "justice is often thwarted").

61. BENTHAM, *supra* note 50, at 407.

62. An Act for Improving the Law of Evidence 1843, 6 & 7 Vict. c. 85 (Eng.) ("[T]he inquiry after Truth in Courts of Justice is often obstructed by [Incapacities by the present Law, and it is desirable that full Information as to the Facts in Issue, both in Criminal and Civil Cases, should be laid before the Persons who are appointed to decide upon them, and that such Persons should exercise their Judgment on the Credit of the Witnesses adduced and on the Truth of their Testimony . . . .").

63. WHARTON, *supra* note 42, § 567, at 513.

64. 2 WIGMORE, *supra* note 46, § 488, at 647 n.1 (detailing statutory enactments in England and American states from the mid-nineteenth century to the mid-twentieth century eschewing conviction-based witness-disqualification rules in favor of credibility-based impeachment of witnesses with prior convictions).

65. 245 U.S. 467 (1918).

> [T]ruth 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, rather than by rejecting witnesses as incompetent.[66]

The logic espoused in *Rosen* eventually won the day as rules disqualifying previously convicted witnesses from testifying fell in almost every American jurisdiction.[67] Unfortunately, while these rule changes were a victory for parties who needed evidence that could be offered by persons with a criminally-stained past, the impact on those who would now testify would quickly be realized in full force.[68] Today, victims and accused persons are permitted to testify, subject to being impeached with their criminal past. The consequence of permissive impeachment, though, is unavoidable—many choose to remain silent rather than suffer degrading character attacks.[69]

B. Prior Crimes as Evidence of Mendacious Character

The movement favoring impeachment over disqualification was considered one of progressive reform—particularly for criminal defendants previously foreclosed from testifying in their own defense.[70] Progressive change did not, however, come without regressive impact. While the criminally convicted witness could now testify, his credibility was castigated by an open foray into his past crimes.[71] In most states, crimes of any and every sort were available as impeachment fodder without qualification.[72] Justice Holmes summarized the justification for broad

66. *Id.* at 471.

67. Rogers v. Balt. & Ohio R.R., 325 F.2d 134, 137 (6th Cir. 1963).

68. *See, e.g.*, Bellin, *Silence Penalty*, *supra* note 8, at 415–24; Blume, *supra* note 8, at 477; Carodine, *supra* note 7, at 521, 550–52; Roberts, *Impeachment*, *supra* note 8, at 1994–2014; Roberts, *Implicit Stereotyping*, *supra* note 8, at 835; Roberts, *Unreliable Conviction*, *supra* note 8, at 563.

69. WEINSTEIN & BERGER, *supra* note 39, § 609 app. 100, at 18 ("Fear of public degradation may make the possessors of a criminal record reluctant to testify, or even to complain of criminal acts directed against them, to the detriment of the judicial system's interest in obtaining useful testimony."); Bellin, *Silence Penalty*, *supra* note 8, at 398–99.

70. Bellin, *Circumventing Congress*, *supra* note 8, at 297 (noting that witness impeachment with prior-conviction evidence "was a byproduct of a progressive reform that removed rather than added to the obstacles facing convicts (including, of course, many criminal defendants) who sought to testify").

71. 3A WIGMORE, *supra* note 46, § 986, at 861 ("When in the 1800s the disqualification was abolished, the statute sanctioned the use of convictions for all kinds of crimes by way of impeachment.").

72. WHARTON, *supra* note 42, § 567, at 513 (observing that once states revised rules formerly disqualifying criminals from testifying, they begin permitting the witness's record of

impeachment with any prior crime in an 1884 opinion penned for the Massachusetts Supreme Court.[73] He postulated that when "a witness has been convicted of a crime," the "ground for disbelieving him" is afforded by the conviction, which, according to Holmes, reveals in the witness a "general readiness to do evil."[74] Holmes claimed that it is from this "general disposition alone that the jury is asked to infer a *readiness to lie in the particular case*."[75]

The "infamous" crime theory supporting testimonial *disqualification* was thus recast into testimonial *impeachment* theory. American legislatures followed along, transposing the grounds for witness disqualification into grounds for impeaching witness credibility.[76] In doing so, however, they universally failed to analyze the very premise on which Holmes based his theory.[77] Most legislatures, like North Carolina's then and today, blindly assumed a prior criminal offense begat dishonest testimony without considering the crime itself or its correlation to untruthfulness.[78]

More than a century later, Justice Holmes's hypothesis about mendacious character as a derivative of criminal conduct remains firmly entrenched in American law.[79] Under the federal rules, and those in forty-nine states, witness credibility may be challenged with prior-conviction

conviction to "be put in[to] evidence in order to impeach credibility"); 3A WIGMORE, *supra* note 46, § 986, at 861.

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

74. *Id.*

75. *Id.* (emphasis added).

76. *See* Advisory Committee's Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 297 (1969) (noting that impeachment-based statutes across the states "consist[] in substance of the common law grounds of disqualification transposed into grounds of impeachment").

77. Mason Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166, 175 (1940) ("[N]one [of the statutes abandoning disqualification in favor of impeachment by prior conviction were] drafted upon the basis of the specific relationship of the crime to the character of the witness for truthfulness.").

78. *Id.*; *see, e.g.*, Blakney v. United States, 397 F.2d 648, 649–50 (D.C. Cir. 1968) (McGowan, J. concurring) (noting of the D.C. statute adopting impeachment-based use of prior convictions that "[t]here is apparently no relevant legislative history, so we can only speculate as to why the attainder continued to some degree in the form of permissive employment of the past conviction to impeach credibility"); State v. Carter, 326 N.C. 243, 250, 388 S.E.2d 111, 116 (1990) (concluding that, under North Carolina Rule 609(a), convictions for discrediting a witness are admissible without the crime having any "rational relevance to untruthfulness" (quoting 1 HENRY BRANDIS, BRANDIS ON NORTH CAROLINA EVIDENCE § 112, at 484 (3d ed. 1988))).

79. *See, e.g.*, United States v. Martinez, 555 F.2d 1273, 1276 (5th Cir. 1977) ("The rationale of the rule allowing impeachment by the use of former convictions is that *unbelievability may be inferred from defendant's general readiness to do evil* . . . [and that] [p]rior convictions may indicate the accused has a criminal nature *and . . . propensity to falsify his testimony*." (emphasis added)); People v. Castro, 696 P.2d 111, 118–19 (Cal. 1984) (in bank) (repeating the Holmes rationale from *Gertz* and concluding that "[t]he [p]eople point to no other rational justification for felony impeachment").

evidence.[80] Although the types of convictions permitted to impeach witnesses vary, the theory remains the same. Ostensibly, a person who has been previously convicted of a crime is less apt to offer a truthful account of the facts when testifying at a subsequent trial.[81] When conviction-based impeachment is untethered from crimes correlating to dishonesty, the theory is sustained on this bare assumption alone.[82] That Justice Holmes's hypothesis is psychologically viable is unfounded.[83] Many crimes have no bearing on a person's veracity whatsoever.[84] Studies suggest that their predictive value for future untruthfulness is fundamentally flawed.[85] Unsurprisingly, the multilayered assumptions justifying the conclusion that convictions translate to false testimony have been repeatedly derided as "junk science at its worst."[86] The distinct likelihood that the jury will use prior-conviction evidence to punish the witness, however, is inescapable.[87]

80. Roberts, *Impeachment*, *supra* note 8, at 2027 (highlighting Montana as the lone state prohibiting conviction-based impeachment of all witnesses).

81. Davis v. Alaska, 415 U.S. 308, 316 (1974) (concluding that the jury is permitted to infer that a witness who has a prior criminal conviction is "less likely than the average trustworthy citizen to be truthful in his testimony").

82. Roderick Surratt, *Prior-Conviction Impeachment Under the Federal Rules of Evidence: A Suggested Approach to Applying the "Balancing" Provision of Rule 609(a)*, 31 SYRACUSE L. REV. 907, 910 (1980) ("The rationale for prior-conviction impeachment is that a person who has committed a crime may have less of a general propensity for 'truthfulness' than a person without a criminal 'record.'").

83. Campbell v. Greer, 831 F.2d 700, 707 (7th Cir. 1987) ("The proposition that felons perjure themselves more often than other, similarly situated witnesses (e.g., a criminal defendant who has not been convicted of a felony or a prisoner in a civil rights suit whose only prior conviction is a misdemeanor) is one of many important empirical assertions about law that have never been tested, and may be false. It is undermined, though not disproved, by psychological studies which show that moral conduct in one situation is not highly correlated with moral conduct in another."); Rice, *supra* note 2, at 691 (noting that research demonstrates that moral conduct is situationally dependent). The rule's validity remains dependent on trait-based assumptions of human character rooted in Justice Holmes's unsubstantiated theory. *See supra* note 53 and accompanying text. It is easy to see how the theory fails on innumerable fronts. If the prior crime bears no rational correlation to untruthful acts, the theory is corrupt at the outset. Even where the crime does involve an element of deceit, a single instance of misconduct is unlikely to reveal a person's generalized character for future perjury. *See* Dannye W. Holley, *Federalism Gone Far Astray from Policy and Constitutional Concerns: The Administration of Convictions to Impeach by State's Rules—1990–2004*, 2 TENN. J.L. & POL'Y 239, 303–05 (2005) ("A record of conviction of a crime is a provable fact, but there is *no evidence* that it has the probability of proving that the person whose credibility is attacked has a greater propensity to lie." (emphasis added)); Ladd, *supra* note 77, at 177–78.

84. Ladd, *supra* note 77, at 178.

85. Berger, *supra* note 19, at 207–14 (debunking trait-based assumptions that prior crimes are predictive of future untruthfulness through psychological studies to conclude that "[b]ecause Rule 609 overestimates the importance of general character traits, and underestimates the importance of the situation and context, the psychological assumptions upon which Rule 609 is based reflect at its very core the Fundamental Attribution Error").

86. Roberts, *Impeachment*, *supra* note 8, at 1992 ("The historical heuristic, which is the longest historical proffered 'proof' of this reality hypothesis—that disobedience to the law is

C. Reining in Conviction-Based Impeachment

In the early part of the twentieth century, broad use of convictions for challenging witness credibility began falling out of favor. The theory that prior criminal acts suggested a general character for mendacity appeared unsound, particularly when applied to crimes not involving an element of dishonesty.[88] In turn, the English legal system that first gave life to impeachment by prior conviction became the first to abandon its use.[89] American jurisdictions retained conviction-based impeachment but began narrowing the available offenses. Revised rules focused on crimes that more closely related to untruthfulness, including crimes of moral turpitude or those involving crimen falsi.[90] Similarly, courts began departing from the stringent approach to impeachment by excluding convictions based on unfair prejudice considerations.[91]

These piecemeal statutory and judicial revisions soon gave way to comprehensive efforts to reform American evidence law, including impeachment practices. In 1941, the American Law Institute's Model Code of Evidence proposed limiting impeachment with prior-conviction evidence to offenses involving dishonesty or false statement only.[92] The Model Code's approach was not absolute in permitting impeachment with these limited offenses, either; Rule 303 proposed empowering judges with discretion to exclude any conviction that raised a substantial danger of

logical evidence of a greater propensity to lie—is 'junk science' at its worst." (quoting Holley, *supra* note 83, at 304–05)).

87. Erwin N. Griswold, *The Long View*, 51 A.B.A. J. 1017, 1021 (1965) ("Is there anyone who doubts what the effect of [prior-conviction] evidence . . . is on the jury?"). *See generally* Eisenberg & Hans, *supra* note 15, at 1388 (demonstrating through research and studies that jurors do not use prior-conviction evidence to evaluate credibility but to punish the witness, making the historical justifications for conviction-based impeachment "unfounded").

88. Innocuous malum prohibitum misdemeanors are clearly distinguishable from malum in se felonies. *See* Ladd, *supra* note 77, at 181 & n.54.

89. Criminal Evidence Act, 1898, 61 & 62 Vict. c. 36, § 1(f) (Eng.) (prohibiting the use of prior-conviction evidence to impeach a testifying defendant); *see also* Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1, 28–29 (1999) (noting several exceptions recognized by English courts, including when the defendant placed his character "in issue" and when prior convictions were used to demonstrate similar acts or motive as those in the crime accused).

90. Julia Simon-Kerr, *Credibility by Proxy*, 85 GEO. WASH. L. REV. 152, 172 (2017) [hereinafter Simon-Kerr, *Credibility by Proxy*] ("By the late nineteenth century, courts in states including Alabama, Arkansas, Georgia, Texas, California, Connecticut, Louisiana, Maine, New York, Ohio, Oklahoma, Tennessee, Vermont, Wyoming, and Maine were using moral turpitude as an impeachment standard."); *see infra* notes 165–68 and accompanying text.

91. Campbell v. Greer, 831 F.2d 700, 706 (7th Cir. 1987).

92. MODEL CODE OF EVID. R. 106 (AM. LAW INST. 1942).

undue prejudice when weighed against its probative value as an impeachment tool.[93]

A decade later, the National Conference of Commissioners on Uniform State Laws published the Uniform Rules of Evidence to promote uniformity across American jurisdictions.[94] Like its predecessor, the Uniform Rules proposed strict limits on impeachment with prior convictions, protecting victim-witnesses and accused persons from improper collateral attacks on character. For witnesses other than the accused, Rule 21 proposed limiting conviction-based impeachment only to crimes "involving dishonesty or false statement."[95] The Uniform Rules equally emphasized the importance of judicial discretion for courts to exclude impeachment evidence deemed too prejudicial.[96] Thus, the Uniform Rules protected victim-witnesses from egregious attacks on their character with prior convictions wholly unrelated to the narrow class of crimes involving dishonesty or false statement.[97] At the same time, victims could be reassured that judges maintained discretion to prohibit unfair attacks, even with the narrowed class of convictions available.

Therefore, by the latter half of the twentieth century, the common law's open approach to making any criminal offense available to impeach witness credibility was slowly abandoned. At the same time, additional judicial safeguards for excluding convictions bearing little value in foretelling a witness's truthfulness when measured against the harm to the witness were widely embraced.

93. MODEL CODE OF EVID. R. 303 (AM. LAW INST. 1942); *see also* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 513 (1989) (citing Rule 303 and noting its interplay with Rule 106 of the Model Code of Evidence by allowing any unduly prejudicial evidence to be excluded, including prior-conviction evidence used for impeachment purposes).

94. *See Proceedings of the National Conference on Commissioners on Uniform State Laws*, 62 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 36, 102–03 (UNIF. LAW COMM'N 1953) (documenting the Commissioners' decision to adopt the Uniform Rules of Evidence in 1953); Leonard S. Powers, *The North Carolina Hearsay Rule and the Uniform Rules of Evidence*, 34 N.C. L. REV. 171, 171–72 (1956). The goal of the Uniform Rules of Evidence was twofold: uniformity and acceptability. *Id.* at 172. Whereas the Model Code of Evidence had been rejected by legislatures and courts as "too drastic" or "too academic," the Uniform Rules of Evidence were drafted to be slanted more toward practicing lawyers and judges than academics. *Id.* at 171, 172–73 n.10.

95. UNIF. R. EVID. 21. If the witness was the accused in a criminal trial, prior-conviction evidence was barred unless the defendant opened the door by offering evidence "solely for the purpose of supporting his credibility." *Id.*

96. *See id.* at 7, 45; *see also Green*, 490 U.S. at 513.

97. *See* UNIF. R. EVID. 21. Similarly, limits on using prior convictions against the accused were intended to "correct the abuse of smearing rather than discrediting a defendant who takes the stand" that were as well known then as they are now. *Id.* at 21 cmt.

D. Competing Theories and Compromise: Federal Rule 609

When Congress debated the Federal Rules of Evidence, no one questioned the general premise that a previously convicted individual would be more willing to lie on the witness stand than the average person.[98] The primary debate centered on *which* convictions most implicated witness untruthfulness and whether judicial discretion to exclude convictions should be permitted.[99] When deciding these questions, two competing interests beset rule drafters: affording fair trials to those at the mercy of the justice system and supporting society's interest in protecting itself against criminals.[100]

The original rule crafted by the Advisory Committee on the Federal Rules of Evidence erred on the side of societal interests in prosecuting cases.[101] Proposed Rule 6–09 called for mandatory admission of all crimes "punishable by death or imprisonment in excess of one year" (i.e., felonies) and any crime involving "dishonesty or false statement" (crimen falsi offenses), no matter the punishment, when offered for the purpose of attacking the witness's credibility.[102] The rule embraced two separate

98. *See* Advisory Committee's Preliminary Draft of Proposed Rules of Evidence for United States District Courts and Magistrates, 46 F.R.D. 161, 297 (1969) ("A demonstrated instance of willingness to engage in conduct in disregard of accepted patterns is translatable into willingness to give false testimony."); *see also* Berger, *supra* note 19, at 205 (noting the legislative history of Rule 609 demonstrates the psychological assumptions about predictive human behavior based on prior criminal conduct was accepted "as so seemingly obvious as to be beyond debate" without concern for whether the study of psychology actually supported the underlying assumption); Green, *supra* note 38, at 1114 ("[T]here 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."). Yet recent empirical studies reveal that prior criminal records do not implicate credibility. Eisenberg & Hans, *supra* note 15, at 1387–88.

99. *See, e.g.*, 120 CONG. REC. 1414 (1974) (listing all the proposals considered for which convictions to allow for impeachment and discussing judicial discretion); Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2298 (1993).

100. For example, Representative Hogan stated during the House's discussion on Rule 609(a) that "[t]he raging debate over impeachment of the accused's credibility by conviction of a crime exemplifies the continual attempt by all involved in the judicial system to balance the scales of justice between the rights of the individual and the rights of society." 120 CONG. REC. 1414 (1974); *see also* Gold, *supra* note 99, at 2303; *see generally* Bellin, *Circumventing Congress*, *supra* note 8, at 304–07 (chronicling the Advisory Committee's attempts to craft a rule balancing competing interests and public policies impacted by conviction-based impeachment).

101. *See* Advisory Committee's Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 295–96 (1969) (allowing admission of prior convictions without mentioning a judge's discretion to exclude for reasons of unfair prejudice); *see also* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 515 (1989) (discussing the historical development of Rule 609).

102. *See* Rules of Evidence for the United States Courts and Magistrates, 56 F.R.D. 183, 269 (1973); Advisory Committee's Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 295–96 (1969). The proposed rule did not include judicial discretion to exclude these categories of crimes, limiting their availability only to

theories. First, felony convictions of any nature were endorsed on the premise that the severity of the crime implicitly made the witness more likely to testify falsely.[103] The fact that the crime bore no rational relation to one's veracity, may have been the subject of an honest confession, or closely mirrored the charged offense did not affect admissibility.[104] Separately, crimen falsi convictions were sanctioned on the theory that commission of a crime involving falsity or deceit directly exhibited mendacious character and a propensity to lie.[105] Importantly, proposed Rule 6–09 deviated from the common law's broad approach to witness impeachment by excluding most misdemeanor offenses. The Advisory Committee deemed the exclusion of misdemeanors unrelated to dishonest acts as "warranted by their relatively insubstantial nature."[106]

After settling on the convictions available for impeachment, the next question concerned whether the rule would grant trial courts the authority to exclude those they judged unfairly prejudicial. The Advisory Committee vacillated on the issue. The rule's varying iterations proposed denying or granting trial courts latitude to exclude a witness's prior convictions to safeguard against unfair prejudice to the witness.[107] Under pressure from a single, albeit powerful, Senator who opposed the draft rule,[108] the final

staleness concerns. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 269–70 (1973). The proposed rule essentially mirrored the District of Colombia Code passed by Congress in 1970 only a few years prior. *Green*, 490 U.S. at 514–15.

103. *See* Advisory Committee's Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 297 (1969) (concluding that major crimes suggest a "willingness to engage in conduct in disregard of accepted patterns [that] is *translatable into willingness to give false testimony*" (emphasis added)).

104. *See id.* (conceding that "it may be argued that considerations of relevancy should limit provable convictions to those of crimes of untruthfulness").

105. *See* Advisory Committee's Preliminary Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 391 (1971) (adhering to the traditional view that crimen falsi offenses are relevant to credibility "without regard to the grade of the offense").

106. Advisory Committee's Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 297 (1969).

107. *See, e.g.*, Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 391 (1971) (supplementing the 1969 rule by adding "in either case, the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice"). The final version was modeled after recent congressional action that had stripped judicial discretion from impeachment rules applicable under the District of Columbia Code. *See Green*, 490 U.S. at 516–18 (detailing the development of 609 and discussing its relation to the District of Columbia Code); Gold, *supra* note 99, at 2298–01 (chronicling the various Rule 609 iterations).

108. *See* Gold, *supra* note 99, at 2300–01 (describing Senator John McClellan's reaction to the Advisory Committee's proposal and the Committee's decision to relent for the betterment of preserving the entire rules drafting effort).

version submitted to Congress simply left open the question of trial court discretion by making no reference to judicial balancing.[109]

The ensuing congressional debate over the rule governing conviction-based impeachment dwarfed all others in the rulemaking process.[110] The two chambers essentially split the Advisory Committee's proposal. The House adopted an approach consistent with the Uniform Rules of Evidence by limiting impeachment solely to crimes involving dishonesty or false statement.[111] The House Judiciary Committee observed that including convictions for any additional crimes raised the danger of unfair prejudice[112] and, notably, that expanded impeachment would have a deterrent effect on *all* witnesses.[113] A divided Senate, however, narrowly approved admitting all felony convictions and lesser crimes involving dishonesty or false statement, without judicial discretion to exclude either.[114]

Congressional negotiators eventually wed the House and Senate proposals together into a single, albeit complex, rule.[115] As adopted, Federal Rule 609 made admissible for impeachment all crimes involving dishonesty or false statement without trial court discretion to consider unfair prejudice.[116] The rule also embraced impeachment with felony convictions, subject to a heightened test, balancing unfair prejudice when offered against an accused person.[117] In a notable departure from the

109. *See* Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 269–70 (1973). The final proposed version arguably left the question open by not mandating admission of all felonies and crimen falsi offenses. The proposed rule merely indicated that a conviction of those types "is" admissible rather than "shall be admitted." *Id.* Suffice it to say, the Advisory Committee wanted out of the fight and for Congress to take on the issue in debate.

110. *See* Gold, *supra* note 99, at 2303 ("The extent of the floor debate in the House over Rule 609(a) far exceeded that relating to any other provision in all the proposed Federal Rules of Evidence." (citing 120 CONG. REC. 1414–15, 2375–81 (1974))).

111. *See* 120 CONG. REC. 2381 (1974) (rejecting the amendment that would add non-crimen falsi felony convictions to 609(a)); *see also* Diggs v. Lyons, 741 F.2d 577, 580 (3d Cir. 1984); Gold *supra* note 99, at 2302–04.

112. H.R. REP. NO. 93-650, at 11 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 7075, 7084–85 ("[B]ecause of the danger of unfair prejudice . . . and the deterrent effect upon an accused who might wish to testify, *and even upon a witness who [is] not the accused*, cross-examination of prior conviction should be limited to those kinds of convictions bearing directly on credibility, i.e., crimes involving dishonesty or false statement." (emphasis added)).

113. *See id.*

114. *See* 120 CONG. REC. 37076, 37083 (1974); *see also* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 519 (1989); Gold, *supra* note 99, at 2304–07.

115. *See* FED. R. EVID. 609(a) (1975) (Rule 609 as originally enacted); Bellin, *Circumventing Congress*, *supra* note 8, at 306–07; Gold, *supra* note 99, at 2307–08.

116. *See* FED. R. EVID. 609(a) (1975) (Rule 609 as originally enacted); Gold, *supra* note 99, at 2308 n.61.

117. *See* FED. R. EVID. 609(a) (1975) (Rule 609 as originally enacted); Gold, *supra* note 99, at 2308 n.61. Notwithstanding these textual protections, the factors courts have developed generally tend to admit prior-conviction evidence for impeachment when offered against accused

common law tradition, all misdemeanor offenses not involving dishonesty or false statements were rejected for impeachment purposes.[118]

As originally enacted, Rule 609(a) left unclear whether trial courts maintained discretion to exclude felony convictions for witnesses other than those testifying on behalf of the criminal defendant—including the victim herself.[119] Unsurprisingly, courts split over the issue.[120] In 1990, the Advisory Committee proposed softening the rule's impact on all witnesses by broadly embracing trial court discretion to exclude felony convictions unrelated to dishonest acts.[121] The Committee noted that all witnesses have an interest in being protected against unfair attacks with prior-conviction evidence.[122] It also accepted that some cases necessarily demand considering the impact of conviction-based impeachment on *government* witnesses.[123]

Pointing to sexual assault cases, the Committee concluded that impeaching victim-witnesses with "prior convictions that have little, if anything, to do with credibility may result in unfair prejudice to the government's interest in a fair trial and unnecessary embarrassment of the witness."[124] Congress agreed, adopting the inclusion of trial court discretion for all witnesses without public debate.[125]

Today, Federal Rule of Evidence 609 represents a marked departure from former conviction-based impeachment practices.[126] Witnesses may

persons. The effect has been to eviscerate congressional intent discouraging the use of convictions against defendants. *See generally* Bellin, *Circumventing Congress*, *supra* note 8, at 307–19 (describing the application of judge's discretion and detailing factor tests that judges imposed on Rule 609).

118. *See* FED. R. EVID. 609(a) (1975) (Rule 609 as originally enacted).

119. *Green*, 490 U.S. at 505; Diggs v. Lyons, 741 F.2d 577, 580–81 (3d Cir. 1984) (describing the debate over Rule 609 and its applicability to all witnesses and all types of cases).

120. *See* David A. Sonenshein, *Circuit Roulette: The Use of Prior Convictions to Impeach Credibility in Civil Cases Under the Federal Rules of Evidence*, 57 GEO. WASH. L. REV. 279, 284–85 (1988) (detailing the conflict among the circuits concerning trial court discretion, or lack thereof, to exclude felony convictions when offered to impeach witnesses in civil cases).

121. Amendments to Federal Rules of Evidence—Rule 609, 129 F.R.D. 347, 353–54 (1990).

122. *Id.* at 353 ("The danger from the use of prior convictions is not confined to criminal defendants.").

123. *Id.* at 354 (rejecting the suggestion that government witnesses should not be afforded protection against unfair prejudice from conviction-based impeachment).

124. *Id.*

125. *See* Federal Rules of Evidence: Amendment to Rule 609(a)(1) and (2), 132 F.R.D. 307, 307 (1991) (giving notice of the amendment); Amendments to the Federal Rules of Evidence—Rule 609, 129 F.R.D. 347, 352 (1990); Gold, *supra* note 99, at 2307–09.

126. *See* FED. R. EVID. 609; Bellin, *Circumventing Congress*, *supra* note 8, at 307–08 ("As a preliminary matter, the Rule represents a sweeping departure from prior federal law, unequivocally rejecting the automatic admissibility of felony convictions that had previously been the federal norm.").

not be impeached with just any prior conviction.[127] Automatic admission of prior-conviction evidence applies only to crimes that require proving (or the witness's admitting) dishonesty or false statement as an element.[128] Felony convictions may be admitted only after satisfying judicial balancing tests designed to safeguard against unfair prejudice.[129] A vast number of lesser misdemeanor crimes are made inadmissible for impeaching witness credibility.[130] That is not to say the rule is without fault. Appropriately, scholars have criticized the rule's impact on accused persons[131] and the judiciary's abandonment of the protections the rule textually affords.[132] Compared to its North Carolina counterpart, however, Federal Rule 609 represents significant reform that at least attempts to minimize the harmful effects accorded by conviction-based impeachment.

In the next part, this Article explores how North Carolina's adherence to broad conviction-based impeachment has remained essentially unaltered for more than a century. While evidence rules throughout the country have evolved to contend with the undeniable impact of prior-conviction evidence on all witnesses, North Carolina impeachment rules have not. Part II offers a comprehensive analysis of the state's permissive impeachment practices dating from the common law to current statutory evidence rules. By revealing the General Assembly's ongoing conformance to ancient dogma, coupled with the judiciary's recalcitrance to embracing modest witness protection measures, Part II sets the stage for discussing how North Carolina Rule 609 negatively impacts victims and their participation in the judicial system.

II. NORTH CAROLINA'S BROAD APPROACH TO WITNESS IMPEACHMENT

North Carolina impeachment practices remain beholden to antiquated traditions long since abandoned as unfounded or harmful. Today, unfettered use of prior-conviction evidence to impeach witness credibility has been discarded at the federal level and in almost every state. Most

127. *See* FED. R. EVID. 609 (limiting conviction-based impeachment solely to felony convictions and crimen falsi offenses); Bellin, *Circumventing Congress*, *supra* note 8, at 308.

128. FED. R. EVID. 609(a)(2).

129. FED. R. EVID. 609(a)(1). For non-criminal defendant-witnesses, felony convictions must pass muster applying Rule 403 scrutiny whereas prosecutors must demonstrate that felony convictions are more probative than prejudicial when used to impeach criminal defendant-witnesses. *Id.*

130. FED. R. EVID. 609(a).

131. *See* sources cited *supra* note 8.

132. *See generally* Bellin, *Circumventing Congress*, *supra* note 8, at 289 ("This article spotlights the flawed analytical framework at the heart of the federal courts' approach to one of the most controversial trial practices in American criminal jurisprudence—the admission of prior convictions to impeach the credibility of defendants to testify.").

states employ a balanced approach that corresponds to the federal rule in form and application.[133] Several have adopted stricter standards.[134] Hawaii and Montana, for example, forbid witness impeachment with prior-conviction evidence.[135] Those permitting conviction-based impeachment often impose strict limits on the types of convictions utilized.[136] The nature of the offense and witness being impeached are determinative factors.[137] Notably, trial courts widely embrace discretion to exclude convictions that would unfairly prejudice the witness, even in jurisdictions that otherwise restrict conviction-based impeachment.[138]

133. Julia Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001, 1035 [hereinafter Simon-Kerr, *Moral Turpitude*] (noting that a majority of states have now joined the federal rule either through statutory enactment or judicial decisions).

134. *See* ALASKA R. EVID. 609 (LEXIS through Feb. 15, 2019 amendments); CONN. CODE EVID. ANN. § 6-7 (Westlaw through Feb. 1, 2019 amendments); KAN. STAT. ANN. § 60-421 (Westlaw through 2019 Leg. Sess.); KY. R. EVID. 609 (Westlaw Apr. 1, 2019 amendments); MASS. GEN. LAWS ANN. ch. 233, § 21 (Westlaw through ch. 9 of the 2019 1st Ann. Sess.); MICH. R. EVID. 609 (Westlaw through Feb. 1, 2019 amendments); NEV. REV. STAT. § 50.095 (Westlaw through ch. 2 of the 80th Reg. Sess. 2019); TEX. R. EVID. 609 (Westlaw through Mar. 1, 2019 amendments); W. VA. R. EVID. 609 (Westlaw through Dec. 1, 2018 amendments).

135. *See* HAW. REV. STAT. § 626-1 R. 609 (Westlaw through Act 27 of the 2019 Reg. Sess.); MONT. R. EVID. 609 (Westlaw through the 2019 Sess.); State v. Santiago, 492 P.2d 657, 661 (Haw. 1971) (holding that admission of prior convictions to impeach criminal defendants' credibility unreasonably imposes on defendants' right to testify).

136. *See* MASS. GEN. LAWS ANN. ch. 233, § 21 (Westlaw through ch. 9 of the 2019 1st Ann. Sess.); MICH. R. EVID. 609 (Westlaw through Feb. 1, 2019 amendments); NEV. REV. STAT. § 50.095 (Westlaw through ch. 2 of the 80th Reg. Sess. 2019); TEX. R. EVID. 609 (Westlaw through Mar. 1, 2019 amendments); W. VA. R. EVID. 609 (Westlaw through Dec. 1, 2018 amendments).

137. *See* ALA. R. EVID. 609 (Westlaw through Mar. 15, 2019 amendments); ALASKA R. EVID. 609 (LEXIS through Feb. 15, 2019 amendments); ARIZ. R. EVID. 609 (Westlaw through Feb. 1, 2019 amendments); ARK. R. EVID. 609 (LEXIS through 2019 legislation); FLA. STAT. ANN. § 90.610 (West 2010); GA. CODE. ANN. § 24-6-609 (2013) (LEXIS through 2019 legislation); HAW. REV. STAT. ANN. § 626-1 R. 609 (Westlaw through Act 27 of the 2019 Reg. Sess.); IDAHO R. EVID. 609 (LEXIS through 2019 legislation); IND. R. EVID. 609 (Westlaw through Mar. 1, 2019 amendments); IOWA R. EVID. 5.609 (Westlaw through Feb. 1, 2019 amendments); MASS. GEN. LAWS ANN. ch. 233, § 21 (Westlaw through ch. 9 of the 2019 1st Ann. Sess.); MICH. R. EVID. 609 (Westlaw through Feb. 1, 2019 amendments); N.H. R. EVID. 609 (Westlaw through Apr. 15, 2019 amendments); N.J. R. EVID. 609 (Westlaw current through May 1, 2019 amendments); N.D. R. EVID. 609 (LEXIS through Apr. 16, 2019 amendments); OKLA. STAT. ANN. tit. 12, § 2609 (Westlaw through ch. 179 of the 1st Reg. Sess. of the 57th Leg.); OR. REV. STAT. ANN. § 40.355 (Westlaw through July 1, 2019 amendments); S.D. CODIFIED LAWS § 19-19-609 (Westlaw through 2019 Reg. Sess.); TENN. R. EVID. 609 (LEXIS through Mar. 25, 2019 amendments); UTAH R. EVID. 609 (LEXIS through 2019 legislation); VT. R. EVID. 609 (LEXIS through 2019 legislation); VA. CODE ANN. § 19.2-269 (2015); W. VA. R. EVID. 609 (Westlaw through Dec. 1, 2018 amendments); WYO. R. EVID. 609 (LEXIS through 2019 legislation).

138. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 233, § 21 (Westlaw through ch. 9 of the 2019 1st Ann. Sess.); Commonwealth v. Harris, 825 N.E.2d 58, 68 (Mass. 2005) (concluding that prior convictions for sex-related offenses may be admitted for impeachment purposes notwithstanding the state's rape shield statute, given the trial court's discretion to preclude unfairly prejudicial evidence).

North Carolina is an outlier in every respect. The North Carolina General Assembly rejected the modest protections afforded by the federal rule when crafting the corresponding state rule on conviction-based impeachment.[139] Since then, North Carolina courts have exacerbated the rule's negative effects by abandoning rules enabling trial court discretion to protect witnesses against prejudicial use of conviction evidence.[140] Survivors of domestic and sexual assault, in particular, suffer the consequences of the state's ongoing broad approach to impeachment, which has been almost universally abandoned in common law jurisdictions contemplating the propriety of conviction-based impeachment.[141]

A. Historical Antecedents to Witness Impeachment

North Carolina adheres to the ancient assumption that persons convicted of crimes lack credibility in the general sense and are therefore more likely to lie when testifying as a witness.[142] The rules governing conviction-based impeachment in North Carolina state courts today are largely indistinguishable from those developed at common law more than a century ago.[143] To appreciate the state's rigid adherence to primitive dogma, a brief history of North Carolina's approach to witness disqualification and unrestricted impeachment is necessary.

From its earliest existence, North Carolina perpetuated the English common law's cynicism toward testimony given by previously convicted persons.[144] Early decisions from the Supreme Court of North Carolina embraced absolute testimonial disqualification for any witness previously

139. *See infra* Section II.D.

140. *See infra* Section II.F.

141. *See infra* Part III.

142. *See, e.g.*, Ingle v. Roy Stone Transfer Corp., 271 N.C. 276, 280, 156 S.E.2d 265, 269 (1967) (confirming North Carolina as a state where general character for dishonest behavior may be used as an impeachment tool to suggest untruthful testimony); State v. Jones, 63 N.C. App. 411, 421, 305 S.E.2d 221, 227 (1983) (finding that multiple traffic violations generally supported an attack on the witness's credibility); James E. Sizemore, *Character Evidence in Criminal Cases in North Carolina*, 7 WAKE FOREST L. REV. 17, 22 (1970) (concluding that, under North Carolina law, "general bad character may be shown for purposes of impeachment").

143. DALE F. STANSBURY, THE NORTH CAROLINA LAW OF EVIDENCE § 112, at 210 (1st ed. 1946). Analyzing North Carolina common law dating back to the mid 1800s, Stansbury concluded that "[a]pparently any sort of criminal offense may be inquired about" to impeach a witness's credibility. *Id.* He would note as "wholesome," however, later judicial dicta suggesting that "traffic violations and other offenses bearing no relation to credibility" arguably should not apply. *Id.* (citing State v. King, 224 N.C. 329, 332, 30 S.E.2d 230, 232 (1944)). The common law's broad approach to allowing a wide range of conviction evidence to impeach witness credibility is remarkably similar to the current version of North Carolina Rule 609, which broadly permits impeachment with an array of convictions, except for minor traffic offenses and low-level misdemeanors. *See* N.C. R. EVID. 609.

144. *See supra* notes 40–56 and accompanying text.

convicted of a crime, no matter how material the witness's testimony to a party's case.[145] Impeachment was not an option; persons previously convicted of crimes were deemed incompetent as witnesses and prohibited from testifying per se.[146] In fact, the state's first common law evidence rules categorically disqualified individuals from testifying for a host of reasons, including the witness's status as a civil party or accused criminal.[147]

The state's approach to outright witness disqualification would not endure, however.[148] By the mid-nineteenth century, most of the former impediments to witness qualification were dropped by statutory measures favoring witness testimony, subject to impeachment for the various reasons previously disabling the witness.[149] Witnesses formerly disqualified from testifying because of their prior convictions were now free to offer their accounts in North Carolina courts.[150] Doing so, however, exacted a personal toll. Although the General Assembly lifted the ban on receiving testimony from previously convicted persons, it placed no restrictions on the types of prior crimes available to impeach the witness.[151] Any limitations on prior-conviction evidence used to impeach a witness would thus come only at the hands of the judiciary.

The judicial attitude toward emancipated witnesses recently freed from their former disqualifications, however, was unflinching. Throughout the late nineteenth and early twentieth century, the state's high court embraced wide-open impeachment, sanctioning unrestricted credibility

145. Keith v. Goodwin, 51 N.C. (1 Jones) 398, 398 (1859) (per curiam) (finding no error in the trial court's exclusion of a material witness who had been previously convicted of manslaughter).

146. *Id.*; STANSBURY, *supra* note 143, § 53, at 87.

147. STANSBURY, *supra* note 143, § 53, at 87–88. North Carolina's approach to witness competency echoed English common law by absolutely disqualifying "the defendant in a criminal case, all parties to a civil action or suit, the husband or wife of a party, and person interested in the event of the action, persons convicted of crimes, and infidels" as incompetent. *Id.*

148. The only remaining rigid form of witness disqualification today applies to interested witnesses in a lawsuit against an estate offering oral statements made by a decedent under the "Dead Man's Statute." *See* N.C. R. EVID. 601(c). This particular disqualification, however, is highly limited and easily waived by unwitting parties. *See, e.g.*, *In re* Will of Baitschora, 207 N.C. App. 174, 186, 700 S.E. 2d 50, 58 (2010).

149. STANSBURY, *supra* note 143, § 53, at 88. A series of statutory revisions in the mid- and late nineteenth century eventually abolished most of the categorical disqualifications, including a person's status as a previously convicted criminal. *Id.* These largely mirrored the reforms adopted in England and other American jurisdictions favoring witness testimony subject to impeachment over witness disqualification. Ladd, *supra* note 77, at 174–75.

150. *See* An Act to Improve the Law of Evidence, ch. 43, pmbl. & § 1, 1866 N.C. Sess. Laws 112, 112.

151. Although the Act to Improve the Law of Evidence proscribed automatic disqualification of witnesses with prior convictions, the Act did not restrict the scope of prior convictions that could be leveraged to impeach the witness. *See id.*

tests with prior criminal conduct.[152] Few boundaries existed to protect against abuses. Witnesses could be cross-examined with prior criminal convictions, indictments, and some uncharged accusations.[153] Over the decades, unfettered cross-examination became the norm. In *State v. Beal*[154] the court unanimously proclaimed, "Competency and credibility are two different things. A person may be a competent witness and yet not a credible one. The law declares his competency, but it cannot make him credible."[155] The *Beal* court exalted cross-examination as "one of the principal tests which the law has devised for the discovery of truth."[156] Accordingly, the court pronounced that a witness's interest, motives, prejudices, knowledge, and other matters bearing on credibility "may be fully investigated in the presence of the jury."[157] The court emphatically concluded that "[o]rdinarily, therefore, a witness may be asked *any questions* on cross-examination which tend to test his accuracy, to show his interest or bias, or to impeach his credibility."[158]

Although penned in 1930, *Beal* embodied the judicial attitude favoring unrestrained cross-examination that persisted throughout the century. The state's supreme court would later characterize North Carolina cross-examination as "rough-and-tumble"[159] with "few holds barred," hold that "questions relating to crime and anti-social conduct are freely allowed," and confirm commentator observations that, when impeaching a witness in the state's trial courts, "apparently any sort of criminal offense may be

152. *See, e.g.*, State v. Simonds, 154 N.C. 197, 198, 69 S.E. 790, 790 (1910) (proclaiming that the ability to question a witness that has taken the stand with any crime he or she may have committed is "settled law"); State v. Thomas, 98 N.C. 599, 604–05, 1 S.E. 518, 521 (1887) (declaring that a witness who takes the stand, including the criminally accused, may be subjected "to the peril of being examined *as to any and every matter* pertinent to the issue" (emphasis added) (citing McGarry v. People, 2 Lans. 227, 227–34 (N.Y. Gen. Term. 1870))); State v. Lawhorn, 88 N.C. 634, 637 (1883) ("In this state, it is well settled that a witness may be asked on cross-examination whether he has not been convicted of offences calculated to affect his standing as a witness.").

153. *See, e.g.*, State v. Cureton, 215 N.C. 778, 781–83, 3 S.E.2d 343, 345–46 (1939) (finding no error in cross-examination questions posed to the defendant about being indicted as an accessory to murder in another case); State v. Maslin, 195 N.C. 537, 541, 143 S.E. 3, 6 (1928) (excluding mere accusations of crimes, but continuing to permit evidence of criminal indictments to impeach witness credibility); *Thomas*, 98 N.C. at 604–06, 1 S.E. at 519–21 (1887) (holding that questioning whether the witness had been accused of murder in another state was permissible to test the witness's credibility).

154. 199 N.C. 278, 154 S.E. 604 (1930).

155. *Id.* at 300, 154 S.E. at 617.

156. *Id.*

157. *Id.* at 300–01, 154 S.E. at 617.

158. *Id.* at 301, 154 S.E. at 617 (emphasis added).

159. *See, e.g.*, State v. King, 224 N.C. 329, 331–32, 30 S.E. 2d 230, 231 (1944).

inquired about."[160] The North Carolina common law viewed any act remotely bearing on the witness's moral, ethical, social, or criminal character as fodder for cross-examination.[161]

Further exacerbating the effects of unmitigated cross-examination, North Carolina also steadfastly refused to place any restrictions on the types of convictions available to impeach a witness's credibility.[162] This stance placed the state among a shrinking minority as other jurisdictions moved to curtail the prejudice inherent in unmitigated impeachment.[163] Initially, North Carolina's open approach to impeaching witnesses with the bias, prejudice, and status that formerly disqualified the witness as incompetent was well within the norm for the era. The original statutes that removed testimonial disqualification for persons previously convicted of crimes tended to make the former impediment an open point of attack during cross-examination in virtually every jurisdiction.[164] As early as the late nineteenth century, however, states began distinguishing between convictions generally and those that more closely impacted witness credibility; several restricted impeachment to crimes involving moral turpitude.[165] This loosely defined standard encompassed acts that tended to

160. Ingle v. Roy Stone Transfer Corp., 271 N.C. 276, 280, 156 S.E.2d 265, 269 (1967) (quoting STANSBURY, *supra* note 143, § 112, at 210). The wide-open cross-examination approach permitted in North Carolina courts for testing witness credibility eventually devolved to utter absurdity. As one commentator noted, prosecutors were permitted to question witnesses on adulterous liaisons, performing abortions, and calling the district attorney a "punk." Gary R. Govert, *Evidence—Stuck in a Serbonian Bog:* State v. Jean *and the Future of Character Impeachment in North Carolina*, 63 N.C. L. REV. 535, 539 (1985) (first citing State v. Small, 301 N.C. 407, 432–33, 272 S.E.2d 128, 143 (1980); then citing State v. Broom, 222 N.C. 324, 325, 22 S.E.2d 926, 927 (1942); and then citing State v. Lynch, 300 N.C. 534, 543, 268 S.E. 161, 166–67 (1980)).

161. STANSBURY, *supra* note 143, § 111, at 209 (observing that, under North Carolina common law, "[a]ll kinds of disparaging facts may be elicited" on cross-examination when impeaching a witness's credibility).

162. *See, e.g.*, *Ingle*, 271 N.C. at 280, 156 S.E.2d at 268–69 (reaffirming the North Carolina rule that any conviction may be used to impeach witness credibility, including acts that have not resulted in a conviction); State v. Sims, 213 N.C. 590, 593, 197 S.E. 176, 178 (1938) (refusing to recognize any limitations on the type of convictions, or any other conduct, when cross-examining a witness's credibility).

163. *See Ingle*, 271 N.C. at 280–82, 156 S.E.2d at 269–70 (noting, somewhat disdainfully, the movement within other states towards limiting impeachment by conviction evidence to various standards aimed at linking crimes to veracity); *King*, 224 N.C. at 332, 30 S.E.2d at 232 (conceding that "[i]n many jurisdictions questions as to commission of crime are not permitted at all, unless addressed to those offenses which have an obvious relation to the virtue of veracity").

164. Ladd, *supra* note 77, at 174–75 ("Both in England and in this country the incompetency has been removed by statute, with but few exceptions, but usually by the same act it is provided that the conviction of a crime shall thereafter be admissible as a test of the credibility of the witness.").

165. Simon-Kerr, *Credibility by Proxy*, *supra* note 90, at 172 (detailing the late nineteenth-century movement to adopt "moral turpitude" as the standard for conviction-based impeachment,

condemn the individual as a social outcast.[166] While rudimentary, the "moral turpitude" standard first began sifting between crimes that might correlate to an individual's dishonorable character and those bearing no relationship to veracity whatsoever.[167] Similarly, some jurisdictions curtailed impeachment practices by designating "infamous" crimes or felonies as a mechanism for delineating between convictions suggestive of a witness's character for untruthfulness.[168] North Carolina law would not evolve likewise, however.

In 1938, the Supreme Court of North Carolina decided *State v. Sims*,[169] firmly echoing Justice Holmes's then fifty-year-old theory that a conviction of any kind was pertinent to inferring witness untruthfulness.[170] As previously discussed, Holmes believed criminal convictions generally revealed a witness's dishonest character from which the jury could infer perjured testimony.[171] According to this logic, any conviction would suffice. The *Sims* court agreed, stating flatly that "[i]t is not the practice in this jurisdiction to limit the cross-examination for the purpose of impeachment to felonies, or to crimes involving moral turpitude."[172] A conviction of any kind remained viable for impeaching the witness under the theory that "a bad man probably includes lying among his vices."[173] Convictions for injury to property,[174] public drunkenness,[175] disorderly

in states including Alabama, Arkansas, Georgia, Texas, California, Connecticut, Louisiana, Maine, New York, Ohio, Oklahoma, Tennessee, Vermont, and Wyoming).

166. Simon-Kerr, *Moral Turpitude*, *supra* note 133, at 1025–39 (chronicling moral turpitude as rooted in civil slander before evolving into an impeachment standard under the rules of evidence within numerous American jurisdictions).

167. Simon-Kerr, *Credibility by Proxy*, *supra* note 90, at 171. At the time, gender stereotypes and misogyny played a central role in distinguishing the "moral turpitude" associated with the individual witness being impeached. *Id.* As Professor Simon-Kerr eloquently describes, moral turpitude "embodied many of the country's self-conscious norms of conduct, such as notions that oath-breaking and disloyalty in men and sexual impurity in women were particularly damning to reputation." *Id.* At a minimum, however, the standard did at least distinguish between petty crimes and those more indicative of mendacious character. *Id.* at 172 n.109.

168. Ladd, *supra* note 77, at 175 (observing that statutes encompassed an array of specific limitations on the types of convictions available for impeachment, including felonies, infamous crimes, those involving moral turpitude, and misdemeanors of a particular nature).

169. 213 N.C. 590, 197 S.E. 176 (1938).

170. *Id.* at 593, 197 S.E. at 178. Under Holmes's theory, conviction evidence demonstrated in the witness a "general readiness to do evil" from which the jury could "infer a readiness to lie in the particular case." Gertz v. Fitchburg R.R., 137 Mass. 77, 78 (1884).

171. *See supra* notes 73–75 and accompanying text.

172. *Sims*, 213 N.C. at 593, 197 S.E. at 178. The court would further state that cross-examination "is not limited to crimes" and that any act tending to impeach the witness's character was cross-examination fodder. *Id.*

173. 1 HENRY BRANDIS, Jr., BRANDIS ON NORTH CAROLINA EVIDENCE § 107, at 398 (2d ed. 1982).

174. *See, e.g.*, State v. Blackwell, 276 N.C. 714, 724, 174 S.E.2d 534, 541 (1970).

175. *See, e.g.*, *id.*

conduct,[176] unlawful possession of liquor,[177] motor vehicle offenses,[178] and traffic violations[179] all branded the witness as a liar as equally as convictions for embezzlement or perjury.[180]

The unapologetic adherence to limitless conviction-based impeachment prevailed in North Carolina throughout the twentieth century, even as its viability waned.[181] While other states and federal courts moved to rein in impeachment abuses, particularly against the criminally accused, North Carolina jurisprudence remained firmly entrenched.[182] The Supreme Court of North Carolina in *Ingle v. Roy Stone Transfer Corp.*[183] recoiled at the burgeoning movement toward restricting the scope and nature of criminal convictions available for impeaching witnesses.[184] While readily acknowledging that unrestrained conviction-based impeachment was being abandoned throughout the country, the court reviled these reforms as injecting uncertainty, pithily declaring, "Thus does the serpent of

176. *See, e.g.*, *id.*

177. *See, e.g.*, State v. King, 224 N.C. 329, 331, 334, 30 S.E. 230, 231, 233 (1944) (holding that impeaching a witness with a litany of criminal convictions, including possession of liquor and disorderly conduct, was proper but the trial court's exclusion of the records supporting the convictions was not an abuse of discretion).

178. *See, e.g.*, State v. Atkinson, 39 N.C. App. 575, 580, 251 S.E.2d 677, 681 (1979) (upholding a prosecutor's use of the defendant's multiple prior motor vehicle convictions as proper conviction-based impeachment "relevant to show [the] defendant's repeated and abiding contempt for the law and, thereby, his lack of trustworthiness").

179. *See, e.g.*, State v. Jones, 63 N.C. App. 411, 421, 305 S.E.2d 221, 227 (1983) (upholding the trial court's decision to admit the defendant's entire twenty-five year driving record, showing traffic violations dating back to 1956, as "relevant to show defendant's lack of credibility").

180. As Dean Ladd observed in 1940, impeachment by prior conviction is not based on any specific tendency of the witness to falsify his testimony. *See* Ladd, *supra* note 77, at 176. Rather, it serves primarily to "brand the witness with the stigma of distrust" in the purely general sense. *Id.* Yet classifying drunkenness, running a red light, or failing to pay a parking ticket as convictions that suggest untruthfulness "is nonsense" whereas crimes involving actual falsity may actually be useful to testing the witness's credibility. *Id.* at 182.

181. *See, e.g.*, *King*, 224 N.C. at 332, 30 S.E.2d at 232 (conceding that "[i]n many jurisdictions questions as to commission of crime are not permitted at all, unless addressed to those offenses which have an obvious relation to the virtue of veracity"); Sizemore, *supra* note 142, at 22 ("In many states, the inquiry into past criminal conduct and convictions is limited to those types of crimes which reflect on truth and veracity, such as fraud, forgery, embezzlement, perjury, and the like. However, in North Carolina, where general bad character may be shown for purposes of impeachment, no such limitation is observed.").

182. In fact, the court would take the *opposite* approach to addressing the prejudice to a person criminally accused when impeached with a litany of prior criminal convictions. Rather than recognizing the obvious likelihood that the jury would convict based on the prior convictions, the court claimed impeaching a defendant with prior convictions was *more probative* to the defendant lying on the witness stand because he "has a direct interest in the outcome of the case." State v. Ross, 295 N.C. 488, 493, 246 S.E.2d 780, 784 (1978). The court apparently failed to recognize that the defendant's bias as a witness with a stake in the outcome would be true regardless of his status as a prior-convicted person.

183. 271 N.C. 276, 156 S.E.2d 265 (1967).

184. *See id.* at 280–82, 156 S.E.2d at 269–70.

uncertainty crawl into the Eden of trial administration."[185] Limitations recognized by other courts were chastised as "oversensitive . . . to the feelings of the witnesses."[186] Offering trial courts discretion to exclude convictions was deemed "inexpedient."[187] Instead, the *Ingle* court unabashedly maintained that one's general character for mendacity could be derived from any criminal conviction, including violations of motor vehicle laws.[188] According to the court, holding steadfast to unrestrained use of convictions to attack witness credibility had the "virtue of certainty."[189] The reforms aimed at associating convictions with untruthful behavior were acknowledged and then summarily rejected.[190]

The *Ingle* court was equally recalcitrant to concerns that the unchecked use of prior-conviction evidence would raise the specter of unfair prejudice, even when applied to the defendant-witness. By the time *Ingle* was decided, commentators accepted that jurors were prone to using conviction evidence beyond gauging an accused person's testimony but also (if not primarily) for the defendant's propensity to commit the charged crime.[191] The court chose to absolve itself of these misuses by claiming "[j]urors are intelligent people" and "[r]esponsible counsel will not abuse it."[192] Yet, North Carolina cases are replete with examples of defendants being cross-examined with a host of prior convictions not relevant to untruthfulness, without an assessment of the obvious potential for jurors to

185. *Id.* at 281, 156 S.E.2d at 269 (quoting CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 43, at 90–91 (1954)).

186. *Id.* at 280, 156 S.E.2d at 269.

187. *Id.* at 281, 156 S.E.2d at 269.

188. *Id.* at 281–82, 156 S.E.2d at 270. The *Ingle* court conceded that the limits proposed within the Uniform Rules of Evidence were perhaps better than others for confining convictions more closely to untruthful criminal behavior, yet held fast to the proposition that anything less than an "unblemished general character" was fodder for cross-examination of a person's credibility, including motor vehicle laws. *Id.* at 281–82, 156 S.E.2d at 269–70.

189. *Id.* at 282, 156 S.E.2d at 270.

190. *Id.* at 281–82, 156 S.E.2d at 270 (conceding the propriety of limiting impeachment to convictions for crimes involving dishonesty or false statements as proposed by the Uniform Rules of Evidence but deciding that a conviction of any sort could still "cast some doubt" on the witness's credibility).

191. *See* Ladd, *supra* note 77, at 184–86 (noting how the defendant-witness is left in the unenviable position of choosing between remaining silent and the "reasonable speculation" that the jury will use conviction evidence for "the propensity of the accused to commit the crime as well as to falsity"); *see also* Erwin N. Griswold, *The Long View*, 51 A.B.A. J. 1017, 1021 (1965) (noting the defendant's "two almost hopeless alternatives" and the obvious impact on jurors confronted with prior convictions offered against an accused—no matter the instructions to the contrary); Sizemore, *supra* note 142, at 17 (observing that when "character evidence is paraded before the jury there is a natural inclination to reward a good man or to punish a bad man, regardless of the merits of the particular case").

192. *Ingle*, 271 N.C. at 282, 156 S.E.2d at 270.

misuse them as circumstantial evidence of guilt.[193] Even when offering occasional statements in dicta that trial courts have authority to curb abuses and discretion to prevent cross-examination from going "too far," appellate decisions reiterated the open impeachment rule with conviction evidence.[194] As one scholar aptly concluded, "North Carolina courts do not directly consider the prejudicial effect of impeachment evidence, nor do courts limit cross-examination to serious crimes or those bearing on veracity."[195] Instead, North Carolina courts assigned the task of balancing the prejudice associated with conviction-based impeachment to the same jury asked to convict.[196] Ignoring the obvious impact on witnesses confronted by their past misdeeds was one of several failures of North Carolina's Wild West impeachment practice. A victim had to choose between testifying and having her entire criminal record paraded before the jury or withdrawing and having her attacker go unpunished.[197]

As the judiciary remained entrenched in regressive impeachment practices, the best opportunity for reform became a state evidence code crafted to resemble the Model Code or Federal Rules of Evidence. In the early 1980s, rules drafters set to that task with hopes of improving the complicated rules and outmoded traditions that had come to define common law evidence in North Carolina.

193. *See, e.g.*, State v. Brown, 357 N.C. 382, 390, 584 S.E.2d 278, 283 (2003) (finding no error in the court's admission of the defendant's prior "malicious wounding" conviction despite its obvious potential for juror misuse in a case alleging murder); State v. Blackwell, 276 N.C. 714, 724, 174 S.E.2d 534, 541 (1970) (finding no prejudice in the admission of convictions for injury to property, public intoxication, disorderly conduct, and violation of prohibition laws); State v. Neal, 222 N.C. 546, 547, 23 S.E.2d 911, 912 (1943) (finding no error in the trial court's decision to admit "various infractions" including "larceny, vagrancy, nuisance and violation of the prohibition law" without weighing the prejudice to the witness or the fact that none of the convictions had any bearing on untruthfulness); State v. Jones, 63 N.C. App. 411, 421, 305 S.E.2d 221, 227 (1983) (finding no error in the trial court's decision to admit the defendant's fourteen traffic offenses over a twenty-five year span to impeach the defendant's credibility in case alleging vehicular manslaughter).

194. *See, e.g.*, *Blackwell*, 276 N.C. at 726, 174 S.E.2d at 541; *Neal*, 222 N.C. at 547, 23 S.E.2d at 912 (upholding the use of multiple convictions unrelated to veracity while suggesting that "whether the cross-examination goes too far or is unfair is a matter for the determination of the trial judge").

195. Thomas C. Manning, *Impeachment: The Dilemma of the Defendant-Witness in North Carolina*, 13 N.C. CENT. L.J. 35, 36–37 (1981); *see, e.g.*, *Jones*, 63 N.C. App. at 421, 305 S.E.2d at 227 (1983) (finding defendant's fourteen traffic violations over a twenty-five-year span was "admissible for impeachment, and [was] relevant to show defendant's lack of credibility").

196. Manning, *supra* note 195, at 37 ("The burden of balancing the prejudice of character impeachment against its probative value falls largely upon the jury.").

197. *See* Michael W. Patrick, *Toward a Codification of the Law of Evidence in North Carolina*, 16 WAKE FOREST L. REV. 669, 694 (1980) (characterizing North Carolina's unrestricted conviction-based practice as "seriously undermin[ing] the policy against use of character and misconduct as circumstantial evidence").

B. Adopting an Evidence Code: Opportunity for Reform

By the latter half of the twentieth century, North Carolina's need for a reformed evidence code was undeniable.[198] The amalgamation of decisional law and statutory enactments that comprised the state's body of evidence law created an untenable framework for judges and practitioners.[199] As one commentator lamented,

> [t]he rules governing the introduction of evidence often lie buried in the hundreds of volumes of North Carolina decisions . . . . Even when the judge or practitioner can leisurely search for the applicable rules, the hunt too often ends revealing no law on point or numerous precedents seemingly at war with themselves.[200]

The General Assembly responded to the growing need for an accessible evidence code in 1979, directing the Legislative Research Commission to study the state's evidence laws and propose a comprehensive code.[201] Four years later, the Commission delivered its Report to the 1983 General Assembly.[202] The Commission's Evidence Laws Study Committee observed that the state's evidence laws were "complex and confusing," consisted of a "morass of cases and statutes," and often resulted in "no clear answer" when consulted.[203] Adopting a centralized code offered the opportunity to make the rules of evidence more accessible and easier to use for judges and trial lawyers alike.[204] Most

198. As early as 1946, in the first edition of his treatise on North Carolina evidence, Dale Stansbury observed that the "law of Evidence is in need of considerable overhauling." STANSBURY, *supra* note 143, at VIII.

199. *See* Walter J. Blakey, *Moving Towards an Evidence Law of General Principles: Several Suggestions Concerning an Evidence Code for North Carolina*, 13 N.C. CENT. L.J. 1, 5 (1981) ("The evidence law of North Carolina is a complex and confusing mixture of common law and narrow statutes.").

200. Patrick, *supra* note 197, at 669–70 (discussing the need to reform North Carolina evidence law and calling for modified adoption of the Federal Rules of Evidence).

201. H.R.J. Res. 65, 1979 Gen. Assemb., 1st Sess. (N.C. 1979).

202. LEGISLATIVE RESEARCH COMM'N, EVIDENCE LAWS: REPORT TO THE 1983 GENERAL ASSEMBLY OF NORTH CAROLINA i (1982). The Commission's Evidence Laws Study Committee initially met ten times, approving half of a proposed evidence code. *Id.* at ii. The Commission sought approval for further study, which the General Assembly approved in 1981. *Id.* The Evidence Laws Study Committee met eight additional times before approving a final, fully integrated evidence code for consideration to the General Assembly. *Id.*

203. *Id.* at iii. The Evidence Laws Study Committee found that evidence law in the state lacked clarity, often provided no answer to evidence questions, relied on slow-evolving decisional law, and failed to provide trial lawyers and judges with easily accessible guidance for arguing and ruling on evidence issues in the heat of trial. *Id.*

204. *Id.* ("The most compelling reason why North Carolina should codify the law of evidence is to make that law easier to find and use.").

notably, however, it meant less reliance on a slow, evolving common law and would "serve as a vehicle *for badly needed reform*."[205]

The Evidence Laws Study Committee proposed that the General Assembly adopt an integrated code largely based on the recently enacted Federal Rules of Evidence.[206] In crafting the proposed rules, the Committee took a logical approach by integrating the Federal Rules of Evidence with existing North Carolina evidence law. It concluded that "[a]n evidence code should retain the principles of North Carolina evidence law that are superior to the federal rules but not those that are outmoded."[207] Regrettably, the Committee ultimately decided that the state's broad approach to conviction-based impeachment was not "outmoded," proposing minimal changes to impeachment with conviction evidence while largely leaving intact the practices that typified North Carolina common law.[208]

C. North Carolina Rule 609

Initially, the Evidence Laws Study Committee proposed comprehensive reform to the state's widely permissive impeachment practices. In 1980, the Committee's first draft of Rule 609(a) embraced a logical, refined approach by limiting convictions available for impeachment to crimes involving deceit, dishonesty, or false statement.[209] The original draft read as follows:

> (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible if elicited from him or established by public record during cross-examination or thereafter *but only if the crime involved some element of deceit, untruthfulness, or falsification bearing upon the witness's propensity to testify untruthfully, such as perjury or subordination of perjury, false statement, criminal fraud, embezzlement or false pretense or other crime in the nature of crimen falsi*.[210]

As proposed, the rule would have protected all witnesses, including victims, against broad forays into their criminal histories with crimes unrelated to dishonesty. Regrettably, the Committee's initial proposal was discarded three years later for reasons not made known in the legislative

205. *Id.* (emphasis added).
206. *Id.* at iv–v.
207. *Id.* at vi.
208. *See id.* at 59–61.
209. Memorandum from Donald B. Hunt, Comm. Counsel, Leg. Res. Comm'n, to Evid. Law. Study Comm. 3 (May 6, 1982) (on file with the North Carolina Law Review) (detailing the original proposal for North Carolina Rule 609).
210. *Id*. (emphasis added).

history of the rule drafting.[211] The final version submitted to the General Assembly encompassed a vast array of criminal convictions, echoing the state's common law practice.[212]

The 1983 General Assembly formally codified impeachment by prior conviction in North Carolina Rule of Evidence 609.[213] The rule largely follows the structure of the federal rule but diverges significantly in the types of crimes available to impeach a witness. As originally adopted, North Carolina Rule 609(a) stated:

> (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime *punishable by more than 60 days confinement* shall be admitted if elicited from him or established by public record during cross-examination or thereafter.[214]

The final approach taken by the Evidence Laws Study Committee and later approved by the General Assembly echoed the common law approach to impeaching witnesses with most convictions. The rule did not limit convictions to crimes of dishonesty bearing directly on untruthfulness, such as those involving perjury, embezzlement, and fraud.[215] It offered no rational correlation between the nature of the crime and untruthfulness whatsoever.[216] And the rule placed only marginal limits on the severity of the crime by excluding convictions punishable by less than sixty days' confinement.[217] In fact, the rule linked conviction-based impeachment to the vast array of criminal convictions used as aggravating factors in sentencing rather than tying impeachment to crimes directly associated with dishonesty.[218] The theory was purely punitive. A witness could be punished on the witness stand with a prior conviction that would later enhance punishment if convicted of a new crime.

211. The reasons for limiting impeachment to convictions based only on crimes of dishonesty and false statement are not indicated in the record. All that may be discerned is that the final, proposed rule rejected the original form in favor of broader conviction usage without reference to the nature or type of crime.

212. *See* LEGISLATIVE RESEARCH COMM'N, *supra* note 202, at 59–60.

213. An Act to Simplify and Codify the Rules of Evidence, ch. 701, § 1, 1983 N.C. Sess. Laws 666, 673 (codified as amended at N.C. GEN. STAT. § 8C-1 (2017)).

214. *Id.* (emphasis added).

215. *See id.*; 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 98, at 337–39 (7th ed. 2011).

216. State v. Carter, 326 N.C. 243, 250, 388 S.E.2d 111, 116 (1990) (concluding that, under North Carolina Rule 609(a), convictions for discrediting a witness are admissible without the crime having any "rational relevance to untruthfulness" (quoting 1 HENRY BRANDIS, JR., BRANDIS ON NORTH CAROLINA EVIDENCE § 112, at 484 (3d ed. 1988))).

217. N.C. R. EVID. 609(a) (1983).

218. *See* LEGISLATIVE RESEARCH COMM'N, *supra* note 202, at 60 (describing the standard in 609(a) as "the standard used in the Fair Sentencing Act in defining an aggravating factor").

D. Diverging from the Federal Rule

North Carolina Rule 609(a) is significantly more permissive than its federal counterpart in both form and function.[219] The federal rule narrows the range of convictions available for impeaching witnesses to felony-level crimes and those that involve dishonesty or false statement.[220] Impeachment is thereby restricted in scope to serious crimes that may generally suggest untruthful character and those crimes of any severity that directly correspond to untruthfulness.[221] Like the common law before it, however, North Carolina Rule 609(a) offers no such distinctions. The rule is not tied to severe crimes, but instead incorporates a wide array of lesser misdemeanors as impeachment material.[222] Moreover, the scope of low-level misdemeanors is not narrowly tailored to those crimes involving deceit or falsity.[223]

North Carolina Rule 609(a) is also less forgiving in function. As originally drafted and currently codified, the rule's text affords no discretion for trial courts to guard against unfair prejudice to impeached witnesses, including victims.[224] This textual absence represents a significant divergence from the federal rule.[225] In federal trials, generic felony convictions that do not involve dishonest acts or false statements are not per se admissible to impeach a witness.[226] Federal Rule 609(a) mandates that trial judges weigh the admissibility of a conviction not directly correlated to untruthfulness by balancing its probative value in revealing untruthful character against its prejudicial impact.[227] Federal judges are

219. State v. Ross, 329 N.C. 108, 118, 405 S.E.2d 158, 164 (1991) (noting that the North Carolina rule is "more permissive than its federal counterpart").

220. FED. R. EVID. 609(a).

221. *Id.*

222. N.C. R. EVID. 609(a); *see* discussion *infra* Part IV.

223. *Id.*; *see* discussion *infra* Part IV.

224. *Compare* N.C. R. EVID. 609(a) (1983) (Rule 609 as originally enacted), *with* N.C. R. EVID. 609(a) (2017).

225. *See* State v. Brown, 357 N.C. 382, 390, 584 S.E.2d 278, 283 (2003) (asserting that the text of Rule 609(a) affords "no room for the trial court's discretion").

226. FED. R. EVID. 609(a); State v. Ross, 329 N.C. 108, 118–19, 405 S.E.2d 158, 164 (1991) (observing that the federal rule requires the trial court to balance the probative value of the witness's conviction against its prejudicial effect).

227. FED. R. EVID. 609(a). Under the federal approach, trial courts must weigh the conviction's probative value in questioning credibility against the danger it may have in prejudicing the witness or case. *Id.* Where the prejudicial effect substantially outweighs the probative value in questioning credibility, the trial court has discretion to exclude the conviction. *Id.* This approach is markedly different from North Carolina Rule 609(a) which affords no direct textual discretion for trial courts to exclude convictions offered for impeachment purposes. N.C. R. EVID. 609(a). Certainly, North Carolina Rule 403 can and should be read in harmony with Rule 609(a) to give trial courts discretion to exclude convictions. *See* discussion *infra* Section II.F.

thereby empowered to shield witnesses from unfair attacks with generic felony convictions, including victims testifying as government witnesses.[228] The text of Federal Rule 609(a) also acknowledges the fundamental difference between impeaching a neutral witness and an accused person with prior-conviction evidence.[229] The federal standard for impeaching testifying defendants with generic felony-level convictions is higher than all other witnesses given the danger that the jury will use the evidence to convict rather than to question the defendant's veracity.[230] North Carolina Rule 609(a) offers no similar protection to defendant-witnesses. Prior crimes that have identical attributes with the charged crime may be admitted against a testifying defendant,[231] even though same-crime convictions carry the highest degree of prejudice and likelihood for juror misuse.[232]

While other jurisdictions followed the federal approach to reining in conviction-based impeachment, North Carolina's modifications were slight at best.[233] The most significant alteration involved limiting the use of stale convictions.[234] At common law, North Carolina courts refused to time-limit the age of a conviction—a conviction twenty-five years past was just as viable as a recent conviction for discrediting the witness.[235] Mirroring the

228. FED. R. EVID. 609(a).

229. *Id.* at 609(a)(1)(A)–(B) (incorporating a higher standard for admitting felony-level convictions against a defendant-witness than the lesser standard employed for witnesses in civil cases and those other than the defendant in a criminal case).

230. *See id.* at 609(a) (permitting the trial court to exclude felony-level convictions that do not involve a dishonest act or false statement when offered to impeach a defendant-witness if the prejudicial effect even slightly outweighs the conviction's probative value in questioning truthful testimony).

231. *See, e.g.*, State v. Little, 163 N.C. App. 235, 242–43, 593 S.E.2d 113, 118 (2004) (finding proper impeachment of the defendant with a prior conviction for larceny in a case charging the defendant with first-degree burglary).

232. *See, e.g.*, State v. Norris, 101 N.C. App. 144, 148, 398 S.E.2d 652, 654 (1990) (finding that the defendant's prior conviction for incest was "so similar" to the current allegations for child rape that admitting it would have clearly prejudiced the defendant when applying the balancing factors in Rule 609(b)).

233. *See* WALTER JAMES BLAKEY, DEAN P. LOVEN & GLEN WEISSENBERGER, NORTH CAROLINA EVIDENCE, 2017 COURTROOM MANUAL 456 (2017) (describing Rule 609(a) as "only slightly more restrictive than the prior common law"); *see also* State v. Ross, 329 N.C. 108, 118, 405 S.E.2d 158, 164 (1991) ("North Carolina's version of Rule 609(a) is more permissive than its federal counterpart in that its only limitation on evidence of a witness's convictions is that the crime be punishable by more than sixty days confinement.").

234. N.C. R. EVID. 609(b). North Carolina Rule 609(c), (d) and (e) made modest changes to the use of convictions for pardoned crimes, juvenile convictions, and convictions on appeal. *Id.* at 609(c)–(e). Because these provisions are beyond the scope of this Article, they are not addressed.

235. Laura E. Crumpler & Gordon Widenhouse, *An Analysis of the New North Carolina Evidence Code: Opportunity for Reform*, 20 WAKE FOREST L. REV. 1, 53 n.378 (1984) (observing that no common law case suggests time restrictions on convictions used to impeach);

federal rule, North Carolina Rule 609(b) treats convictions more than ten years removed (from the later of the conviction date or release from confinement) as ostensibly inadmissible.[236] Counsel offering a stale conviction for impeachment purposes must convince the trial court that admitting the conviction is in the interest of justice.[237] In doing so, the proffering counsel is tasked with demonstrating that the conviction's impeachment value is substantially more probative to untruthfulness than the prejudicial effect it would have against the witness.[238]

E. North Carolina Rule 609(a) Revision and Regression

The General Assembly amended Rule 609(a) in 1999 to clarify the types of convictions permissible for discrediting witness testimony.[239] Where the original standard was based on convictions "punishable by more than 60 days confinement," the revised rule states the types of crimes, rather than the term of confinement.[240] North Carolina Rule 609(a) now provides:

see, e.g., State v. Jones, 63 N.C. App. 411, 421, 305 S.E.2d 221, 227 (1983) (admitting the defendant's entire twenty-five year driving record showing traffic violations dating back to 1956).

236. N.C. R. EVID. 609(b); *see* State v. Brown, 357 N.C. 382, 390, 584 S.E.2d 278, 283 (2003) (determining that a defendant's 1986 conviction fell within the ambit of Rule 609(a), and not the more restrictive 609(b), because the defendant had not been released from confinement for the conviction until "1991 or 1992" and the defendant's trial in 1998 placed the 1986 conviction "well within ten years from the date of defendant's release from confinement"); *Ross*, 329 N.C. at 119, 405 S.E.2d at 164 (noting that, unlike Rule 609(a), North Carolina Rule 609(b) "is identical to the federal rule" and therefore presumes that stale convictions are more prejudicial than probative of a witness's "general character for truthfulness").

237. N.C. R. EVID. 609(b). The reforms included in Rule 609(b) limiting the use of remote convictions were the most significant modification to the common law approach that placed no time restrictions on the conviction. Crumpler & Widenhouse, *supra* note 235, at 53 n.378 (observing that no common law case suggests time restrictions on convictions used to impeach). Regrettably, as much as the rule speaks to the presumptive inadmissibility of stale convictions, modern North Carolina appellate courts continue to cling to tradition by repeatedly finding either no error or harmless error in trial court decisions to admit convictions well past the ten-year mark. *See, e.g.*, *Ross*, 329 N.C. at 120–21, 405 S.E.2d at 165 (finding harmless error in the trial court's admission of a fifteen-year-old conviction in Virginia for sodomy despite its prejudice and having zero relationship to untruthful character); State v. Joyner, 243 N.C. App. 644, 650, 777 S.E.2d 332, 335–37 (2015) (finding no error in the trial court's failure to make specific findings supporting the use of five stale convictions to impeach the defendant); State v. Hensley, 77 N.C. App. 192, 194–95, 334 S.E.2d 783, 784–85 (1985) (finding harmless error in the trial court's decision to admit while failing to weigh the prejudice of the defendant's thirteen-year-old conviction).

238. N.C. R. EVID. 609(b).

239. Act of May 21, 1999, ch. 79, sec. 1, § 8C-1, 1999 N.C. Sess. 114, 114 (codified as amended at N.C. GEN. STAT. § 8C-1 (2017)) (amending the Evidence Code to make admissible for the purposes of impeachment evidence of a witness's conviction of a felony or Class A1, Class 1, or Class 2 misdemeanor).

240. *Id.*

> (a) General rule.—For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of *a felony, or of a Class A1, Class 1, or Class 2 misdemeanor*, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter.[241]

Although perhaps not intentional, the 1999 revision effectively regressed conviction-based impeachment towards the wide-open impeachment practices of the pre-rules era given the state's movement toward expanding crimes and increasing penalties. Today, Rule 609(a) makes the vast majority of North Carolina state crimes available for witness impeachment. The North Carolina Sentencing and Policy Advisory Commission currently identifies 2,206 unique crimes that may be admitted under Rule 609 given their classification.[242] The Commission's most recent summary of felony and misdemeanor offenses indicates that eighty-six percent of all crimes in North Carolina may be used to impeach witnesses.[243] Only 349 total offenses are excluded.[244] These low-level, Class 3 misdemeanors primarily consist of petty offenses like littering[245] and impermissible posting of advertisements.[246] A total of 795 felonies and 1,411 varying misdemeanors may currently be used to discredit a witness.[247] These numbers will continue to increase if the trend of expanding crimes continues in North Carolina, as it has in recent years.[248] In the five-year period from 2008 to 2013, the General Assembly averaged an additional 16.8 new felonies and 17.5 new misdemeanors per year.[249]

241. N.C. R. EVID. 609(a) (emphasis added).

242. *See* N.C. SENTENCING & POL'Y ADVISORY COMM'N, FELONY CLASSIFICATION UNDER THE STRUCTURED SENTENCING ACT (2018), [hereinafter N.C. FELONY CLASSIFICATIONS], https://www.nccourts.gov/documents/publications/offense-classifications/felony-list-2018.pdf?CmxDfaPpOW5kONSYs4fxE2b34uYX8.23 [https://perma.cc/76CT-GLA4]; N.C. SENTENCING & POL'Y ADVISORY COMM'N, MISDEMEANOR CLASSIFICATION UNDER THE STRUCTURED SENTENCING ACT (2018), [hereinafter N.C. MISDEMEANOR CLASSIFICATIONS], https://www.nccourts.gov/documents/publications/offense-classifications/miademeanor-list-2018.pdf?FvP.iinNlu8aw.0UtReGkz.e185Shu4a [https://perma.cc/7BUS-9XN2].

243. *See* N.C. FELONY CLASSIFICATIONS, *supra* note 242; N.C. MISDEMEANOR CLASSIFICATIONS, *supra* note 242.

244. *See* N.C. FELONY CLASSIFICATIONS, *supra* note 242; N.C. MISDEMEANOR CLASSIFICATIONS, *supra* note 242.

245. N.C. GEN STAT. § 14-399(c) (2017).

246. *Id.* § 14-145.

247. *See* N.C. FELONY CLASSIFICATIONS, *supra* note 242; N.C. MISDEMEANOR CLASSIFICATIONS, *supra* note 242.

248. *See* Welty, *supra* note 11, at 1939 (chronicling the precipitous rise in criminal statutes adopted by the North Carolina General Assembly and overcriminalization concerns in the state). Jeff Welty's comprehensive review of the trend in statutory enactments is alarming. Between 1986 and 2011 alone, the General Assembly increased the number of sections in Chapter 14, which contains North Carolina's criminal code, by almost twenty-five percent. *Id.* at 1940.

249. *Id.* at 1942.

And many preexisting crimes have been reclassified to have a harsher punishment since Rule 609(a) was revised, suddenly making crimes that were previously unavailable for impeachment into cross-examination fodder.[250] The correlative impact on witness impeachment cannot be ignored given that the standard used in Rule 609(a) ties admissible convictions to broad criminal categories.

When amending the standard employed under Rule 609, the General Assembly compounded the negative impact of impeachment by prior conviction on witnesses and trial outcomes by opting not to correlate the type of conviction available to impeach a witness with crimes involving dishonesty.[251] Today, felony convictions for impaired driving,[252] beach bingo,[253] and dog fighting[254] are as admissible as embezzlement,[255] extortion,[256] and perjury.[257] Misdemeanor convictions for aggressive driving,[258] failing to vaccinate a pet,[259] fastening a boat to a bridge,[260] and disorderly conduct[261] stand alongside misdemeanor forgery,[262] passing worthless checks,[263] and blackmailing.[264] The only basis for impeaching a

250. *Id.* at 1943. When Rule 609 was first adopted, commentators viewed it as making at least some modest reform to the otherwise limitless common law. INST. GOV'T, UNIV. N.C. CHAPEL HILL, NORTH CAROLINA LEGISLATION 1983: A SUMMARY OF LEGISLATION IN THE 1983 GENERAL ASSEMBLY OF INTEREST TO NORTH CAROLINA PUBLIC OFFICIALS 67 (Ann L. Sawyer ed. 1983). At the time, the Institute of Government noted that simple assault could "*not* be used" to impeach a witness. *Id.* Today, simple assault *is* available to impeach a witness. N.C. GEN. STAT. § 14-33(a) (2017); N.C. R. EVID. 609(a).

251. BROUN, *supra* note 215, § 98, at 337–38 (observing that, true to its common law antecedent, North Carolina Rule 609 "does not require that the crime have a rational relevance to untruthfulness"); Franklin Miller Williams, Note, *The New North Carolina Rules of Evidence: Privileges, Relevancy, Competency, Impeachment, and Expert Opinion*, 62 N.C. L. REV. 1290, 1297 (1984) (concluding that Rule 609 can "be criticized for admitting evidence that may have no relation to the credibility of the witness").

252. N.C. GEN. STAT. § 20-138.5(b) (2017) (classifying habitual impaired driving as a felony).

253. *Id.* § 14-309.14(2) (classifying beach bingo as a felony).

254. *Id.* § 14-362.2(a) (classifying dog fighting as a felony).

255. *Id.* § 14-90(b)(2) (classifying embezzlement as a felony).

256. *Id.* § 14-118.4 (classifying extortion as a felony).

257. *Id.* § 14-209 (classifying perjury as a felony); *see also* N.C. R. EVID. 609(a).

258. N.C. GEN. STAT. § 20-141.6(c) (2017) (classifying aggressive driving as a Class 1 misdemeanor).

259. *Id.* §§ 130A-25(a), -185 (classifying failing to vaccinate a pet as a misdemeanor); *see also* N.C. MISDEMEANOR CLASSIFICATIONS, *supra* note 242, at 31.

260. N.C. GEN. STAT. § 136-80 (2017) (classifying fastening a boat to a bridge as a Class 1 misdemeanor).

261. *Id.* § 14-288.4(c) (classifying disorderly conduct as a Class 2 misdemeanor).

262. N.C. MISDEMEANOR CLASSIFICATIONS, *supra* note 242, at 4 (classifying common law forgery as a Class 1 misdemeanor under the North Carolina Structured Sentencing Act).

263. N.C. GEN, STAT. § 14-107(d)(3) (2017) (classifying passing worthless checks as a Class 1 misdemeanor).

witness with crimes clearly removed from false acts is the outmoded assumption that criminality of any kind corresponds to a dishonest character. In that sense, the current North Carolina Rule 609 perpetuates the same unsupported, ancient assumption that a witness's prior convictions generally correlate to her subsequent untruthfulness, no matter the type or nature of the crime.[265]

As detailed in the following parts, the General Assembly's decision to adopt a broad classification standard for Rule 609 opens the door to lawyer abuse and juror misuse. Jurors are unlikely to view a witness's prior conviction for disorderly conduct or aggressive driving as an indication that the witness is currently lying under oath. They are far more prone to view the witness as predisposed to antisocial behavior, regardless of the merits of her testimony or the case itself.[266]

F. Judicial Recalcitrance to Reform

Judicial recalcitrance to modern evidence rules aimed at preventing trial abuses has erased the initial hope for modest reform in impeachment practices. When the North Carolina Rules of Evidence were first enacted in 1983, commentators expected greater flexibility for trial courts to manage the types of evidence presented to juries.[267] They noted that the discretion mandated by the rules represented a marked improvement from the common law's rigid commands.[268] The North Carolina Institute of Government similarly described the rules as generally being "more liberal

264. *Id.* § 14-118 (classifying blackmail as a Class 1 misdemeanor); *see also* N.C. R. EVID. 609(a).

265. By rejecting the common law's broad approach to witness impeachment, Federal Rule 609 would exclude some of the aforementioned crimes outright and would enable the trial court to exclude many of the others. As lesser crimes that do not require proving a dishonest act or false statement, the misdemeanor offenses for aggressive driving, failing to vaccinate a pet, fastening a boat to a bridge, and disorderly conduct would be wholly excluded for impeachment purposes. FED. R. EVID. 609(a). A federal judge would also have discretion to exclude the felony offenses having little probative value toward evaluating the witness's character for dishonesty (e.g, beach bingo). *Id.* The only offenses that would be per se admissible under the federal rule would be the crimes of embezzlement, extortion, perjury, forgery, passing worthless checks, and blackmailing, given how they directly implicate dishonest character. *See id.*

266. Ladd, *supra* note 77, at 186; Sizemore, *supra* note 142, at 17 (observing that when "character evidence is paraded before the jury there is a natural inclination to reward a good man or to punish a bad man, regardless of the merits of the particular case").

267. Crumpler & Widenhouse, *supra* note 235, at 2, 13 (anticipating that the then-newly-enacted evidence code would "check the abuses involved in the interpretation and application of evidentiary principles" and that trial courts would have "the discretion needed to apply the rule[s] to each case as fairness and justice require").

268. *Id.* at 53 n.378; Manning, *supra* note 195, at 37 (observing the "harshness" of North Carolina's "all-inclusive" rule on impeachment with conviction evidence); Patrick, *supra* note 197, at 673 (noting the difference between the approach to offering trial court discretion under the federal rules "[i]n contrast to the common law's propensity to rely on rigid rules").

than current law by granting greater discretion to the trial judges."[269] Trial judges were empowered to apply the rules "to each case as fairness and justice requires."[270] As a result, scholars anticipated that the former abuses encountered in cross-examination would be curtailed significantly given the broader discretion granted to trial judges to evaluate all forms of relevant evidence.[271] This was especially true for convictions offered to impeach witnesses, which were among the most susceptible to abuse.[272] The judicial attitude toward the new rules, however, would prove commentators and scholars wrong on both fronts.

Unquestionably, the overarching discretion afforded to trial courts under the newly enacted rules offered an opportunity for judicial intervention to prevent impeachment abuses.[273] Most notably, the delegation of broad oversight to trial courts to exclude unfairly prejudicial evidence provided a clear avenue for judicial winnowing of conviction-based impeachment.[274] This authority was crystalized in North Carolina Rule of Evidence 403.[275] The state's adopted version of Rule 403 mirrors the federal rule, granting trial courts discretion to exclude relevant evidence that, on balance, creates too great a risk of unfair prejudice.[276] Practitioners and scholars alike expected that the policy supporting Rule 403's mandate would apply broadly to all types of relevant evidence.[277] They noted that the rules of evidence were adopted as a single, comprehensive code[278] and

269. INST. GOV'T, UNIV. N.C. CHAPEL HILL, *supra* note 250, at 66.

270. Crumpler & Widenhouse, *supra* note 235, at 13.

271. *Id.* at 23 (concluding that the limitations found in Rules 608 and 609 would "significantly alter the law in North Carolina" for impeaching witness credibility); Govert, *supra* note 160, at 540; Amanda F. Spence, Note, *Evidence—Cross-Examination—Impeachment of Witnesses*—State v. Williams, *330 N.C. 711, 412 S.E.2d 359 (1992)*, 71 N.C. L. REV. 2059, 2059 (1993).

272. Crumpler & Widenhouse, *supra* note 235, at 47.

273. *Id.* at 52–53 (observing that if courts read the rules on conviction-based impeachment "in tandem with Rule 403" the cumulative effect would serve to reduce the "likelihood of undue prejudice in this area"). Trial court discretion is particularly appropriate for evaluating the propriety of discrediting witnesses with prior convictions for crimes unrelated to dishonest acts. *See, e.g.*, Abshire v. Walls, 830 F.2d 1277, 1281 (4th Cir. 1987) (observing that minor crimes not involving dishonesty are worth "almost nil on the question of whether the jury should" believe the witness).

274. N.C. R. EVID. 403; *see* Crumpler & Widenhouse, *supra* note 235, at 13 (noting that Rule 403 affords discretion for judges to evaluate the fairness of admitting each item of evidence proffered).

275. N.C. R. EVID. 403.

276. *Compare* N.C. R. EVID. 403 (permitting exclusion of evidence if the risk of unfair prejudice outweighs the probative value), *with* FED. R. EVID. 403 (same).

277. Crumpler & Widenhouse, *supra* note 235, at 15 ("Rule 403 erects a standard that *every* item of relevant evidence should meet."); Patrick, *supra* note 197, at 673 (noting that Rule 403 "expressly authorizes the trial judge to exercise discretion to exclude relevant evidence").

278. Crumpler & Widenhouse, *supra* note 235, at 3 (observing that "[t]he rules were not adopted in isolation" but were designed to operate in tandem).

that Rule 403 served as a barrier over which all relevant evidence had to pass.[279] Thus, if read in tandem, Rule 403 would serve as a discretionary check on the broad convictions generally deemed relevant to impeaching witness credibility under Rule 609(a).[280] This logic was echoed at the time by federal courts interpreting Rule 403's clear mandate as a "rule of exclusion that cuts across the rules of evidence."[281] Nevertheless, the Supreme Court of North Carolina took the opposite approach, favoring the common law tradition of unimpeded impeachment without regard to the prejudicial impact or harm to the witness.[282]

Since the passage of the North Carolina Rules of Evidence in 1983, the state's judiciary has repeatedly declared itself powerless to exclude prior-conviction evidence that meets the requirements of 609(a) when offered for impeachment purposes.[283] In *State v. Brown*,[284] the Supreme Court of North Carolina rejected any basis for allowing trial court discretion to exclude convictions under Rule 609(a), no matter the prejudice to the witness, relevance to untruthful behavior, or likely impact on the jury's decisionmaking.[285] At trial, the defendant argued that his prior conviction so closely related to the charged offense that its admission

279. *Id.* at 15.

280. *Id.* at 26–27 ("Rule 403, with its independent requirement that probative value outweigh potential prejudice, should provide the extra measure of protection against some of the abuses inherent in the use of evidence of other crimes.").

281. Jones v. Bd. of Police Comm'rs, 844 F.2d 500, 505 (8th Cir. 1988) (quoting Shows v. M/V Red Eagle, 695 F.2d 114, 118 (5th Cir. 1983)). Several federal appellate courts viewed Rule 403 as a qualifier to Rule 609 where a specific standard was not included in the rule. *See, e.g.*, Abshire v. Walls, 830 F.2d 1277, 1281 (4th Cir. 1987) (concluding that Rule 403 must be read in conjunction with Rule 609); Czajka v. Hickman, 703 F.2d 317, 319 (8th Cir. 1983) ("Rule 609 does not foreclose the district court's duty under Fed. R. Evid. 403 to weigh the probative value of the evidence against the danger of unfair prejudice."). Others would view Rule 609 as controlling. *See, e.g.*, Campbell v. Greer, 831 F.2d 700, 705–06 (7th Cir. 1987) (concluding that Rule 403 was not intended to supplant Rule 609); Diggs v. Lyons, 741 F.2d 577, 582 (3d Cir. 1984) (concluding that the legislative history did not support federal Rule 403 modifying Rule 609). Congress would amend Rule 609(a) in 1990 to clarify that Rule 403 applies to all witnesses other than the criminal defendant when evaluating the impeachment viability of convictions unrelated to dishonest acts and false statements. H.R. DOC. NO. 101-142, at 2 (1990).

282. *See* State v. Brown, 357 N.C. 382, 390, 584 S.E.2d 278, 283 (2003) (foreclosing Rule 403's application to conviction-based impeachment standards).

283. *Id.* (asserting that Rule 609(a) affords "no room for the trial court's discretion"); State v. Perkins, 235 N.C. Ct. App. 425, 763 S.E.2d 928, 2014 WL 3824261, at *2 (2014) (unpublished table decision) (citing *Brown* in confirming the trial court's decision to admit the defendant's prior-conviction evidence if defendant elected to testify); State v. Lynch, 217 N.C. App. 455, 462, 720 S.E.2d 452, 456 (2011) (granting a new trial after the trial court's decision to exclude prior-conviction evidence in violation of the "mandatory" language in Rule 609); Outlaw v. Johnson, 190 N.C. App. 233, 247, 660 S.E.2d 550, 561 (2008) (finding error in the trial court's decision to exclude convictions under Rule 403 under the controlling decision in *Brown*).

284. 357 N.C. 382, 584 S.E.2d 278 (2003).

285. *Id.* at 390, 584 S.E.2d at 283.

would be unfairly prejudicial.[286] He urged the trial judge to exclude the conviction under Rule 403, arguing that the conviction's low probative value for untruthfulness was substantially outweighed by its obvious prejudicial impact.[287] The trial court denied the objection and admitted the conviction, refusing to employ Rule 403's balancing test.[288]

The Supreme Court of North Carolina endorsed the trial court's decision, claiming the legislature foreclosed any basis for trial courts to exclude evidence otherwise admissible under Rule 609(a), notwithstanding the clear discretion afforded trial judges under Rule 403.[289] The court maintained that the language within Rule 609(a) required "mandatory" admissibility of all convictions falling within its purview.[290] According to *Brown*, the rule's text left "no room for the trial court's discretion."[291] The court maintained that, unlike the rule's federal counterpart, North Carolina Rule 609(a) included no balancing test.[292] This textual absence revealed to the court "an unequivocal intention to diverge from the federal requirement of a balancing test," which embraced prejudicial impact, particularly to the defendant.[293] As a consequence, trial court discretion to protect against unfair conviction-based impeachments was judicially nullified for all witnesses—civil or criminal, victim or accused—testifying in North Carolina courts.

Today, the *Brown* decision stands firmly entrenched in North Carolina jurisprudence for the proposition that every conviction falling within the purview of Rule 609(a) *must be admitted*.[294] The Supreme Court of North Carolina ignored its own precedent,[295] scholarly admonitions,[296] and the

286. *Id.* at 389, 584 S.E.2d at 282. The defendant argued that his prior conviction for "malicious wounding" would obviously create a danger of unfair prejudice given the murder allegations against him and that the conviction itself bore a remote connection to untruthfulness. *Id.*

287. *Id.*

288. *Id.*

289. *See id.* at 390, 584 S.E.2d at 283 (declaring that the defendant's argument in favor of balancing convictions under Rule 403 failed to account for the "clearly expressed intent of the legislature").

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.* The hard line adopted by the *Brown* court failed to consider federal circuit decisions reading Federal Rule 609 in harmony with Federal Rule 403. Moreover, the court ignored the fact that the balancing provision found in Rule 609(b) represented a higher standard than that found in Rule 403. In that sense, it seems apparent that the reason Rule 609(a) includes no balancing provision is because it may be read in conjunction with Rule 403.

294. *Id.* ("The language of Rule 609(a) ('shall be admitted') is mandatory, *leaving no room for the trial court's discretion*." (emphasis added)).

295. *See, e.g.*, State v. Blackwell, 276 N.C. 714, 724, 174 S.E.2d 534, 541 (1970) ("Whether the cross-examination goes too far or is unfair is a matter for determination of the trial judge and rests largely in his sole discretion."); Ingle v. Roy Stone Transfer Corp., 271 N.C. 276, 282, 156

purpose of the rules themselves[297] when concluding that trial courts have no discretion to exclude convictions with little probative value and a high degree of misuse. The General Assembly has made no effort to amend Rule 609 in light of *Brown*'s mandate. Congress, within the same period, clarified the federal rule to confirm trial court discretion under Rule 403 for non-crimen falsi felonies.[298] In 1999, Federal Rule 609 was amended to add a degree of protection to an entire class of witnesses, including victims.[299] North Carolina has not budged. Today, North Carolina trial courts are obliged to uphold *Brown*'s mandate: the thousands of convictions falling within Rule 609 must be admitted when offered by counsel, notwithstanding the unfair prejudice to the witness or impact on the jury's decision.

* * *

The initial promise that a comprehensive evidence code would usher in systematic reform to the state's impeachment practices has been dispelled. As drafted, and since interpreted, North Carolina Rule 609 essentially embraces the same broad use of conviction evidence without regard to the accompanying prejudice, impact, or juror misuse. As a consequence, individuals subject to the force of open impeachment often elect not to subject themselves to the indignity imposed by the rule.[300] When applied to victims of domestic and sexual violence, dangerous defendants reap the benefits; when imposed on wrongly accused persons, jurors are tacitly permitted to circumvent affirmative proof of guilt.

S.E.2d 265, 270 (1967) (demurring that "the judge is in charge of the trial" and "has plenary power to protect a witness from harassment and to keep cross-examination within the bounds of reason" after rejecting limits on conviction-based impeachment and berating other states' statutes granting trial court discretion to exclude convictions); State v. King, 224 N.C. 329, 331, 30 S.E.2d 230, 231–33 (1944) (recognizing fifty years before *Brown* that—even in a broad impeachment arena—some convictions simply afforded no value in weighing credibility and therefore should be excluded); State v. Neal, 222 N.C. 547, 547, 23 S.E.2d 911, 912 (1943) ("[W]hether the cross-examination goes too far or is *unfair* is a matter for determination of the trial judge, and rests largely in his sound discretion." (emphasis added)); State v. Atkinson, 39 N.C. App. 575, 580, 251 S.E.2d 677, 681 (1979).

296. Crumpler & Widenhouse, *supra* note 235, at 26–27 ("Rule 403, with its independent requirement that probative value outweigh potential prejudice, should provide the extra measure of protection against some of the abuses inherent in the use of evidence of other crimes.").

297. N.C. R. EVID. 102(a) ("These rules shall be construed to secure *fairness in administration*, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings *justly determined*." (emphases added)).

298. *See supra* notes 121–25 and accompanying text.

299. *See* Amendments to Federal Rules of Evidence—Rule 609, 129 F.R.D. 347, 353–54 (1990).

300. WEINSTEIN & BERGER, *supra* note 39, at § 609 app. 100; *see infra* Section III.C.

In the next part, this Article reveals the detrimental effect of North Carolina's conviction-based impeachment practices by illustrating their impact on victims of sexual assault and domestic violence. Part III explores how the state's adherence to rigid impeachment rules negatively affects juror decisionmaking, victim trauma, and victim-witness participation in the judicial system. Thereafter, Part IV proposes a straightforward amendment for reforming Rule 609 of the North Carolina Rules of Evidence to curb the harmful outcomes it currently produces.

III. ATTACKING VICTIMS: CHILLING TESTIMONY AND PROMOTING REVICTIMIZATION

The victim of domestic or sexual violence invariably encounters a grueling experience when called to testify at trial. She must recount the horrors inflicted upon her—reliving the events as she tells them in vivid detail.[301] During the process, she is expected to delve into deeply private concerns.[302] Otherwise confidential information about her medical condition and psychological well-being are laid bare.[303] Intimate details about her body are openly discussed.[304] All of this occurs in a public forum before a jury comprised of complete strangers.[305]

301. H. Hunter Bruton, *Cross-Examination, College Sexual-Assault Adjudications, and the Opportunity for Tuning Up the "Greatest Legal Engine Ever Invented,"* 27 CORNELL J.L. & PUB. POL'Y 145, 177 (2017) ("At trial, the victim must undergo [the assault] trauma again when she recounts her experience in court."); Mary Fan, *Adversarial Justice's Casualties: Defending Victim-Witness Protection*, 55 B.C. L. REV. 775, 776 (2014) ("The evidence is mounting that undergoing rituals of adversarial adjudication retraumatizes victims of violent and sexual assault crimes."); Jacqueline St. Joan, *Sex, Sense, and Sensibility: Trespassing into the Culture of Domestic Abuse*, 20 HARV. WOMEN'S L.J. 263, 282 (1997) (describing the difficulty, albeit critical importance, of domestic violence victims offering rich narratives to persuade judges and fact-finders).

302. Bruton, *supra* note 301, at 175 ("Testifying often entails a deep dive into private aspects of a witness's life."); St. Joan, *supra* note 301, at 298 (noting that trials are punctuated by the prosecution and defense as a "collection of [the victim's] bodily functions that become available for public discourse").

303. *See, e.g.*, State v. Williams, 330 N.C. 711, 719, 723, 412 S.E.2d 359, 364, 367 (1992) (holding that the prosecution witness's prior drug use, suicide attempts, and psychiatric history were "proper and admissible for purposes of impeachment" because North Carolina "has long allowed cross-examination regarding the witness's past mental problems or defects"); Anoosha Rouhanian, *A Call for Change: The Detrimental Impacts of* Crawford v. Washington *on Domestic Violence and Rape Prosecutions*, 37 B.C. J.L. & SOC. JUST. 1, 34 (2017) (detailing the deterrent effect on victims testifying out of fear of personal records being exposed publicly at trial, including private counseling records used to cast doubt on the victim's credibility).

304. Rouhanian, *supra* note 303, at 25 (noting the myriad reasons assault victims fail to testify at trial, including "being vulnerable to questioning on highly personal and sensitive topics").

305. Ponce v. State, 901 S.W.2d 537, 541 (Tex. App.—El Paso 1995, no pet.) (noting the trauma imposed on the victim of sexual violence who is "forced to recount the entire ordeal for all and sundry in open court").

The victim-witness must then endure the "crucible" of cross-examination.[306] Her testimony is given in the presence of the very person she alleges committed the violent acts—making the experience all the more daunting and traumatic.[307] She often shoulders the burden as the primary witness in the prosecution's case. Unlike other crimes where forensic evidence, video surveillance, and third-party witnesses abound, domestic abuse and sexual assaults routinely lack corroborating evidence.[308] Most involve a single victim who has little more to offer than her own account.[309] Consequently, the victim-witness's credibility often becomes the central focus of the trial.[310]

Defense counsel frequently elect to "try the victim" when the government's success or failure in convicting the assailant turns on the victim-witness's credibility.[311] When this tactic is employed, the focus of

306. Crawford v. Washington, 541 U.S. 36, 61 (2004) (holding that the Sixth Amendment's guarantee of confrontation "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the *crucible* of cross-examination" (emphasis added)).

307. *Id.* (holding that the Sixth Amendment guarantees the procedural right to confront accusers through cross-examination); Fan, *supra* note 301, at 788 ("From just a simple lunge away, victims are required to testify and have their credibility judged, tested, and challenged on cross-examination."). *See generally* Rouhanian, *supra* note 303, at 22–36 (detailing the deleterious effects of confrontation by cross-examination on victims of domestic and sexual violence).

308. Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 370–71 (1996) (observing that the prosecutorial problems unique to domestic violence cases include the lack of third-party witnesses and physical evidence because attacks tend to occur at home and victims often refuse or delay medical treatment); Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 771 (2005) [hereinafter Lininger, *Prosecuting Batterers*] ("The physical evidence in a domestic violence case is often scant, and it is susceptible to many different explanations.").

309. Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 870 (2009) [hereinafter Lininger, *Holding Batterers Accountable*] (observing the difficulty prosecutors experience in proving domestic assault cases because the event typically involves only two witnesses).

310. People v. Griffin, 242 A.D.2d 70, 74 (N.Y. App. Div. 1998) (noting that where no other witnesses are available, "the credibility of the two people involved [is] the paramount issue for the jury to resolve"); Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1361 (2005) [hereinafter Lininger, *Bearing the Cross*] ("In most prosecutions of domestic violence or sexual assault, the key question is whether the jury believes the accuser's or the defendant's versions of the facts."); Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 679–81 (1998); *see* St. Joan, *supra* note 301, at 304 ("The credibility factor is particularly crucial in cases involving domestic violence, because there are often no other witnesses.").

311. Galloway v. State, 122 So. 3d 614, 668 (Miss. 2013) (upholding the trial court's decision to prohibit defense counsel from revealing the victim's sexual preferences as an improper attempt to inflame the jury into trying the victim rather than the accused); Lininger, *Bearing the Cross*, *supra* note 310, at 1378–79 (noting that the tactics employed by Kobe Bryant's legal defense team in attacking the victim who alleged Bryant had raped her confirmed for men and defense attorneys that the "strategy of 'trying the accuser' pays big dividends in a rape prosecution").

the trial shifts away from the violent event and onto the victim herself.[312] She is subjected to a barrage of questions about her sexual history, mental health, alcohol use, manner of dress, social interactions, and past crimes.[313] These forays are designed to discredit her by pandering to juror misconceptions about sexual assault and negative stereotypes concerning domestic violence.[314] At the same time, they have the effect of harassing, embarrassing, and emotionally traumatizing the victim-witness.[315]

The victim-witness's trial experience is worsened further when cross-examination confirms the victim's fear that testifying will expose her to personal castigation.[316] Those fears are realized when defense counsel elects to impeach her as a witness unworthy of belief.[317] While rape-shield statutes protect some victims from character assaults,[318] impeaching a victim-witness with her prior convictions remains a powerful weapon for

312. Bruton, *supra* note 301, at 174–78 (describing the strategy of turning trials into attacks on the victim by focusing on the victim's past behavior under the auspices of consent); Lininger, *Bearing the Cross*, *supra* note 310, at 1355 ("In a 'he said, she said' contest, the defendant will naturally attempt to shift the focus from his own conduct to the foibles of the alleged victim.").

313. Kennard v. State, 349 S.E.2d 470, 471 (Ga. Ct. App. 1986) (finding that defense counsel's evidence of the victim's prior drug and alcohol treatment was correctly "excluded as irrelevant and as improperly tending to 'blacken' the victim's character"); Orenstein, *supra* note 310, at 680–82 (detailing the sexist belief that women are somehow blameworthy for being assaulted based on their behavior, reputation, and decisionmaking).

314. Wood v. State, 957 F.2d 1544, 1552–53 (9th Cir. 1992) (recognizing the likelihood that jurors may be influenced by notions of morality and proper conduct); Bruton, *supra* note 301, at 177 (detailing how defense counsel utilize juror stereotypes and misconceptions about abuse in their efforts to achieve acquittals in sexual assault and domestic violence cases); Orenstein, *supra* note 310, at 681 ("Abundant evidence from psychology experiments indicates that various rape myths and other sexist stereotypes play a vital role in determining whether and how much the victim is held responsible.").

315. *See, e.g.*, Doe v. Baum, 903 F.3d 575, 583 (6th Cir. 2018) (conceding that cross-examination can have a harmful, harassing impact on the victim); *Wood*, 957 F.2d at 1552 (noting that sexual assault victims are disincentivized from reporting crimes against them out of fear of facing harassing questions and having their private lives made public at trial).

316. Lininger, *Bearing the Cross*, *supra* note 310, at 1357 ("As a general matter, victims' willingness to report crimes varies inversely with their fear of embarrassment during cross-examination.").

317. Certainly, many criminal defense lawyers avoid harsh cross-examination tactics and are keenly aware of the danger that comes with unnecessarily attacking the victim. In North Carolina, the rule itself may force defense counsel's hand where one's client has a criminal history that will be used against him if he testifies. In that scenario, it is conceivable that defense counsel will impeach the victim with her prior convictions to equalize the impact such evidence may have at trial.

318. Fan, *supra* note 301, at 787 (noting that, although victim protection statutes safeguard some victims—primarily sexual but not domestic assault victims—from personal character assaults, they leave open other avenues for credibility attacks). Today, rape-shield statutes prohibit most of the insidious attacks formerly utilized to expose the victim's personal sexual behavior. However, these statutes—including North Carolina's own—are limited in nature and do not inhibit general attacks on the witness's prior misdeeds. *See* N.C. R. EVID. 412.

attacking her personally.[319] When this tactic is employed, the victim labors under the additional burden of having her criminal record turned against her. In these situations, the victim understandably feels that she, as opposed to the defendant, is on trial.

Under the Federal Rules of Evidence, victim-witnesses are largely shielded from defense counsel attacks with prior-conviction evidence. The types of crimes available for impeaching a witness's general character for untruthfulness are limited.[320] And the trial court is empowered to exclude those convictions with scant probative value but which risk unfairly marring the victim in the eyes of the jury.[321] Victim-witnesses in North Carolina are afforded no similar protection. As this Article reveals, the state's impeachment practices widely permit exposing a witness's prior criminal misdeeds.[322] Few crimes fall outside the credibility-attack ambit.[323] Trial courts lack any discretion to prevent general character attacks aimed at revealing prior criminal foibles.[324] When the witness has no personal stake in the outcome, North Carolina's impeachment policies may be humiliating, but not harmful. But when the witness is the victim, the state's broad embrace of attacking witness credibility has far greater implications.

As detailed below, North Carolina conviction-based impeachment practices impact negatively juror decisionmaking by perpetuating assault stereotypes, foster revictimization trauma on victim-witnesses, and impede societal interests in criminal accountability by depressing victim participation in the judicial system.

A. Juror Influence: Promoting Harmful Stereotypes

North Carolina's broad approach to impeaching a witness's credibility with prior-conviction evidence offers defense counsel an open avenue for pandering to juror stereotypes. Unlike most criminal cases, jurors may harbor a general distrust of victims who allege sexual assault and domestic

319. *See, e.g.*, *In re* Ferguson, 487 P.2d 1234, 1240 (Cal. 1971) (in bank) (concluding that defense counsel's need to attack the victim-witness's credibility is heightened when the defendant claims innocence and the victim has prior convictions).

320. FED. R. EVID. 609(a) (limiting conviction-based impeachment to felonies and crimes involving an element of falsity while excluding all misdemeanors unrelated to truthfulness).

321. *Id.* For non-defendant-witnesses such as victims, trial courts are empowered to exercise their broad discretion granted under Federal Rule of Evidence 403 to protect victim-witnesses against character attacks with criminal convictions that have little probative value when weighed against the danger they will unfairly prejudice the witness or trial. *Id.*; FED. R. EVID. 403.

322. *See supra* Section II.C.

323. *See supra* Section II.E. (noting over two thousand crimes, including the vast majority of misdemeanors, available to impeach North Carolina witnesses).

324. *See supra* Section II.D.

violence.[325] This distrust often derives from long-standing myths surrounding domestic abuse and sexual assault. Many jurors adhere to domestic violence myths that family violence is rare or somehow invited by the victim's actions.[326] Some conform to antiquated notions that domestic violence is a personal, family matter that should remain private.[327] Cultural myths surrounding sexual assault continue to plague prosecution of these offenses as well.[328] Jurors prefer to believe rape rarely occurs.[329] They incorrectly assume sexual assault is "wildly aberrational," only happening at the hands of a stranger who violently attacks an unknown victim who placed herself in the wrong place at the wrong time.[330] They therefore tend to focus primarily on the victim and her actions, especially when sexual assault is perpetrated by an acquaintance.[331] Where the victim is less than the ideal image jurors associate with an "innocent" victim, jurors may be less likely to believe the victim is a victim at all.[332]

Professor Aviva Orenstein, a noted social justice scholar, aptly describes the cultural rape myth:

> [A] heroine—young, attractive, respectable—who has been brutally attacked and raped despite fierce resistance. At the time of the rape, she is modestly dressed and where she is supposed to be. She has no promiscuous past or lascivious inclinations. Thus, she has also done nothing, be it seductive or incautious to "invite" the violent attack. She reports this violation immediately. The anti-hero of this fable is

325. Lininger, *Bearing the Cross*, *supra* note 310, at 1360 (observing that some jurors and judges simply believe victims "fabricate" sexual assault claims); Rouhanian, *supra* note 303, at 36 ("There is a national, 'widespread perception' amongst the public that rape victims lie about their assaults."); Christina M. Tchen, *Rape Reform and a Statutory Consent Defense*, 74 J. CRIM. L. & CRIMINOLOGY 1518, 1520–22 (1983) (detailing the extensive history of the legal system's distrust of rape complainants).

326. De Sanctis, *supra* note 308, at 372–73 (observing that jurors may prefer believing that domestic abuse is rare or subscribe to domestic violence myths including, "she likes the abuse, it is her own fault for not leaving, she shouldn't be airing her personal problems in public, etc.").

327. Lininger, *Bearing the Cross*, *supra* note 310, at 1360 ("Some jurors and judges believe that domestic violence is a natural occurrence in families . . . .").

328. *Id.* at 1360; Orenstein, *supra* note 310, at 677–78; Rouhanian, *supra* note 303, at 37–39.

329. *See* De Sanctis, *supra* note 308, at 371–72 (explaining that juror "belief in a just world" predisposes jurors to think the assault did not occur or was the result of the victim's own actions); Orenstein, *supra* note 310, at 676 (describing the common view of rape as "exceptional or unusual" as a form of cultural denial).

330. Orenstein, *supra* note 310, at 676.

331. *Id.* at 679–80 (noting that distrust of rape victims leads jurors to focus on victims' motives and mores).

332. Lininger, *Bearing the Cross*, *supra* note 310, at 1360 (explaining that "sexist stereotypes" dominate judge and juror assumptions about whether domestic violence or sexual assault occurred or, worse, whether it was invited); Orenstein, *supra* note 310, at 682 (explaining the "rape myth" and how deviation from juror expectations of rape, victim response, and victim behavior "may prompt juries to believe that no rape occurred or that the incident was the victim's fault").

> the brutish male aggressor. He is a sex-crazed, deviant sociopath. He has no previous acquaintance with the victim. He is violent and sadistic, using extreme force to violate his victim. He is a "loser" who has no girlfriend.[333]

The perpetual myths surrounding domestic violence and sexual assault play a significant role in juror stereotypes of victim and aggressor behavior.[334] Jurors are more likely to cast blame on a woman who engages in behavior they believe somehow helped facilitate the assault.[335] Survivors are scrutinized for their actions—how much they had to drink, what they wore, how they acted, who they were with, what they said, etc.[336] When a victim deviates from juror prototypes of the "innocent" victim, jurors become less inclined to convict.[337] As a result, the law rewards defense counsel efforts to portray the victim in a negative light as it permits attacks on the victim's character through evidence of prior convictions, especially for crimes that jurors may view as immoral or risky.[338]

Consider the following hypothetical modeled on recent campus sexual assault cases from California,[339] Ohio,[340] and Texas[341]:

> *A twenty-year-old college student attends a fraternity party. Despite being under the legal drinking age, she is served alcohol in fruit punch drinks. As the evening progresses, one of the fraternity members approaches and begins talking to her. She is later seen leaving his room in the predawn hours the following morning. A ride service drops her off at the hospital. She tells the intake nurse she*

333. Orenstein, *supra* note 310, at 677–78.

334. *Id.* at 678–84 ("The traditional image of a rapist as a 'knife wielding maniac unknown to his attacker' is simply false.").

335. De Sanctis, *supra* note 308, at 372–73; Orenstein, *supra* note 310, at 684–86.

336. Bruton, *supra* note 301, at 176–77.

337. *See* Orenstein, *supra* note 310, at 684–86 (describing the rape paradigm and its negative impact on police, prosecutors, and jurors who simply fail to believe the victim when she does not conform to the paradigm's constructs).

338. *See generally* Bruton, *supra* note 301, at 176–78 (describing defense counsel attempts to exculpate defendants by pandering to juror stereotypes about victim behavior); Orenstein, *supra* note 310, at 685–86 (detailing defense counsel attacks on victims' "so-called contributory negligence and other non-traditional behaviors"). Prostitution, public indecency, and other morality-based crimes may pander to juror expectations of moral decency and invite antiquated assumptions about victim behavior bearing on consent.

339. People v. Turner, No. H043709, 2018 WL 3751731, at *1–3 (Cal. Ct. App. Aug 8, 2018); Liam Stack, *Light Sentence for Brock Turner in Stanford Rape Case Draws Outrage*, N.Y. TIMES (June 6, 2016), https://www.nytimes.com/2016/06/07/us/outrage-in-stanford-rape-case-over-dueling-statements-of-victim-and-attackers-father.html [https://perma.cc/55U4-J8VB (dark archive)].

340. Doe v. Baum, 903 F.3d 575, 578–80 (6th Cir. 2018).

341. *No Jail Time for Ex-Baylor Fraternity President Accused of Rape*, L.A. TIMES (Dec. 11, 2018), https://www.latimes.com/nation/la-na-baylor-frat-rape-accusation-20181211-story.html [https://perma.cc/EB8W-4JXD].

> *has been sexually assaulted. Medical providers perform a rape test to collect DNA. She later tells investigators about the night prior. She recalls being given several drinks at the party. She says the last drink she was given caused her to become disoriented and ill. A male individual she met earlier led her through the fraternity house to his room, telling her she could rest until she felt better. Once inside, he sexually assaulted her—taking advantage of her incapacitated state.*
>
> *Forensic analysis confirms that the DNA taken from the victim matches the fraternity member. The defendant readily admits to the sexual encounter. He simply says it was consensual. He claims the victim asked him to take her to his room and, although she was intoxicated, fully consented to the sexual encounter. Nobody else was present at the time. Witnesses at the party indicate the victim had been drinking and recall the defendant offering her a place to sleep for the night. Some indicate the victim was in no condition to make informed decisions and was saying she needed to lie down. Prosecutors bring sexual assault charges against the fraternity member based on the victim's allegations, DNA evidence, and witness accounts. The case proceeds to trial.*

Let us pause at this juncture. The case is antithetical to the traditional sexual assault myth most jurors likely accept about "stranger" rapists. The assailant is not a violent sociopath using extreme force on an unknown victim. This example does, though, represent the most common form of sexual assault. In the majority of cases, the victim is acquainted with her assailant.[342] Thus, from the outset, prosecutors will have to educate prospective jurors about rape realities during jury selection.[343] At trial, they may need to call an expert witness to deconstruct the rape myth for jurors while explaining how sexual assault occurs in our society predominately at the hands of acquaintances and intimate partners.[344]

The facts present another impediment to prosecution germane to this analysis. Because people prefer to assume they live in a world where sexual violence does not occur, jurors are predisposed to scrutinizing the victim when her behavior falls outside of the "innocent" victim model jurors

342. *Sexual Assault in the United States*, NAT'L SEXUAL VIOLENCE RESOURCE CTR., www.nsvrc.org/statistics [https://perma.cc/P7GE-XXVP] (indicating that 51.1% of female victims of rape reported being raped by an intimate partner and 40.8% by an acquaintance).

343. Christopher Mallios & Toolsi Meisner, *Educating Juries in Sexual Assault Cases Part I: Using Voir Dire to Eliminate Jury Bias*, STRATEGIES 2–6 (July 2012), http://www.ncdsv.org/images/AEquitas_EducatingJuriesInSexualAssaultCasesPart1_7-2010.pdf [https://perma.cc/68LJ-TYSL].

344. Orenstein, *supra* note 310, at 701–11 (discussing the use of experts to educate juries on rape trauma syndrome and the domestic violence paradigm).

expect.[345] The more jurors perceive that the victim engaged in risk-taking behavior, the more likely they are to assign blame to the victim by applying "assumption-of-the-risk" logic.[346]

Capitalizing on juror aversion to victims who engage in risk-taking activities, such as drug or alcohol use, one can imagine defense counsel's cross-examination proceeding in part as follows:

Q: You went to the fraternity party?

A: I did.

Q: You had an alcoholic drink?

A: Someone gave me a drink.

Q: You took it, right?

A: Yes.

Q: Even though you were under twenty-one years old?

A: They were handing them out.

Q: Is that a "yes?"

A: Yes . . .

Q: And then you had another drink?

A: Yes.

Q: And then another?

A: Umm, yeah . . .[347]

Victim cross-examination often focuses on the victim's actions preceding the assault to elicit questions about the victim's memory, mannerisms, and behavior.[348] All of these are aimed at attacking her

345. De Sanctis, *supra* note 308, at 371–72.

346. Orenstein, *supra* note 310, at 685–86 (describing permissible attacks on victims not excluded by rape shield statutes that pander to juror stereotypes that the victim somehow contributed to her attack by her risk-taking); Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 JUST. Q. 652, 672–73 (2001) (analyzing empirical data to conclude that victim risk-taking and reputation play a significant role in prosecutor decisions to charge based on their expectations of success at trial).

347. *See generally* Eleanor W. Myers & Edward D. Ohlbaum, *Discrediting the Truthful Witness: Demonstrating the Reality of Adversary Advocacy*, 69 FORDHAM L. REV. 1055, 1060 (2000) (demonstrating the impact of cross-examining the "truthful" assault victim with evidence of victim behavior occurring prior to the assault).

348. Sara D. Schotland, *Rape Victims as Mockingbirds: A Law and Linguistics Analysis of Cross-Examination of Rape Complainants*, 19 BUFF. J. GENDER, L. & SOC. POL'Y 1, 25 (2011) ("Inevitably, cross-examinations in rape cases paint the rape complainant as someone who is lax in her dating behavior, loose in her morals, or otherwise 'wanted it.'" (quoting GREGORY M.

credibility and raising the question of whether the victim consented to the sexual encounter as alleged by the defendant.[349] In these situations, the victim-witness is subject to attack on the very stereotypes that jurors likely possess: sexual assault happens in one way and victims are "responsible" for their own risky choices.

Let us now move our hypothetical case into a North Carolina state superior court and consider the exacerbating effect criminal-conviction evidence has on exploiting juror stereotypes about sexual assault and victim behavior:

> *Knowing the victim must testify, defense counsel begins preparing for cross-examination. Private investigators have revealed the victim's past run-ins with the law. Her indiscretions appear useful to the defense as it builds the case against her: a Class 2 misdemeanor for possession of alcohol as an eighteen-year-old*[350] *in high school followed by a Class 2 misdemeanor disorderly conduct offense*[351] *after a concert the summer before college. During her freshman year, a resident assistant discovered drug paraphernalia in her dorm room, resulting in another Class 1 misdemeanor.*[352]
>
> *Armed with the victim's criminal record, defense counsel begins crafting cross-examination. Counsel intends to discredit her by revealing to the jury all of her prior encounters with the law. The stated purpose will be to question her character for truthfulness. Subtly, however, counsel plans on using these indiscretions to suggest she has a character for "wild, reckless behavior" and is a "party girl" who consented to the sexual encounter with the defendant the night of the fraternity party.*

The Federal Rules of Evidence and jurisdictions hewing closely thereto would proscribe the cross-examination contemplated in this hypothetical case[353] and force defense counsel to pursue another line of questioning. The convictions are not felonies, nor are they misdemeanors

MATOESIAN, REPRODUCING RAPE: DOMINATION THROUGH TALK IN THE COURTROOM 222 (William M. O'Barr & John M. Conley eds., 1993))).

349. David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1028 (1990) ("To make it seem plausible that the victim consented and then turned around and charged rape, the lawyer must play to the jurors' deeply rooted cultural fantasies about feminine sexual voracity and vengefulness."); Schotland, *supra* note 348, at 25.

350. *See* N.C. GEN. STAT. § 18B-302(b)(1) (2017).

351. *See id.* § 14-288.4.

352. *See id.* § 90-113.22(a).

353. FED. R. EVID. 609(a) (strictly limiting conviction-based impeachment to felonies and crimes involving an element of falsity while excluding all misdemeanors unrelated to truthfulness).

that require proving dishonesty or false statement as an element.[354] None remotely correlates to untruthfulness.[355]

The convictions are not, however, divorced from what jurors may perceive as risk-taking activities demonstrating poor judgment or, worse, immoral behavior.[356] And that is the very sentiment defense counsel seeks to exploit.[357] Directly attacking the victim-witness as a "party girl" or a person with a "wild, reckless character" through evidence of prior acts of drinking, disorderly conduct, or drug use is off limits, even in North Carolina.[358] Indirectly, however, defense counsel is afforded a clear path to circumvent prohibitions on character assaults given the mandatory admission of her convictions under North Carolina Rule 609(a).[359] When the victim's criminal history aligns with risk-taking activities, defense counsel can openly impugn the victim's moral character under the auspices of attacking her credibility.

North Carolina's permissive approach to conviction-based impeachment tacitly encourages exploiting juror beliefs about victim behavior and perpetuates insidious cultural stereotypes about domestic violence and sexual assault. Where a victim's criminal convictions correlate to immoral or risky behavior, jurors are more likely to succumb to false myths. At the same time, juror focus is directed away from the defendant's guilt or innocence and onto the victim herself.

This deleterious effect on juror decisionmaking alone is sufficient cause for reforming North Carolina Rule 609(a). It is not, however, the sole reason.

354. *See* N.C. GEN. STAT. §§ 14-288.4, 18B-302(b)(1), 90-113.22(a) (2017).

355. *See, e.g.*, State v. Pickens, No. W2015-00368-CCA-R3-CD, 2015 WL 9581393, at *4–5 (Tenn. Crim. App. Dec. 29, 2015) (concluding that the sexual assault victim's prior convictions in North Carolina for possession of cocaine and marijuana were not felonies nor crimes of dishonesty and were therefore properly excluded by the trial court).

356. Wood v. Alaska, 957 F.2d 1544, 1552–53 (9th Cir. 1992) (observing that jurors are influenced by moral constructs that negatively impact their decisionmaking if the victim's behavior does not conform thereto); Bruton, *supra* note 301, at 176–77; Orenstein, *supra* note 310, at 683–84 (discussing juror feelings about victim behavior and their sense that the victim may have "invited" the assault by her actions).

357. Bruton, *supra* note 301, at 175 (observing that "creative cross-examiners can devise subtle subterfuge to elicit the same information [about impermissible topics] or make the same insinuations through permissible questioning").

358. *See, e.g.*, N.C. R. EVID. 404 (excluding prior acts of a person to prove his or her character, including victim traits not pertinent to the case issues); Dunton v. State, 453 S.E.2d 800, 801 (Ga. Ct. App. 1995) ("[W]hether the victim used drugs in the past or was generally knowledgeable about illegal drugs is irrelevant to the issue of whether [the defendant] committed the offenses of rape and kidnapping. Rape is no more lawful when committed against a woman who uses cocaine than it is against one who does not use cocaine.").

359. State v. Brown, 357 N.C. 382, 390, 584 S.E.2d 278, 283 (2003) (holding that Rule 609(a) affords "no room for the trial court's discretion").

B. Victim Trauma: Enhancing Revictimization

North Carolina's permissive approach to impeaching witnesses with prior-conviction evidence also enhances the revictimization effect experienced by victim-witnesses. Revictimization is an accepted byproduct of the adversarial system for assault victims who brave testifying.[360] The victim suffers at least two and, depending on the cross-examination tactics employed, potentially three traumatic events.[361] First, the victim suffers the trauma of the assault and the resultant physical and psychological injuries.[362] If she reports the attack, she next endures the ordeal of evidence collection, investigative inquiry, and public disclosure.[363] Finally, if she proceeds with assisting the prosecution, she must confront her alleged assailant and succumb to a cross-examination often aimed at discrediting her story by attacking her character.[364]

Cross-examination is confrontational by design. The American justice system reveres face-to-face confrontation through cross-examination as indispensable to truth-finding.[365] The adversarial process therefore condones aggressive cross-examination of witnesses as part and parcel of the trial system.[366] Understandably, given the due process rights of the defendant and the life and liberty interests at stake, victim-witnesses are equally as subject to the rigors of cross-examination as any other witness. The impact, however, is dissimilar. The neighbor who sees a domestic assault through her window and later recounts what she witnessed in court is subject to cross-examination. The same is true for the woman who survived the attack. The personal impact of cross-examination on these witnesses, however, is profoundly disparate. The neighbor is not susceptible to revictimization. She has not been victimized in the first instance.

360. Bruton, *supra* note 301, at 178 (describing the victim trial experience and observing that "[e]ven when a favorable outcome occurs, the trauma inflicted by the trial can contribute to lasting psychological injury"); *see also* Fan, *supra* note 301, at 783–92 (explaining how the adversarial criminal justice process worsens post-traumatic stress and causes victims pain); Lininger, *Bearing the Cross*, *supra* note 310, at 1359–60; Rouhanian, *supra* note 303, at 43–44.

361. Bruton, *supra* note 301, at 176–77; Schotland, *supra* note 348, at 25.

362. Bruton, *supra* note 301, at 176–77; Orenstein, *supra* note 310, at 674.

363. Myka Held, *A Constitutional Remedy for Sexual Assault Survivors*, 16 GEO. J. GENDER & L. 445, 447–52 (2015) (detailing revictimization at the hands of investigators and prosecutors entrenched in cultural rape myths and victim stereotyping); Orenstein, *supra* note 310, at 682 (noting that when a victim reports an assault she is "measured by everyone" including "friends, police, prosecutors, and . . . jurors").

364. Fan, *supra* note 301, at 790–92; *see* Lininger, *Bearing the Cross*, *supra* note 310, at 1359–60; Lininger, *Prosecuting Batterers*, *supra* note 308, at 772.

365. Crawford v. Washington, 541 U.S. 36, 61–62 (2004) (proclaiming that adversarial testing through cross-examination "beats and bolts out the Truth much better" (quoting MATTHEW HALE, HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 258 (1713))).

366. Lininger, *Prosecuting Batterers*, *supra* note 308, at 772.

The assault victim absorbs the impact of cross-examination personally, even under the best of circumstances.[367] Where cross-examination questions are directed toward exposing the witness's faulty perception, biases, and motivations, they are permissible, albeit traumatic.[368] The victim must relive the events as told through the narrow constructs the cross-examiner seeks to reveal.[369] For example, defense counsel commonly use variances in her account to suggest she cannot be trusted.[370] To the victim, this can feel like her story is being twisted or inconsistencies exaggerated, elevating her sense of self-blame.[371] When cross-examination questions veer away from her story and into her lifestyle, the victim's trial trauma elevates.[372] She encounters a personal assault as questions chip away at her behavior, manner of dress, decisionmaking, speech, memory, and other individual concerns.[373] Revictimization trauma is inevitable at this point. Regrettably, for a North Carolina victim with a prior criminal record, revictimization trauma is not yet complete.

In our prior hypothetical, we analyzed a college sexual assault case by contemplating the negative effect the victim's criminal record may have on jurors. We did not then examine the impact on the victim-witness herself. It cannot be ignored. Let us now consider how revictimization trauma escalates when prior crimes are used as additional cross-examination fodder to attack the victim's credibility.

Exposing the victim's past crimes to impugn her credibility, defense counsel's cross-examination continues as follows:

Q: This isn't your first time in the court system is it?

A: Excuse me?

Q: You have had trouble following the law, haven't you?

A: I don't think that's fair, no.

367. Doe v. Baum, 903 F.3d 575, 583 (6th Cir. 2018) (observing that cross-examination can have a harmful, harassing impact on the victim).

368. *See* Orenstein, *supra* note 310, at 679.

369. Bruton, *supra* note 301, at 164 ("Many advocates use cross-examination more to trap witnesses than to add information.").

370. *Id.* at 165 (observing how cross-examination can mislead the victim-witness into changing her truthful story); De Sanctis, *supra* note 308, at 373 ("Jurors may assume a 'real' victim would remember the details of her abuse, and may interpret a partial memory as evidence that the victim is lying.").

371. *See generally* Fan, *supra* note 301, at 785–86, 788–90 (detailing the circumstances under which victims are retraumatized and experience PTSD triggers during the adversarial process).

372. *Id.*; Schotland, *supra* note 348, at 28.

373. Lininger, *Bearing the Cross*, *supra* note 310, at 1361 (describing such questions as "tantamount to public psychoanalysis"); Orenstein, *supra* note 310, at 681–82 (describing blame tactics employed through personal attacks on the victim).

Q: You received your first misdemeanor in high school?

A: I got caught with a beer. I wasn't the only one.

Q: Is that a "yes" to my question?

A: Yes . . .

Q: You later received a second misdemeanor?

A: Yes.

Q: The summer before enrolling in college?

A: Yes.

Q: That was for disorderly conduct?

A: Yes.

Q: After attending a concert?

A: Yes, it was stupid . . .

Q: Your first year in college you were guilty of another?

A: I made a dumb mistake.

Q: My question is whether you received a third conviction?

A: Yes.

Q: This time for drug paraphernalia?

A: Yes . . .

As the victim experiences a cross-examination bent on discrediting her with her criminal past, revictimization trauma is inevitable. Do the victim's underage alcohol possession, disorderly conduct, or drug paraphernalia misdemeanors correspond to her lying about being sexually assaulted? Not unless one continues to accept Justice Holmes's unsubstantiated claim that a person who commits any crime is prepared to commit further "evil" by lying on the witness stand.[374] None of these crimes remotely corresponds to witness untruthfulness. Their primary value is to dehumanize rather than discredit the victim-witness. Whether intentional or not, attacking the victim with innocuous convictions embarrasses and demeans her personally. And yet North Carolina impeachment practice openly condones it.

374. *See supra* notes 73–75 and accompanying text.

The corresponding result is a defendant who may reap the windfall of revictimizing the victim-witness.[375] It is a simple reality of the system the state has adopted. Defendants and defense counsel alike increasingly recognize the dilemma for the victim.[376] If she testifies against her assailant, he will have the opportunity to confront her through his attorney or personally if he elects self-representation.[377] The prospect of confrontation alone may cause her to withdraw from prosecution. If not, revictimization tactics—like those encouraged by broad impeachment practices—may play out in the defendant's favor. If she responds angrily to questions aimed at assailing her character, jurors may be less sympathetic to her.[378] If she retreats into herself, jurors may view her as less credible.[379] However the jury is influenced, the corollary effect is to further traumatize the victim.

North Carolina Rule 609 promotes systemic revictimization by permitting victim impeachment with an array of crimes that assails her personal, rather than truthful, character. The state's courts then implicitly accept revictimization as a byproduct of impeachment by denouncing discretion to exclude crimes falling within the rule's wide net.[380] Paradoxically, North Carolina Rule 609 is based on the dubious theory that a crime that enhances punishment also impugns credibility.[381] Yet when employed against victim-witnesses, the rule itself punishes them through senseless revictimization. For the victim, suffering violence at the hands of her attacker is the first injury. Publicly recounting her attack is a second. Being castigated as a liar with her prior criminal record is one more trauma needlessly imposed on the survivor by the justice system.

C. Societal Harm: Deterring Victim Participation

North Carolina Rule 609 perverts justice further by chilling victim-witness participation in the very system it means to protect. Understandably, public embarrassment ranks among the primary fears

375. Fan, *supra* note 301, at 788–91 (observing that some defense counsel use confrontation to intentionally revictimize victims and that prosecutors may dismiss or offer pleas to lesser charges to protect victims from additional trauma imposed by heavy-handed cross-examination tactics).

376. Lininger, *Bearing the Cross*, *supra* note 310, at 1366.

377. *Id.* at 1360 ("Some accusers may perceive cross-examination by the defense as yet another attack by the defendant (through the proxy of defense counsel).").

378. De Sanctis, *supra* note 308, at 373; Luban, *supra* note 349, at 1028 (noting that when defense counsel pursues questioning that humiliates the victim she may "blow[] up" or retreat inside herself emotionally and, in doing either, lose credibility as a victim).

379. DeSanctis, *supra* note 308, at 373; Luban, *supra* note 349, at 1028.

380. *See supra* notes 282–299 and accompanying text.

381. *See supra* Section II.C.

victims express about cooperating in the prosecution of their assailants.[382] Those fears are confirmed when evidence rules encourage attacking the victim with her prior convictions. North Carolina Rule 609 effectively tells victim-witnesses with criminal pasts they can expect to be humiliated with their criminal record.[383] As a consequence, victim-witnesses who possess criminal records may retreat from prosecution altogether rather than endure public degradation.[384] When they do, the very purpose of the justice system is derailed.[385]

Victim participation and successful prosecution are interdependent. The justice system relies on victims to actively cooperate throughout the process.[386] Many, though, avoid the justice system entirely or elect to abandon it.[387] Surveys indicate that domestic violence victims forgo participation in the alleged assailant's prosecution in eighty-five to ninety percent of cases.[388] Sexual assault survivors disavow the judicial process from the outset by vastly underreporting their assaults.[389] When they do come forward, many choose later to opt out of prosecution.[390] There are manifold reasons in both cases. Notably, the fear of cross-examination is a uniform factor for withdrawal by domestic and sexual violence victims.[391] To appreciate how impeachment practices additionally contribute to the victim's decision to withdraw from prosecution requires a brief discussion of the paradigms unique to both types of survivors.

382. *See* Lininger, *Bearing the Cross*, *supra* note 310, at 1357 (observing that "victims' willingness to report crimes varies inversely with their fear of embarrassment during cross-examination").

383. The rule broadly applies to the vast majority of crimes without correlation to untruthful acts, thus enabling defense counsel to question victim-witnesses about innocuous prior convictions under the auspices of challenging credibility. Moreover, as interpreted, trial courts lack discretion to curb the harmful effect on the witness—even when revealing her prior crimes would be unfairly prejudicial. *See supra* Section II.E.

384. WEINSTEIN & BERGER, *supra* note 39, § 609 app. 100, at 18 ("Fear of public degradation may make the possessors of a criminal record reluctant to testify, or even to complain of criminal acts directed against them, to the detriment of the judicial system's interest in obtaining useful testimony.").

385. *Id.*

386. De Sanctis, *supra* note 308, at 367; Lininger, *Holding Batterers Accountable*, *supra* note 309, at 870–71 (describing the indispensability of domestic assault victims to prosecution).

387. Lininger, *Holding Batterers Accountable*, *supra* note 309, at 868–71 (observing that the vast majority of victims eventually recant, refuse to testify, or fail to appear at trial).

388. De Sanctis, *supra* note 308, at 367; Lininger, *Prosecuting Batterers*, *supra* note 308, at 768.

389. Sexual assault remains the most underreported crime in the nation with sixty-three percent of sexual violence not being reported to police. *Sexual Assault in the United States*, *supra* note 342.

390. Fan, *supra* note 301, at 785–88 (noting studies demonstrating severe victim dissatisfaction with the judicial system and how the adversarial process discourages victims from participation).

391. Bruton, *supra* note 301, at 178; Lininger, *Bearing the Cross*, *supra* note 310, at 1357–58.

In domestic cases, violence is one part of a complex cycle characterized by three distinct phases.[392] In the tension-building phase, the victim commonly experiences psychological abuse targeting her self-esteem.[393] This period eventually crescendos into the violence phase where she is physically assaulted.[394] The third "honeymoon" phase is characterized by the assailant expressing remorse while seeking reconciliation.[395] Most efforts to prosecute the assailant are frustrated by the effect of the honeymoon phase on the victim.[396] Domestic violence victims who do not succumb to its effects, however, face other impediments to assisting prosecution. They must overcome reprisal threats from the assailants, public scrutiny, confrontation with their abusers, and targeted cross-examination tactics.[397]

Sexual assault victims experience their own distinct psychological trauma that impacts their willingness to cooperate in prosecuting their perpetrators. The violation to the victim's autonomy imposes a deep sense of personal vulnerability.[398] She may experience feelings of weakness, loss of control, and fear.[399] Most survivors are also plagued by deep distrust.[400] Their victimization leads not only to distrusting the assailant but also infects their faith in society as a whole.[401] The severe psychological trauma inflicted on the sexual assault survivor represents a significant impediment to her participation in the judicial process.

The psychological disincentives for victims of domestic and sexual assault to confront their assailants are valid. The judicial system itself should not exacerbate them. Yet, systemic impediments that cause victims to abandon the process abound. Domestic violence victims may encounter unsympathetic police grown weary from responding to the repeated cycle.[402] They may have to work in tandem with prosecutors frustrated by

392. St. Joan, *supra* note 301, at 274.

393. De Sanctis, *supra* note 308, at 369 (explaining how victim cooperation directly correlates to the cycle of violence); Jennice Vilhauer, *Understanding the Victim: A Guide to Aid in the Prosecution of Domestic Violence*, 27 FORDHAM URB. L.J. 953, 954–55 (2000) (chronicling the cycles of domestic violence and their effect on prosecuting assailants).

394. De Sanctis, *supra* note 308 at 369; Vilhauer, *supra* note 393, at 954.

395. De Sanctis, *supra* note 308, at 369; Vilhauer, *supra* note 393, at 955.

396. De Sanctis, *supra* note 308, at 369–70; Rouhanian, *supra* note 303, at 33 (noting that the honeymoon phase is characterized by domestic violence survivors experiencing hope that reconciliation is real, believing their abusers will transform their lives).

397. *See* De Sanctis, *supra* note 308, at 368–74; St. Joan, *supra* note 301, at 298; Vilhauer, *supra* note 393, at 958–59.

398. Rouhanian, *supra* note 303, at 33.

399. *Id.*

400. *Id.*

401. *Id.*

402. *See* De Sanctis, *supra* note 308, at 371; Rouhanian, *supra* note 303, at 27.

the victim's reluctance.[403] In some cases, domestic violence victims experience judges who are intolerant of the victim who, in their view, has continued to put herself in harm's way.[404]

Meanwhile, sexual assault victims must endure the realities of the proof process. They often undergo invasive tests to collect forensic evidence.[405] Investigators probe their stories in excruciating detail by delving into deeply personal aspects of their bodies, lives, and health.[406] And, of course, the adversarial system commands that victims directly confront their assailants.[407]

Victim reluctance with assisting prosecution is unnecessarily heightened, however, when evidence rules open avenues for personal attacks in the courtroom.[408] Today, the fear of cross-examination ranks among the key structural impediments to victim participation through final prosecution.[409] Defendants know this.[410] When a case cannot go forward without the victim's testimony, defendants are incentivized to make cross-examination particularly unpleasant in hopes the victim recants or withdraws.[411] Thus, in some cases, the primary defense tactic involves employing a "brutal cross-examination" to destroy the victim.[412] The victim's behavior, sexual history, psychological well-being, and lifestyle are paraded publicly.[413] Humiliating details about her body and personal life may be revealed in questioning.[414] The victim's imagined fears thus become reality. She may simply relent or recant rather than suffer an inevitable indignity.

North Carolina Rule 609 imposes yet another impediment to victim participation. Its purported function is to reveal a witness's mendacious character. The rule is not limited to crimes of dishonesty, however.[415] It encompasses thousands of offenses.[416] When the victim's prior crimes

403. Lininger, *Bearing the Cross*, *supra* note 310, at 1362 ("Many prosecutors, fearing the victims' potential recusal, come to regard accusers as saboteurs.").

404. St. Joan, *supra* note 301, at 265, 282.

405. Held, *supra* note 363, at 448–49 (detailing the deplorable state of untested rape kits).

406. *Id.* at 447–52.

407. *See* Fan, *supra* note 301, at 787.

408. *See id.* at 785–89.

409. *See* Bruton, *supra* note 301, at 178; Lininger, *Bearing the Cross*, *supra* note 310, at 1357–58.

410. *See* Lininger, *Bearing the Cross*, *supra* note 310, at 1366 (observing that defendants and defense counsel are well aware of the need for victim participation and therefore have an interest in making cross-examination so unpleasant the victim elects to discontinue participation).

411. *Id.* at 1361.

412. *Id.* at 1362; Luban, *supra* note 349, at 1028.

413. Lininger, *Bearing the Cross*, *supra* note 310, at 1361; Schotland, *supra* note 348, at 28.

414. Schotland, *supra* note 348, at 28.

415. *See supra* notes 219–23 and accompanying text.

416. *See supra* notes 242–47 and accompanying text.

reveal risky, foolish, or immoral behavior, the rule functions in fact as one more source of public embarrassment.[417] The state's broad impeachment rule also facilitates senseless psychological trauma the victim would understandably want to avoid. For example, the domestic victim may perceive conviction-based impeachment as confirming the type of verbal abuse she has endured. Permitting attacks on her credibility with innocuous crimes mirrors the coercive tactics the defendant may have employed throughout their relationship. His threats that "nobody will believe you," "they don't know the real you," and "if you say anything I will destroy you," are confirmed by broad conviction-based impeachment.

Naturally, any voluntary witness would reconsider a scenario that involved being publicly humiliated with the witness's criminal record. Few would elect to withstand such an ordeal willingly. For a North Carolina victim, that calculus is psychologically intertwined with knowing the torment will come from her attacker. She is not merely castigated with her criminal record by an unknown person. The defendant himself or his lawyer will demand she account for her criminal foibles.[418] That attacks on her character come from the defendant, either personally or by proxy, further disincentivizes the victim's participation at trial.[419]

A victim's reluctance to cooperate with the prosecution is equally justified by North Carolina courts' own reluctance to intervene. Her fear that cross-examination will turn into a humiliating exposé is hardly misplaced when the law makes her criminal record fair game for attack and denies trial judges the discretion to curb its use. A victim-witness who possesses even a modest criminal record has yet another valid reason to avoid a North Carolina criminal justice system that seems stacked against her when trial courts fail to intervene. Using our prior hypothetical to illustrate, consider the inevitable conversation between the prosecutor and victim in the weeks preceding trial:

P: We also need to discuss your criminal record.

V: Why? I'm not in trouble am I?

P: No. No, you're not.

V: Then why do we need to talk about my record?

P: Because it will probably come up at trial.

V: What? Why would it come up then?

417. *See generally* Bruton, *supra* note 301, at 175 ("[S]ome questions do not advance a truth-seeking function at all, but instead serve only to embarrass or abuse.").

418. Lininger, *Bearing the Cross*, *supra* note 310, at 1360.

419. *See* Fan, *supra* note 301, at 789–90; Lininger, *Bearing the Cross*, *supra* note 310, at 1366.

P: Because defense counsel can use it to challenge you.

V: I don't understand.

P: North Carolina law allows witnesses to be challenged with their criminal convictions.

V: They're going to ask me about stuff from high school?

P: They may. All of your convictions can be used to impeach you.

V: Impeach me?

P: Suggest that you are not telling the truth.

V: They're going to say I'm lying about being raped because of those stupid things?

P: They are allowed to, yes.

V: What does that have to do with what he did to me?

P: Well, nothing, but the law says the jury can consider your convictions.

V: Jurors are going to consider my convictions?

P: They are permitted to, yes.

V: Can't the judge stop this?

D: No. And that's why we need to talk about how to address them.

V: This is unbelievable . . .

A federal prosecutor could offer markedly different advice to the same victim, reassuring her that, under the federal rules, her misdemeanor offenses would be off limits for impeaching her at trial. The federal prosecutor could assuage any lingering doubts by filing a pretrial motion to exclude her convictions under Federal Rule 609. The victim would have confidence going forward knowing the judge would prevent disparaging forays into her criminal past. She could trust the judicial system to protect her from this kind of public embarrassment. Likewise, the federal prosecutor could focus on addressing her other fears knowing her criminal record would not deter her from cooperating further.

The cross-examination tactics that may be employed at trial rank among the critical factors victims contemplate when deciding whether to testify.[420] North Carolina victims who possess a criminal record face an

420. Luban, *supra* note 349, at 1030 ("[T]he nightmare of the woman who has been raped on a date and does not report it because she is afraid of what will happen to her reputation during the trial is *real*." (emphasis added)).

additional factor weighing against participation. Knowing she may be impeached with her criminal past is one more reason to decline assisting prosecution. The effect of that decision is simply too great—particularly when weighed against the negligible value crimes unrelated to truthfulness have in assessing witness credibility. When survivors elect to forgo assisting prosecution, guilty persons avoid accountability for their crimes. They remain at large to reinjure the victim or others. North Carolina Rule 609 thus compels an irreconcilable paradox: the judicial system that affords justice for the victim is the same system that systemically discourages her participation.

IV. PROPOSED REFORM TO NORTH CAROLINA RULE 609

The negative repercussions to victim-witnesses alone compel reforming North Carolina's current impeachment practices.[421] While little scholarship has been devoted to the impact of conviction-based impeachment on victim-witnesses, the harmful effects associated with the practice generally are well documented.[422] Scholars have proposed alternatives for years to rectify the abuses inherent in a rule that exposes jurors to damning evidence about the witness's past and, correspondingly, tends to chill the participation of witnesses vital to the justice system.[423] This Article adds a victim-focused perspective to that chorus, proposing revisions to North Carolina Rule 609 to rid it of the harmful side effects associated with conviction-based impeachment previously revealed and now being exposed.

Reforming conviction-based impeachment practices offers several alternatives. One approach would prohibit impeachment with prior-conviction evidence entirely.[424] Another involves mimicking the federal rule.[425] Although both would represent significant reform to North Carolina practice, each is problematic. A new rule that is narrow in focus, relying less on subjective tests and jury instructions, is preferable.

A. Credibility in Focus

The sole purpose of impeaching a witness with her criminal record should be to challenge her credibility as a truth-telling witness.[426] Starting

421. The deleterious impact on accused persons is undeniable as well. This issue, however, is the subject of the author's future scholarship and beyond the scope of this Article.

422. *See supra* note 8.

423. *See supra* notes 8–10.

424. *See supra* note 135 and accompanying text.

425. *See supra* notes 133–38 and accompanying text.

426. Rule 609's focus is explicit: "For the purpose of attacking the credibility of a witness," evidence of the witness's prior criminal convictions may be elicited. N.C. R. EVID. 609(a).

with this premise focuses the task. Crimes that primarily bear upon this singular question are the most viable and should be included; those that do not deserve exclusion.

Certainly, one option for curing the ills associated with conviction-based impeachment would be to ban the practice. Hawaii and Montana elected this approach after concluding the harms simply outweigh the benefits.[427] Similarly, the Uniform Rules suggest an outright ban on using convictions to impeach accused persons.[428] Categorical bans raise significant concerns, however. While laudable for focusing juror attention solely on the case questions, they deny jurors information directly related to the credibility of the witness. Respecting the defendant's confrontation rights by leaving open a narrow cross-examination window is a key consideration.[429] And a witness previously convicted of perjury should not be shielded from rules primarily designed to protect against *unfair* character assumptions.[430] Simply put, excluding all prior convictions for impeaching witness credibility is overly *exclusive*.

How to delineate between the crimes that directly correlate to witness untruthfulness against those that do not becomes the critical question. The long history of contemplating witness impeachment provides the answer. The consensus of rule drafters is that crimes involving dishonesty or false statements most directly impugn witness credibility.[431] These crimen falsi offenses, including perjury, embezzlement, criminal fraud, and false statements, have long been recognized as bearing directly on an individual's credibility as a truth-telling witness.[432] The proof in establishing crimen falsi crimes offers assurance that the witness has engaged in acts directly correlated to falsity. These crimes fit the narrow focus of testing witness credibility and therefore warrant inclusion for juror consideration.

Admitting crimes not involving dishonesty or false statements invites harmful side effects and is therefore inadvisable. Offenses that do not involve proving dishonesty as an element only impugn witness credibility

Therefore, the convictions permitted under that rule must be considered solely in the context of their intended purpose—to evaluate witness credibility. Bellin, *Circumventing Congress*, *supra* note 8, at 310 n.80.

427. *See supra* note 135 and accompanying text.

428. *See supra* notes 94–97 and accompanying text.

429. Jules Epstein, *True Lies: The Constitutional and Evidentiary Bases for Admitting Prior False Accusation Evidence in Sexual Assault Prosecutions*, 24 QUINNIPIAC L. REV. 609, 632–33 (2006).

430. *See* Simmons, *supra* note 7, at 997–98.

431. *See* FED. R. EVID. 609(a)(2); UNIF. R. EVID. 21 (1953); MODEL CODE OF EVID. R. 106 (AM. LAW. INST. 1942).

432. Ladd, *supra* note 77, at 179–80 ("The relationship of these crimes to veracity is self-evident.").

on the generalized presumption that, by committing an offense, the individual *may* be more willing to testify untruthfully.[433] This hypothesis is equally as unconfirmed as juror misuse of such crimes is established.[434] Certainly Federal Rule 609 endorses broadly admitting generic convictions by permitting witness impeachment with any prior felony.[435] The wisdom in doing so has been the subject of pointed, reasoned criticism for decades.[436]

The harms associated with admitting crimes unrelated to dishonesty are myriad. All are rooted in the fact that these convictions generate negative side effects disproportionate to evaluating witness credibility. The probative value of crimes unrelated to dishonesty is simply low or nonexistent. A crime committed in the heat of passion says something about the actor in that precise moment but little about him far removed from it.[437] A person who commits a crime because of addiction says a great deal about her dependency but nothing about her veracity.[438] Crimes involving violence, drugs, and sexual misconduct are serious offenses to be sure. They do not, however, directly correlate to untruthfulness to the same extent as crimes involving false statements.[439]

The prejudicial effect of admitting a broad range of crimes—whether felonies or misdemeanors—unrelated to dishonest acts is markedly disproportionate. The witness who recognizes the jury will see her criminal record as bearing on her personal behavior is incentivized to forgo testifying.[440] The accused person who realizes he will be viewed as a mere criminal recidivist will elect silence.[441] The juror exposed to conviction evidence is invited to conform to misplaced stereotypes.[442] Senseless revictimization trauma is imposed on the victim.[443] Embarrassment and humiliation to the survivor are obvious byproducts.[444] These effects and more plague broad conviction usage.[445] Narrowing the rule to crimes that directly correlate with witness veracity resolves these issues.

433. *Id.* at 176.

434. *Id.* at 186; *see also* Michelson v. United States, 335 U.S. 469, 475–76 (1948); Gold, *supra* note 99, at 2313.

435. *See supra* Section I.D.

436. *See* sources cited *supra* note 8.

437. *See* Ladd, *supra* note 77, at 178–79

438. Bellin, *Circumventing Congress*, *supra* note 8, at 302–03.

439. Surratt, *supra* note 82, at 931.

440. *See supra* Section III.C.

441. Bellin, *Silence Penalty*, *supra* note 8, at 415–24.

442. *See supra* Section III.A.

443. *See supra* Section III.B.

444. *See supra* Section III.C.

445. *See supra* notes 23–25 and accompanying text.

B. Rejecting Broad Crimes Subject to Balancing Tests

Some impeachment rules, including the federal rules, incorporate judicial balancing tests in an effort to ameliorate the dangers associated with broad inclusion of crimes unrelated to dishonesty.[446] One option for revising North Carolina Rule 609 would be to mimic this approach. However, several decades of application and analysis of the federal rule reveal this option to be too fraught with error and inconsistency.

Broadly incorporating convictions subject to judicial oversight to weigh the probative value against its prejudicial effect promotes inconsistency. Trial judges come from all walks of life. Their backgrounds and experiences, like all persons, influence their worldview. As a result, judicial decisions admitting or excluding convictions for impeachment purposes can vary widely.[447] Some judges admit convictions in a seemingly indiscriminate manner whereas others are more exacting.[448] A prosecutor moving to exclude a victim's conviction for drug possession may be successful in some courts but not in others. Different trial judges applying subjective balancing tests to a broad range of convictions naturally means inconsistent results. In the years since the adoption of Federal Rule 609, appellate courts have languished over tests intended to assist trial judges in making discretionary decisions.[449] More often than not, the tests themselves become a source of confusion or judicial justification.[450]

Crafting a rule that incorporates an array of crimes subject to trial court discretion enables judicial stereotyping and bias to creep in, whether intentional or not.[451] The judge grown weary from domestic abuse may admit a victim-witness's prior crimes out of unrealized apathy or frustration.[452] The jurist unwittingly influenced by cultural myths about sexual assault may be more inclined to permit impeachment with crimes involving risk-taking or immoral behavior.[453] This is not to disparage the state's able judges; it is simply an acknowledgement of documented human behavior. Cultural myths are difficult to displace even over many generations.

Finally, leaving a door open to revealing a witness's prior conviction too often encourages juror misuse and lawyer abuse. When crimes are unrelated to dishonesty, jurors are far more inclined to consider them as

446. *See supra* notes 133, 138 and accompanying text.
447. *See* Simmons, *supra* note 7, at 1030.
448. *Id.*
449. *See* Bellin, *Circumventing Congress*, *supra* note 8, at 312–29.
450. *Id.* at 330–40.
451. *See supra* Section III.C.
452. *See id.*
453. *See supra* Section III.A.

supporting preconceived myths, stereotypes, and a witness's propensity for wrongdoing instead of the witness's credibility.[454] Jury instructions to the contrary are widely regarded as ineffective and, in fact, tend to make things worse by highlighting the impropriety.[455] Likewise, trial lawyers beholden to the constructs of the adversarial system will naturally take the opportunity to reveal crimes for any purpose that may benefit their client's cause. That the byproduct of doing so may revictimize the witness or perpetuate harmful stereotypes indicts the rule that condones the impeachment far more than the lawyer who employs it.

A rule that broadly admits crimes subject to individual judicial balancing would, among other documented ills, needlessly invite inconsistent rulings, disparate treatment of witnesses, judicial stereotyping, juror misuse, and trial lawyer abuse.

C. A Reformed Rule 609

Rather than clinging to outmoded, faulty assumptions that any crime begets untruthful testimony, a reasoned approach that embraces modern understandings of witness testimony and jury bias should be employed. A simple change would protect victim-witnesses and enhance the foundations of the state's justice system.

North Carolina Rule 609(a) now reads:

> (a) General rule.—For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter.[456]

Rule 609(a) should be amended to read as follows:

> (a) General rule.—For the purpose of *questioning* the credibility of a witness, evidence that the witness has been convicted of a *crime may be admitted, subject to Rule 403, where the court can readily determine that establishing the elements of the crime required proving—or the witness admitting—a dishonest act or false statement, such as perjury, subordination of perjury, false statement, embezzlement, or criminal fraud*.

The revised rule narrows the range of crimes available to impeach all witnesses. It also offers a narrow window for judicial discretion to exclude convictions in the limited cases where their admission would do more harm

454. *See* Michelson v. United States, 335 U.S. 469, 475–76 (1948); *supra* Section III.A.
455. Gold, *supra* note 10, at 692–96.
456. N.C. R. EVID. 609(a).

than good.[457] To be sure, not *all* crimes of dishonesty are so probative of witness untruthfulness to warrant mandatory inclusion. For example, the victim who pled guilty to passing a worthless check because she needed food after escaping her abuser has committed a crime out of desperation and not mendacious character.

The proposed revision promotes an important policy goal of protecting victim-witnesses from the abuses currently fostered by the state's broad approach. It also has the concomitant effect of encouraging all persons with knowledge to more freely testify without fear of jurors misusing prior-conviction evidence to demonize them. And it would inhibit trial lawyers from injecting character assaults under the auspices of credibility checks. Notably, the amendment is neither a whimsical nor radical concept. It is, in fact, entirely consistent with the original proposal for Rule 609 suggested by the North Carolina Evidence Laws Study Committee some thirty-five years ago.[458] Their first proposal was the right one.

CONCLUSION

North Carolina impeachment practices continue to be guided by the dead hand of the common law. While the federal system modified conviction-based impeachment decades ago, North Carolina stood its ground. As states have refined impeachment rules over the years, North Carolina has remained mired in the past. Now, as the impact of conviction-based impeachment is being fully understood, North Carolina's regressive approach cannot afford to become fossilized.

As enacted and interpreted, North Carolina Rule of Evidence 609 enables character assassinations under the pretense of questioning credibility. The state's adherence to ancient dogma has a devastating effect on victim-witnesses and the judicial system as a whole. Survivors are subject to being castigated with their prior criminal misdeeds. Impeachment focused on character attacks cuts to the heart of the individual, causing senseless revictimization trauma to persons already abused. At the same time, jurors are invited to degrade survivors by

457. United States v. McRae, 593 F.2d 700, 707 (5th Cir. 1979) ("[The] major function [of Rule 403] is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.").

458. Memorandum from Donald B. Hunt, *supra* note 209 (proposing originally to limit convictions available for impeachment to crimes involving "some element of deceit, untruthfulness, or falsification bearing upon the witness's propensity to testify truthfully, such as perjury or subordination of perjury, false statement, criminal fraud, embezzlement, or false pretense or other crime in the nature of *crimen falsi*"); *see supra* notes 209–11 and accompanying text.

applying cultural myths about violent acts and negative stereotypes concerning victim behavior. Victims contemplating testifying may simply retreat, to the detriment of societal interests.

This Article is not intended to undermine the crucial and historical importance of a pointed cross-examination but to infuse reliability and decency into the process. Trial outcomes tainted by systemic infirmities are most inexcusable when easily avoidable. Acquittals or convictions curated by injecting misplaced conviction evidence into trials circumvent the proof process and undermine confidence in the justice system. Sound policy demands trial results be sustained on reliable, relevant evidence rather than unfounded myths and stereotypes.

Revising North Carolina Rule 609 is an opportunity to take measurable steps toward eliminating harmful structural components within the state's justice system. A rule that narrows the focus of impeachment benefits all witnesses—victims and the accused alike. Senseless ventures into a witness's past offenses that have no bearing on untruthful conduct, and even less on predicting false testimony, function primarily to misdirect the trial process. The sole purpose of impeaching a witness with her prior-conviction history is to enable the jury to evaluate her credibility as a truthful witness. Nothing more; nothing less. From this precept we can reevaluate the crimes that bear primarily on this issue and this issue alone. Crimes that involve proving dishonesty or false statement do just that. All others invite harms on the participants and the process.