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ARTICLES

RESTORING JUSTICE:

PURGING EVIL FROM FEDERAL RULE OF EVIDENCE 609

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Passage of the Second Chance Act[1] in 2008 helped launch a revolutionary

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1. Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008) (codified as amended in scattered sections of 42 U.S.C.); *see also* Press Release, Office of the Press Sec'y, President Bush Signs H.R. 1593, the Second Chance Act of 2007 (Apr. 9, 2008), http://georgewbush-whitehouse.archives.gov/news/releases/2008/04/20080409-2.html [http://perma.cc/6Q5J-FZ3B]

transformation in how society views the more than 650,000 men and women released from prison each year.[2] As a result, an era of mass incarceration is fading,[3] ex-offenders are now known as "returning citizens," and the criminal justice system has embraced bipartisan efforts to help rebuild lives interrupted by lengthy prison terms.[4] In 2016, the Department of Justice for the first time celebrated National Reentry Week to highlight its efforts to assist returning citizens.[5] Research shows that reentry programs work: they reduce

(President Bush, before signing the Second Chance Act, commenting on high recidivism rate and government's responsibility to help prisoners return as contributing members of their communities).

2. *See* NAT'L INST. OF CORR. INFO. CTR., U.S. DEP'T OF JUSTICE, REENTRY ANNOTATED BIBLIOGRAPHY 1 (2016), www.nicic.gov/Library/026286 [http://perma.cc/2CLH-SH7D]; E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2014, at 10 (2015), http://www.bjs.gov/content/pub/pdf/p14.pdf [http://perma.cc/J6DB-8JA5].

3. *See* CARSON, *supra* note 2, at 1 (finding that the U.S. prison population decreased by one percent between 2013 and 2014, with a third of the decrease "due to fewer prisoners under the jurisdiction of the Federal Bureau of Prisons"); Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. Rev. 189, 190–91 (2013) (noting that "more than half of the states are considering implementing or are implementing . . . criminal justice reform" and are reconsidering punitive policies that created mass incarceration, including emergency state sentencing reforms to reduce growing prison populations); Neil Eggleston, *President Obama Has Now Commuted the Sentences of 348 Individuals*, WHITE HOUSE (June 3, 2016, 3:30 PM), http://obamawhitehouse.archives.gov/blog/2016/03/30/president-obama-has-now-commuted-sentences-348-individuals [http://perma.cc/BA8Y-ABE6] (explaining that President Obama "commuted the sentences of more individuals than the past 7 presidents combined"); Sari Horwitz, *Justice Department Set to Free 6,000 Prisoners, Largest One-Time Release*, WASH. POST (Oct. 6, 2015), http://www.washingtonpost.com/world/national-security/justice-department-about-to-free-6000-prisoners-largest-one-time-release/2015/10/06/961f4c9a-6ba2-11e5-aa5b-f78a98956699_story.html [http://perma.cc/LT7L-LUCM] (reporting on the release of 6,000 inmates "in an effort to reduce overcrowding and provide relief to drug offenders who received harsh sentences"); *Materials on 2014 Drug Guidelines Amendment*, U.S. SENT'G COMMISSION, http://www.ussc.gov/policymaking/amendments/materials-2014-drug-guidelines-amendment (last visited May 5, 2017) [http://perma.cc/HWZ9-2SF7] (describing Sentencing Commission's 2014 vote to reduce sentencing guidelines for most federal drug trafficking offenders); *Policy Shifts Reduce Federal Prison Population*, U.S. COURTS (Apr. 25, 2017), http://www.uscourts.gov/news/2017/04/25/policy-shifts-reduce-federal-prison-population [http://perma.cc/PS78-85P6] (explaining that because of a reduction in federal prosecutions and sentences for drug-related crimes, "[t]he federal prison population fell from a peak of nearly 219,300 inmates in 2013 to 188,800 in April 2017").

4. *See* Email Interview with David L. Smith, Counsel for Legal Initiatives, Executive Office for United States Attorneys (June 13, 2016) (stating that fifty-five of ninety-four federal judicial districts feature some type of reentry court to assist ex-offenders); Zoe Tillman, *Federal Courts Focus on High-Risk Ex-Offenders*, NAT'L L.J. (June 7, 2016), http://www.nationallawjournal.com/id=1202759416650/Federal-Courts-Focus-on-HighRisk-ExOffenders?slreturn=20160520103311 [http://perma.cc/UZ48-GL8G] ("D.C. joins federal district courts in more than 30 states that have launched [reentry courts] over the past decade.").

5. *See* Press Release, The White House, Office of the Press Sec'y, FACT SHEET: During National Reentry Week, Reducing Barriers to Reentry and Employment for Formerly Incarcerated Individuals (Apr. 29, 2016), http://www.whitehouse.gov/the-press-office/2016/04/29/fact-sheet-during-national-reentry-week-reducing-barriers-reentry-and [http://perma.cc/L37U-DK9H] ("As part of National Reentry Week, the Administration has taken a series of steps to reform the federal approach to reentry by addressing barriers to reentry, supporting state and local efforts to do the same, and engaging the private sector to provide individuals who have earned a second chance the opportunity to participate in the American economy."); *see also* Press Release, Dep't of Justice, Office of Pub.

reincarceration by helping men and women released from prison obtain employment and education, and reunite with their families.[6] Further, the "restorative justice"[7] movement helps to heal the damage caused by crime and gradually removes barriers created by imprisonment and punitive justice.[8]

Affairs, Department of Justice to Launch Inaugural National Reentry Week (Apr. 22, 2016), http://www.justice.gov/opa/pr/department-justice-launch-inaugural-national-reentry-week (describing participants in DOJ's National Reentry Week in Philadelphia, including community leaders, public housing advocates, and legal services providers).

6. CAITLIN J. TAYLOR, PROGRAM EVALUATION OF THE FEDERAL REENTRY COURT IN THE EASTERN DISTRICT OF PENNSYLVANIA 16–17 (2016) (finding positive impact of reentry program on criminal justice system); Caitlin J. Taylor, *Ending the Punishment Cycle by Reducing Sentence Length and Reconsidering Evidence-Based Reentry Practices*, 89 TEMP. L. REV. 747, 759–62 (2017); Jean Friedman-Rudovsky, *Where Some of the Most Housing-Challenged Philadelphians Find Help*, NEXT CITY (May 1, 2017), http://nextcity.org/features/view/philadelphia-prisons-reentry-finding-housing [http://perma.cc/8APG-3P3T] (explaining that the Supervision to Aid Reentry (STAR) program works to combat the challenge of housing to reduce recidivism). *But see* DAVID RAUMA, FED. JUDICIAL CTR., EVALUATION OF A FEDERAL REENTRY PROGRAM MODEL 2, 36–37 (2016) (describing a study of three federal reentry programs in Florida, New York, and Wisconsin, and finding no impact on revocations or recidivism).

On February 21, 2017, the Committee on Criminal Law of the Judicial Conference of the United States reviewed the Federal Judicial Center's May 2016 study and acknowledged that the Center's findings were "clearly not dispositive on the issue of reentry court programs' effectiveness or that of other types of 'problem-solving courts.'" *See* Letter from Hon. Ricardo S. Martinez, Chair, Criminal Law Comm. on FJC Study of Federal Reentry Court Programs to 1–2 (Feb. 21, 2017) (on file with author). Judge Martinez's letter included a staff paper from the Administrative Office of U.S. Courts titled *Judge-Involved Supervision Programs in the Federal System: Background and Research (January 2017)*. *Id.* The Administrative Office staff paper acknowledged the research of Caitlin J. Taylor on the reentry program in the Eastern District of Pennsylvania. *See* Admin. Office of U.S. Courts, Judge-Involved Supervision Programs in the Federal System: Background and Research (January 2017) 14–15 (Jan. 2017) (on file with author).

7. *See* HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 37 (2002) ("Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible."); Kurt M. Denk, Restorative Justice and Catholic Social Thought: Challenges as Opportunities for Society, Church, and Academy, Address at the Lane Center for Catholic Studies and Social Thought, University of San Francisco Spring Lecture Series 5 (Feb. 29, 2008) (describing restorative justice as the interweaving of theory and application, and a "*process approach* to dealing with crime and violence").

8. *See* United States v. Dokmeci¸ No. 13-CR-00455, 2016 WL 915185, at *3 (E.D.N.Y. March 9, 2016) (discussing a "grassroots movement" in federal courts to reduce the punitive costs of over-incarceration); Joan Gottschall & Molly Armour, *Second Chance: Establishing a Reentry Program in the Northern District of Illinois*, 5 DEPAUL J. FOR SOC. JUST. 31, 33–34 (2011) ("[T]here is now a growing popular and institutional recognition that releasees' chances for successful reintegration and continued law-abiding behavior require more intensive intervention than we have provided in the past.").

In August 2016, the White House's Federal Interagency Reentry Council touted the merits of reentry initiatives: "Without effective reentry policies, we risk perpetuating cycles of violence, victimization, incarceration and poverty in our neighborhoods. We risk wasting the potential of millions of Americans whose past mistakes continue to exclude them from the chance to contribute to their communities." *See* Fed. Interagency Reentry Council, A Record of Progress and a Roadmap for the Future iii (2016); *id.* at 3 (noting the adverse collateral consequences of a criminal record for

Despite such initiatives, returning citizens remain burdened with a stigma from one of the most sacrosanct provisions in federal jurisprudence: Federal Rule of Evidence 609(a)(1).[9] It endorses the use of any felony conviction to impeach any witness, including criminal defendants, regardless of the conviction's link to untruthfulness.[10] Rule 609(a)(1) codifies as law an inherent bias against the men and women who continue to be stereotyped as evil and unworthy of belief based solely on a prior felony conviction.[11]

Although felony convictions unrelated to truthfulness might, in some cases, have some marginal relevance to credibility,[12] this Article challenges the Rule's underlying premise that such felonies are always relevant to the credibility of all witnesses in all cases. Moreover, this Article suggests that principles of restorative justice justify eliminating the use of a prior felony unrelated to

returning citizens attempting to reenter the community); *id.* at 11 ("Effective reentry policies not only lower recidivism and future victimization, but also save government resources . . . .").

9. Federal Rule of Evidence 609(a)(1) provides:

> (a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
>
> > (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
> >
> > > (A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and
> > >
> > > (B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant . . .

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

10. *See* United States v. Garber, 471 F.2d 212, 214 (5th Cir. 1972) ("The danger arising from evidence of prior criminal convictions is that the jury may be unable to restrict the use of this evidence to the proper purpose."); 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, 295, 303, 335 (2008) (noting the "devastating impact" and "prejudice" of prior conviction impeachments, and the existence of empirical data "demonstrating that admission of a defendant's prior convictions 'substantially increase[s] the likelihood that the jury will convict the defendant'" (alteration in original) (quoting L. Timothy Perrin, *Pricking Boils, Preserving Error: On the Horns of a Dilemma After* Ohler v. United States, 34 U.C. DAVIS L. REV. 615, 651–52 (2001))).

11. *See* Campbell v. Greer, 831 F.2d 700, 707 (7th Cir. 1987) ("Rule 609 and the common law tradition out of which it evolved rest on the common-sense proposition that a person who has flouted society's most fundamental norms, as embodied in its felony statutes, is less likely than other members of society to be deterred from lying under oath in a trial by the solemnity of the oath . . . ."); Gertz v. Fitchburg R.R. Co., 137 Mass. 77, 78 (1884) (finding that a jury may infer a witness's propensity to lie under oath based on a "general readiness to do evil" stemming from a prior felony conviction). *But see* MICHAEL J. SAKS & BARBARA A. SPELLMAN, THE PSYCHOLOGICAL FOUNDATIONS OF EVIDENCE LAW 169 (2016) ("The research suggests, then, that prior conviction evidence contributes little or nothing to credibility assessment of defendants who take the witness stand, while at the same time creating the risk that jurors will draw improper propensity inferences.").

12. For example, from a pure relevance perspective, a fact finder might logically consider a serial felon less likely to keep an oath to testify truthfully based on his propensity to repeatedly violate the law. Use of such multiple felonies for impeachment purposes, however, would likely be unfairly prejudicial and therefore excluded under Rule 609 because the evidence would inflame the jury. *See* FED. R. EVID. 609(a)(1)(B).

truthfulness to impeach returning citizens who testify as witnesses.

Proposals to reform Rule 609 are not new.[13] Suggested amendments to eliminate Rule 609(a)(1) have been summarily rejected or ignored for decades,[14] primarily justified by the common law notion that those who commit felonies are less likely to obey the law, and therefore are more likely to lie under oath.[15] The

13. *See, e.g.*, *Garber*, 471 F.2d at 215 (surveying criticism by "a growing number of judges and commentators" of the use of prior conviction evidence to impeach); John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 482–83 (2008) (noting reform efforts to limit and ban use of prior convictions for impeachment); *id.* at 492–93 (proposing modification to Rule 609 so that prosecution could not impeach criminal defendant with prior conviction unless defendant was convicted of perjury and court engages in balancing test, or defendant opens the door by offering evidence of his or her character for truthfulness); Teree E. Foster, *Rule 609(a) in the Civil Context: A Recommendation for Reform*, 57 FORDHAM L. REV. 1, 1 (1988) ("No rule of evidence has provoked commentary so passionate or profuse as that which permits impeachment of a testifying witness in a criminal case by introducing that witness' previous convictions."); *see also, e.g.*, Richard D. Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 691 (1991); James H. Gold, *Sanitizing Prior Conviction Impeachment Evidence to Reduce Its Prejudicial Effects*, 27 ARIZ. L. REV. 691, 693 (1985) [hereinafter James H. Gold, *Sanitizing*] (proposing "sanitizing" Rule 609 by prohibiting prosecution from "eliciting or presenting any information except that the defendant was previously convicted of an unnamed crime"); Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563, 563, 579–80 (2014) (proposing that before a conviction is used for impeachment, it should be assessed as a reliable "indicator of relative culpability"); Edward E. Gainor, Note, *Character Evidence by Any Other Name . . . : A Proposal to Limit Impeachment by Prior Conviction Under Rule 609*, 58 GEO. WASH. L. REV. 762, 769–70 (1990) ("Rule 609(a) should be revised to strictly limit the use of evidence of prior convictions for impeachment purposes to those crimes that bear directly on the criminal defendant's credibility, and to establish a clear, uniformly applicable test of probative value versus prejudicial effect."); Tarleton David Williams, Jr., Comment, *Witness Impeachment by Evidence of Prior Felony Convictions: The Time Has Come for the Federal Rules of Evidence to Put on the New Man and Forgive the Felon*, 65 TEMP. L. REV. 893, 897, 929 (1992) (proposing revision of Rule 609 to exclude evidence of any witness's "non-dishonesty felony convictions").

14. The first attempts to limit Rule 609 to impeachment by convictions only involving acts of untruthfulness occurred during the initial drafting and passage of the Rule during House and Senate proceedings. *See* Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2301 (1994) [hereinafter Victor Gold, *Impeachment*] (citing *Proposed Rules of Evidence: Hearings Before the Spec. Subcomm. on Reform of Fed. Criminal Laws of the H. Comm. on the Judiciary*, 93d Cong. 223, 234–35 (1973) (statement of John J. Cleary, Executive Director, Federal Defenders of San Diego, Inc.); *id.* at 305, 307 (statement of James F. Schaeffer, Association of Trial Lawyers of America); *Proposed Rules of Evidence: Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary* (Supp.), 93d Cong. 25 (1973) (letter from Charles R. Halpern & George T. Frampton, Jr., Center for Law and Social Policy (Apr. 13, 1973)); *id.* at 304–05 (letter from Jack H. Simmons (Aug. 2, 1973))). Although several substantive changes have been made to Rule 609(a) since its enactment, none of those changes have incorporated the idea of limiting the Rule to impeachment by crimes of dishonesty. *See id.* at 2308–09 (describing three amendments to Rule 609); James H. Gold, *Sanitizing*, *supra* note 13, at 694–95 (describing several types of proposals to limit or prohibit the admissibility of prior convictions for impeachment and their very limited effect); Roberts, *supra* note 13, at 565, 579 (summarizing four forms of critiques of Rule 609, and noting that although Rule 609 "has been amended several times, its core remains unchanged, and the liberal judicial admission of convictions continues").

15. *See Campbell*, 831 F.2d at 707 (highlighting the "common-sense proposition" that an

implications of Rule 609(a)(1) are vast and often punitive. The Rule deters defendants from testifying at their own criminal trials based on a fear that jurors will punish them for criminal propensity,[16] potentially increases the risk of wrongful convictions,[17] and subjects returning citizens called as witnesses to character attack in every type of criminal and civil litigation.[18]

Our nation's ongoing effort to assist returning citizens provides a fresh rationale for finally discarding the dubious premise of Rule 609(a)(1). A restorative justice approach to Rule 609, as embodied by many reentry programs, would vest returning citizens with a new presumption: instead of being branded as felons prone to evil, they not only would be welcomed back into society but also would be free from character attacks based on felonies that bear no nexus to truthfulness.[19] Returning citizens who have renounced their criminal

individual who has committed a felony will be less "deterred from lying under oath"); Williams v. United States, 3 F.2d 129, 130 (8th Cir. 1924) ("At common law persons convicted of infamous crimes were incompetent to be witnesses at all, on the theory that they were so destitute of moral honesty that truth could not within them dwell."); *Gertz*, 137 Mass. at 78 (noting that the jury may infer a witness's "bad character" and "readiness to lie" if he has been convicted of a crime).

16. Bellin, *supra* note 10, at 334–35 (noting that "defendants in criminal courts across the country are deterred from testifying based on erroneous rulings (or anticipated rulings) as to the admissibility of their prior convictions"); Blume, *supra* note 13, at 486, 493 (describing the risk of the jury inferring that a testifying defendant is a bad person and is therefore lying, or is a bad person and therefore has done bad things in the past, making it more likely he or she committed the charged offense); *see also* SAKS & SPELLMAN, *supra* note 12, at 168 ("The available empirical research is unanimous in finding that, notwithstanding judicial instructions to the contrary, most people travel the forbidden path of using prior crimes evidence to make substantive inferences about the likelihood that the testifying defendant committed the current crime charged.").

17. Blume, *supra* note 13, at 493 (arguing that prior record impeachment may contribute to wrongful convictions where "jury draws the propensity inference").

18. The Rule permits a returning citizen to be impeached with any felony conviction when he or she testifies to witnessing almost any event, such as a traffic accident, employment discrimination, or criminal conduct by others. *See* FED. R. EVID. 609(a)(1). For example, if a returning citizen is the only eyewitness to a terrorist act, he or she could be impeached with any prior felony conviction, such as drug possession, and could be branded a liar based solely on the prior felony.

19. Rule 609(a)(1), therefore, is inconsistent with a view that law and punishment must be measured by its effect on the lives of human beings. *See* GERALD AUSTIN MCHUGH, CHRISTIAN FAITH AND CRIMINAL JUSTICE: TOWARD A CHRISTIAN RESPONSE TO CRIME AND PUNISHMENT 206 (1978) ("Theories of justice are useless if those theories do nothing to prevent the infliction of needless suffering on thousands of people."). Impeaching a witness with a felony conviction unrelated to truthfulness publicly condemns that witness's character and allows society to extract another round of needless suffering for an offense that already has been punished.

Based on public safety concerns, Congress has imposed other restrictions on the civil liberties of individuals who are convicted of serious crimes, such as limiting the right of convicted felons to possess firearms. *See* 18 U.S.C. § 922(g) (2012). The right of an individual who committed a serious crime to possess firearms is not subject to restoration based on the passage of time or evidence of rehabilitation. *See* Binderup v. Attorney Gen., 836 F.3d 336, 350 (3d Cir. 2016) (en banc) (holding that the Second Amendment right to bear arms is not restored for individuals who committed serious crimes based on "the passage of time or evidence of rehabilitation"). Rule 609(a)(1) impeachment, however, implicates no such public safety concerns and is based solely on the common law's negative character evidence premise.

pasts would no longer be stigmatized when testifying as witnesses.

The Federal Rules of Evidence, and similar state rules, should adopt the view of several states, including Pennsylvania,[20] that permit impeachment using only those convictions involving a dishonest act or a false statement,[21] as set forth in Rule 609(a)(2).[22] Principles of restorative justice, including its focus on reconciliation and healing,[23] outweigh the negative-character rationale underlying Rule 609(a)(1)'s expansive view of relevance for all felony convictions. The Judicial Conference of the United States Advisory Committee on Rules of Evidence, and its state counterparts, should propose an amendment eliminating Rule 609(a)(1) and limiting impeachment to convictions related to truthfulness. Elimination of Rule 609(a)(1), of course, would not preclude use of a felony conviction for another relevant purpose, such as to establish bias,[24] to impeach a witness by rebutting a witness's false claim that he has led a law-abiding life,[25] or to disprove a witness's testimony.[26]

20. Pa. R. Evid. 609(a) ("For the purpose of attacking the credibility of any witness, evidence that the witness has been convicted of a crime, whether by verdict or by plea of guilty or *nolo contendere*, must be admitted if it involved dishonesty or false statement."); *accord, e.g.*, Haw. Rev. Stat. Ann. § 626-1, R. 609(a) (West 2016) ("For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is inadmissible except when the crime is one involving dishonesty."); Mich. R. Evid. 609(a) ("For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and (1) the crime contained an element of dishonesty or false statement, or (2) the crime contained an element of theft . . . .").

21. Such crimes are often referred to as *crimen falsi* offenses. FED. R. EVID. 609(a) advisory committee's note to 1974 enactment (explaining that the term includes crimes involving "some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully"). Rule 609(a)(2) now expressly requires that such offenses have proof of, or an admission to, a dishonest act or false statement. FED. R. EVID. 609(a)(2).

22. Rule 609(a)(2) provides that to attack a witness's character for truthfulness by evidence of a criminal conviction "for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement." FED. R. EVID. 609(a)(2).

Although at least one scholar has advocated a broader reform that includes amending Rule 609(a)(2), *see* Blume, *supra* note 13, at 493, 493 n.59, even that view acknowledges the significant probative value of a perjury conviction in assessing a witness's credibility, *see id.* at 495 ("[E]xcept where the defendant has been previously convicted of perjury, there is no reason to believe that individuals with a prior record are more likely to lie under oath than defendants without prior records.").

23. *See* ZEHR, *supra* note 7, at 40–41 (describing "signposts" of restorative justice, including focusing "on the harms of the crime," restoring and empowering victims, providing "opportunities for dialogue . . . between victim and offender as appropriate," and encouraging "collaboration and reintegration of both victims and offenders"); Denk, *supra* note 7, at 5 (citing ZEHR, *supra* note 7, at 37).

24. *See* United States v. Abel, 469 U.S. 45, 51 (1984) (holding that "it is permissible to impeach a witness by showing his bias under the Federal Rules of Evidence").

25. *See, e.g.*, United States v. Payne, 635 F.2d 643, 647 (7th Cir. 1980) ("[T]rial judge was correct in holding that the defense had 'opened the door' to this line of inquiry by putting in issue appellant's reputation for the traits of truthfulness and law-abiding citizenship"); United States v. Lundy, 416 F.

I. A RULE BUILT UPON A STEREOTYPE

Rule 609 is derived from the common law's disqualification of felons from testifying as witnesses.[27] Although such prohibitions disappeared more than a century ago, the notion that convicted felons lack credibility remains firmly ensconced in the law.[28] Oliver Wendell Holmes championed this view while sitting on the Massachusetts Supreme Judicial Court in 1884. Justice Holmes equated a criminal conviction to a "general readiness to do evil," which would permit a jury to conclude that a witness convicted of a crime has a "readiness to lie" under oath because of his "bad character."[29]

Justice Holmes's view of a felon's evil character and propensity to lie persists in Rule 609(a)(1) and its state law counterparts.[30] Rule 609(a)(1) endorses using evidence of bad character (i.e., a propensity for bad acts based on a prior felony conviction) to infer untruthfulness regardless of the underlying nature of the crime.[31] As one court has observed, "that crookedness and lying

Supp. 2d 325, 337 n.5 (E.D. Pa. 2005) ("[I]f the character witness testifies to the Defendant's reputation as a law-abiding citizen, questions that pertain to prior arrests or convictions may be permitted.").

26. *See* United States v. Gilmore, 553 F.3d 266, 272 (3d Cir. 2009) (noting that evidence of a prior conviction may be admissible for "impeachment by contradiction" under Rules 402 and 403 regardless of the admissibility of a conviction under Rule 609); United States v. Cavender, 228 F.3d 792, 799 (7th Cir. 2000) (concluding that the trial court abused its discretion under Rule 609 by excluding evidence of a government witness's felony drug possession conviction after witness testified on direct and cross-examination that he did not use drugs during period of time encompassing time of conviction).

27. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 511 (1989).

28. Williams v. United States, 3 F.2d 129, 130 (8th Cir. 1924) ("In nearly all of the states of the Union this disqualification of the witness is now removed, and one who has been convicted of crime is a competent witness, but the general provision of state statutes is that the conviction may be shown to affect credibility."); Bellin, *supra* note 10, at 296–97 (describing the gradual disappearance of the disqualification of witnesses, including the common law's categorical bar of prior felons, in the late nineteenth and early twentieth centuries, which "culminated in the Supreme Court's pronouncement in 1918 . . . that 'the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury'" (quoting Rosen v. United States, 245 U.S. 467, 471 (1918))).

29. Gertz v. Fitchburg R.R. Co., 137 Mass. 77, 78 (Mass. 1884); *see also* Bellin, *supra* note 10, at 301–02 (outlining the chain of inferences supporting Holmes' relevancy argument for use of felony convictions to impeach a witness).

30. *See* ROGER PARK & TOM LININGER, THE NEW WIGMORE: A TREATISE ON EVIDENCE: IMPEACHMENT AND REHABILITATION § 3.4, at 3 (Supp. 2017) (providing a survey of state-level jurisdictions' categorical rules on using convictions to impeach); *see, e.g.*, Mo. Ann. Stat. § 491.050 (West 2016) ("[A]ny prior criminal convictions may be proved to affect [a witness's] credibility in a civil or criminal case . . . .").

31. For example, Rule 609(a)(1) gives the court discretion to allow impeachment of an eyewitness with the witness's felony drug conviction. The only permissible inference the jury would be permitted to draw from the prior drug conviction is that as a convicted felon, the witness is more likely to give untruthful testimony.

are correlated is the premise of Rule 609(a), is not for us to question."[32] Trial judges expressly cite criminal propensity as the relevant link between prior felonies and lying under oath.[33]

Deeming all felony convictions relevant to prove untruthfulness, however, ignores the legal evolution of felonious conduct, which has expanded far beyond the narrow category of offenses punishable by death that had previously justified the common law's skepticism toward returning citizens.[34] That skepticism, as expressed by Justice Holmes, equates criminality to untruthfulness without any distinction for the underlying cause or nature of crimes unrelated to truthfulness.[35]

At least one scholar has labeled laws permitting impeachment with criminal convictions an "ancient precept of the law of evidence" that is contrary to common experience.[36] Numerous scholars cite the absence of a direct correlation between a witness's non-dishonesty felony convictions and propensity to lie,[37] and this view has growing support in the scientific community.[38] Research shows that "moral conduct in one situation is not highly correlated with moral conduct in another."[39] Notwithstanding a lack of empirical testing, Rule 609(a)(1)

32. Campbell v. Greer, 831 F.2d 700, 707 (7th Cir. 1987).

33. *See, e.g.*, United States v. Lipscomb, 702 F.2d 1049, 1054 (D.C. Cir. 1983) (upholding trial judge's exercise of discretion in admitting felony conviction for impeachment on the theory that a "desperate person who would commit an armed robbery would also lie under oath" (internal quotation marks omitted)).

34. *See* Roberts, *supra* note 13, at 588 (explaining that at common law, "[f]elonies were a narrow group of offenses, all punishable by death, and all deemed to be 'inherently morally wrong,'" but today the definition of felony has expanded (footnotes omitted) (quoting James J. Tomkovicz, *The Endurance of the Felony Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1445–56 (1994)).

35. *See id.* at 588–89 (noting that some felonies "can occur in the absence of any understanding that the law is being broken," and suggesting that the common law view of felony impeachment based on a readiness to do evil "may be out of step with the current shape of criminal justice"). Holmes's view of the links between felons, their evil propensities, and lying comports with his understanding of human nature in other contexts. *See* Buck v. Bell, 274 U.S. 200, 207 (1927) ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.").

36. H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 813 (1993). The United States Supreme Court recently observed that "[i]t is the mark of a maturing legal system that it seeks to understand and to implement the lessons of history." Pena-Rodriguez v. Colorado, No. 15-606, slip op. at 21 (U.S.S.C. March 6, 2017) (holding that the Sixth Amendment allows impeachment of jury verdicts if a juror clearly states he or she relied on racial stereotypes or animus to convict a defendant).

37. Williams, *supra* note 13, at 895, 895 n.10 (collecting authorities).

38. *See, e.g.*, PARK & LININGER, *supra* note 30, § 3.4 at 2 (describing situationist personality theory and the "classic study of cross-situational lying" that showed "dishonest behaviour in one situation . . . was only modestly related to dishonest behaviour in other situations"); *see also* SAKS & SPELLMAN, *supra* note 11, at 168–69 (outlining empirical research undermining Rule 609's premise that prior convictions can be used by the jury exclusively to evaluate witness credibility); Roberts, *supra* note 13, at 577.

39. Campbell v. Greer, 831 F.2d 700, 707 (7th Cir. 1987) (citing Roger V. Burton, *Generality of*

persists. Moreover, it is at odds with the Federal Rules of Evidence's ban on the use of character or character traits to prove a person's propensity to act consistent with that character, absent some link to untruthfulness.[40]

Attempts to excise convictions unrelated to truthfulness from the impeachment arsenal gained support in the 1940s, influenced by the American Law Institute (ALI)[41] and Professor Mason Ladd.[42] Professor Ladd contended

Honesty Reconsidered, 70 PSYCHOL. REV. 481 (1963); Robert G. Lawson, *Credibility and Character: A Different Look at an Interminable Problem*, 50 NOTRE DAME LAW. 758 (1975) (citing other studies)); *see also* Blume, *supra* note 13, at 481 (describing rationale behind "anti-propensity doctrine" based on danger that jury will punish defendant for offenses other than those for which he or she is on trial and because defendant is a "bad person"); Foster, *supra* note 13, at 29–30 (noting trait-oriented psychologists' attempts to "buttress their theory with empirical data have failed utterly," and their theories have been discredited by "situationism").

40. Colin Miller, *Impeachable Offenses?: Why Civil Parties in Quasi-Criminal Cases Should Be Treated Like Criminal Defendants Under the Felony Impeachment Rule*, 36 PEPP. L. REV. 997, 1001 (2009) ("Rule 609(a)(1) is the sole aberration in the constellation of Federal Rules of Evidence" that makes it difficult to admit character evidence to prove propensity). Federal Rule of Evidence 404 states in part:

> (a) Character Evidence.
>
> > (1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.
> >
> > . . .
>
> (b) Crimes, Wrongs, or Other Acts.
>
> > (1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
> >
> > . . .

FED. R. EVID. 404.

Federal Rule of Evidence 608(a) states:

> A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

FED. R. EVID. 608(a).

41. In 1942, members of the ALI's Committee on Evidence drafted and proposed Model Code of Evidence Rule 106, which allowed prior conviction impeachment only for convictions involving false statement or dishonesty. Rule 106 provides:

> (1) Subject to Paragraphs (2) and (3), for the purpose of impairing or supporting the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence concerning any conduct by him and any other matter relevant upon the issues of his credibility as a witness, . . . [E]xtrinsic evidence shall be inadmissible . . . .
>
> (b) of his conviction of crime not involving dishonesty or false statement, . . .
>
> (3) If an accused who testifies at the trial introduces no evidence for the sole purpose of supporting his credibility, no evidence concerning his commission or conviction of crime shall, for the sole purpose of impairing his credibility, be elicited on his cross-examination or be otherwise introduced against him; if he introduces evidence for the sole purpose of supporting his credibility, all evidence admissible under Paragraph (1) shall be admissible against him.

that felonies unrelated to truthfulness had no relevance to credibility and should be excluded.[43] The American Bar Association (ABA) endorsed that view in 1953.[44]

Efforts persisted in various forms to enact the limitations advocated by the ALI and the ABA until Congress adopted the Federal Rules of Evidence in 1975.[45] Congress compromised[46] by enacting the discretionary model used today, vesting the judiciary with broad discretion to balance the impeachment value of felony convictions with the risk of unfair prejudice.[47] Senator John Little McClellan, the leading advocate for a broad impeachment provision, summarized Congress's rejection of the efforts to limit impeachment only to crimes related to untruthfulness.[48] He maintained that a "person who has committed a serious crime—a felony—will just as readily lie under oath as someone who has committed a misdemeanor involving lying."[49]

II. THE RULE 609 MODEL

Rule 609(a) allows for the use of convictions for "attacking a witness's character for truthfulness."[50] A court must admit evidence of any crime within ten years[51] regardless of the degree of punishment if the crime involved "a dishonest act or false statement."[52] For crimes not involving dishonesty, the rule

MODEL CODE OF EVIDENCE 106 (AM. LAW INST. 1942), *reprinted in* Williams, *supra* note 13, at 908 n.102.

42. *See* Williams, *supra* note 13, at 908–09 (describing Professor Ladd's influence on the ALI's Committee on Evidence).

43. *See id.* ("Professor Ladd challenged the prevailing notion that prior felony conviction evidence had some bearing on a witness's propensity for truth and veracity.").

44. *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 513 (1989) (describing ABA's endorsement of a rule that limited witness impeachment to convictions for crimes involving dishonesty or false statement).

45. *See* Victor Gold, *Impeachment*, *supra* note 14, at 2298–308 (describing history of enactment of Rule 609(a) and debate over the probative value of conviction evidence versus its unfair prejudice).

46. *See Green*, 490 U.S. at 519–20 (describing Congress's "compromise" between the "automatic admissibility approach" and the "impeachment only by *crimen falsi* evidence" approach); Bellin, *supra* note 10, at 306 (noting that Rule 609 "embodies a compromise between 'two diametrically opposed positions'" (quoting 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, 920 (1980))).

47. *See Green*, 490 U.S. at 519–20 (describing Rule 609(a)(1)'s balance); Bellin, *supra* note 10, at 312 ("[T]he Rule relies on trial judges to strike the appropriate balance in particular cases by weighing the 'probative value' and 'prejudicial effect' of each proffered conviction.").

48. *See* United States v. Lipscomb, 702 F.2d 1049, 1075 (D.C. Cir. 1983) (MacKinnon, J., concurring) (citing 120 Cong. Rec. 37076–77 (1974)).

49. *Id.* (quoting 120 CONG. REC. 37076–77).

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

51. The ten-year period is measured from the time of "the witness's conviction or release from confinement for it, whichever is later." FED. R. EVID. 609(b).

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

sets forth a calibrated balancing process.[53] Felony convictions for any witness in a civil or criminal case "must be admitted" under Rule 609(a)(1)(A), subject only to the limitation of Rule 403, which provides that relevant evidence may be excluded "if its probative value is substantially outweighed by a danger" of factors such as unfair prejudice, misleading the jury, wasting time, or confusing the issues.[54] When the witness is the defendant in a criminal case, Rule 609(a)(1)(B) requires that a felony conviction be admitted "if the probative value of the evidence outweighs its prejudicial effect to that defendant."[55]

Rule 609(b)(1) creates a more stringent balancing test for felony convictions beyond ten years.[56] Such a conviction is admissible only if "its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect," and the proponent gives notice of its intent to impeach the witness with the conviction.[57] Impeachment with juvenile adjudications carries even stricter limitations.[58] Rule 609(d) limits the use of juvenile adjudications only to non-defendant witnesses in criminal cases and instructs that an adult conviction for that offense would be admissible to attack the adult's credibility.[59] It also demands that "admitting [evidence of the juvenile adjudication be] necessary to fairly determine guilt or innocence."[60]

III. ILLUSORY GUIDES TO FAIRNESS

Rule 609(a)(1) seems to create safeguards by requiring the court to weigh prior felony convictions pursuant to Rule 403 and, in the case of a defendant witness, only admitting prior conviction evidence if the probative value outweighs the prejudicial effect to the defendant.[61] Rule 403, however, is a rule of inclusion, favoring the admission of relevant evidence.[62] Absent the link between a felony conviction and a tendency to lie, prior felony convictions have no relevance and would be otherwise excluded under the Rules of Evidence as pure propensity evidence subject to significant risk of misuse by the jury.[63]

53. *See* FED. R. EVID. 609.

54. FED. R. EVID. 609(a)(1)(A).

55. FED. R. EVID. 609(a)(1)(B); *see also* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 979–80 (2000) (noting Rule 609(a)(1)'s limit on impeachment of defendants due to risk that juries will misuse prior convictions as evidence of guilt); Roberts, *supra* note 13, at 568 (noting the increased protection for defendants under Rule 609).

56. *See* FED. R. EVID. 609(b)(1).

57. FED. R. EVID. 609(b).

58. *See* FED. R. EVID. 609(d).

59. *See id.*

60. FED. R. EVID. 609(d)(4).

61. *See* FED. R. EVID. 609(a)(1).

62. United States v. Udeozor, 515 F.3d 260, 264–65 (4th Cir. 2008) ("Rule 403 is a rule of inclusion, generally favor[ing] admissibility." (internal quotation marks omitted)).

63. *See* Gainor, *supra* note 13, at 767 ("Rule 609, permitting use of evidence of a criminal defendant's prior convictions '[f]or the purpose of attacking the credibility of a witness,' is an *exception* to the general policy of Rule 404 that character evidence 'is not admissible for the purpose of proving

Moreover, courts often have difficulty quantifying unfair prejudice from impeaching a witness, as opposed to a defendant, with a felony conviction.[64] The Rule's analytical model renders any witness vulnerable to impeachment with prior felonies.[65] For example, if a returning citizen witnessed an armed robbery, he or she would be impeached with a prior felony conviction unrelated to truthfulness unless the court could articulate how the probative value of the impeachment was substantially outweighed by the dangers enumerated in Rule 403. Balancing the impeachment value of the felony conviction of a government witness requires the court to shift its inquiry to how the government, not the defendant, would be unfairly prejudiced. It is more difficult to articulate how impeachment of a witness would be unfairly prejudicial to the government, waste time, or confuse the jury, absent unique factual circumstances.[66]

To guide courts in balancing the probative value of prior felony convictions under Rule 609(a)(1) with the dangers of jurors misusing the evidence, courts have devised a multifaceted inquiry.[67] Although the test has various formulations, the underlying inquiry usually focuses on four central factors: (1) the type of crimes involved, (2) when the convictions occurred, (3) the significance of the witness's testimony to the case, and (4) the importance of the defendant-witness's credibility.[68] In the United States Court of Appeals for the Third Circuit, for example, the balancing test is derived from the factors

that [a person] acted in conformity therewith.'" (alterations in original) (first quoting FED. R. EVID. 609(a); then quoting FED. R. EVID. 404(a))); Roberts, *supra* note 13, at 564 (explaining that Rule 609 "impeachment relies on the assumption that a felony conviction in itself has some probative worth on the issue of credibility: the conviction is viewed as indicating the defendant's willingness to violate the law, and thus suggesting a willingness to violate the laws of perjury").

64. *See* James H. Gold, *Sanitizing*, *supra* note 13, at 695 (arguing that the "discretionary balancing approach" has not been effective at "reducing the prejudicial impact of impeachment with prior convictions," and surveying "appellate court opinions upholding the discretionary admission of prior convictions under circumstances in which suppression would seem most appropriate").

65. *See, e.g.*, United States v. Estrada, 430 F.3d 606, 617 (2d Cir. 2005) ("District courts, in applying Rule 609(a)(1), are thus required to examine which of a witness's crimes have elements relevant to veracity and honesty and which do not.").

66. *See id.* at 620 ("[T]he [Advisory Committee] notes emphasize that impeachment evidence relating to a government witness should be excluded under Rule 609(a)(1) only when there is a real danger that such prejudice substantially outweighs the probative value of a witness's felony convictions as they relate to his or her propensity for truthfulness."); *cf.* United States v. Chaika, 695 F.3d 741, 744–45 (8th Cir. 2012) (barring impeachment of government witness with eight-year-old conviction for felony sex offense in fraud trial because evidence had minimal relevance, and defense possessed other, less prejudicial impeachment evidence).

Although eliminating Rule 609(a)(1) would preclude a defendant from impeaching a government informant or cooperating witness with a felony conviction, numerous other impeachment tools remain, such as questioning government witnesses on plea agreements, grants of immunity, government payments or favors, bias, and prior inconsistent statements. *See, e.g.*, *id.* at 745 (stating that impeachment on "guilty plea, promise to cooperate, and hoped-for leniency was far more potent 'ammunition'" on cross-examination of government witness than a felony conviction).

67. *See, e.g.*, United States v. Greenidge, 495 F.3d 85, 97 (3d Cir. 2007) (outlining the test used for balancing the probative value of prior felony convictions under Rule 609(a)(1)).

68. *See id.*

articulated in the Seventh Circuit's opinion in *United States v. Mahone*,[69] which relied on *Gordon v. United States*,[70] a case decided before adoption of the Federal Rules of Evidence. Both cases cited a five-factor inquiry: (1) the impeachment value of the crime, (2) the point in time of the conviction and the witness's subsequent history, (3) the similarity between the past crime and the charged crime, (4) the importance of the defendant's testimony, and (5) the centrality of the credibility issue.[71]

Those inquiries represent "an apparent attempt to foster uniformity" in the district courts' application of Rule 609.[72] Courts begin their analysis with a presumption that the felony conviction is relevant, leaving the balance of the inquiry to discern the impact of the unfair prejudice arising from the inescapable criminal propensity inference injected into the trial.[73] Even in similar factual scenarios, however, an examination of the various factors can yield disparate results among judges and courts.[74] Although courts routinely engage in the multi-factor balancing, scholars criticize the exercise as a "citation-friendly, albeit facially ambiguous, framework (again without analysis),"[75] which is "fraught with confusion."[76]

Regardless of whether a balancing test leads to consistent results or effectively informs judicial discretion, it fails to address the core flaw in Rule 609(a)(1): a felony conviction's presumed relevance based on the witness's evil propensity. Although decades of judicial decisions have presumed the validity of Rule 609(a)(1)'s propensity-based rationale, the recent emphasis on restorative justice principles in criminal law offers a new justification for severing the Rule's unsupported logical chain linking evil character to lying.[77]

69. 537 F.2d 922, 929 (7th Cir. 1976).

70. 383 F.2d 936, 940 (D.C. Cir. 1967).

71. *See Mahone*, 537 F.2d at 929; *Gordon*, 383 F.2d at 940.

72. Bellin, *supra* note 10, at 312.

73. *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 510 (1989) ("Evidence that a litigant or his witness is a convicted felon tends to shift a jury's focus from the worthiness of the litigant's position to the moral worth of the litigant himself.").

74. *See* United States v. Pettiford, 238 F.R.D. 33, 42 (D.D.C. 2006) (noting the "general trend towards admissibility under Rule 609(a)"); Roberts, *supra* note 13, at 569–70 (describing courts' application of balancing factors as "fraught with confusion" and "trend[ing] toward admissibility"). *Compare* Diaz v. Aberts, No. 10-5939, 2013 WL 2322485, at *7–8 (E.D. Pa. May 28, 2013) (denying admission of prior convictions of plaintiff in excessive force civil rights case because credibility would be crucial inquiry), *with* Prater v. City of Phila., No. 11-CV-00667, 2012 WL 3930063, at *2–3 (E.D. Pa. Sept. 7, 2012) (admitting prior convictions of plaintiff in excessive force civil rights case because credibility would be crucial inquiry).

75. Bellin, *supra* note 10, at 317.

76. Roberts, *supra* note 13, at 569.

77. The restorative justice model is based on an understanding that the causes of criminal behavior include a variety of factors, including the "disintegration of family life," poverty and illness, and poor individual choices. *See* Reverend Ricardo Ramirez, Bishop of Las Cruces, Catholic Social Teaching on Restorative Justice, Address at the Villanova University Academic Symposium 8–9 (Sept. 18, 2009), http://www.priestsforlife.org/magisterium/bishops/09-09-28-ramirez.pdf [http://perma.cc/3J44-A6WU]; *see also* Fed. Interagency Reentry Council, *supra* note 8, at 8–9 (outlining the "[k]ey drivers

IV. RESTORATIVE JUSTICE TRENDS

Howard Zehr, widely regarded as the nation's leading restorative justice theorist and practitioner, describes restorative justice as a process to help those with a stake in a specific offense to "collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible."[78] A restorative model to addressing criminal behavior posits three questions: "Who has been harmed; what are their resulting needs; and who is responsible for meeting those needs."[79] Answers must come from the affected parties: the offender, the victim, their respective families, and the surrounding community.[80]

Often this approach conflicts with traditional punitive models of criminal justice, primarily because the criminal justice system of filing charges and proceeding to a guilty plea or trial affords little or no room for dialogue and true healing.[81] Some scholars, however, suggest the two approaches can be integrated based on their "numerous points of intersection."[82] Although both models have distinct objectives—retribution in the punitive model and "reparation of harm and community empowerment" in the restorative model—they share some common features and goals.[83] These "include rehabilitation, deterrence, incapacitation, and denunciation of crime."[84] Many of those shared concepts are integrated into the punitive model, including in the factors that federal judges must weigh in imposing a sentence.[85]

behind incarceration rates" in the United States).

78. *See* ZEHR, *supra* note 7, at 37. Restorative justice "recognizes that a successful criminal sanction must be both backward-looking—condemning the offense and uncovering its causes—and forward-looking—making amends to the victim and the general community while actively facilitating moral development and pro-social behavior in the offender." Erik Luna & Barton Poulson, *Restorative Justice in Federal Sentencing: An Unexpected Benefit of* Booker*?*, 37 MCGEORGE L. REV. 787, 790 (2006).

79. Hadar Dancig-Rosenberg & Tali Gal, *Restorative Criminal Justice*, 34 CARDOZO L. REV. 2313, 2318 (2013).

80. *Id.* Luna and Poulson argue that the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), which rendered the United States Sentencing Guidelines advisory rather than mandatory, "open[ed] the door for new and progressive options" in sentencing, "including the incorporation of restorative justice programs." Luna & Poulson, *supra* note 78, at 796.

81. *See* Dancig-Rosenberg & Gal, *supra* note 79, at 2319–20.; Gottschall & Armour, *supra* note 8, at 38–39 (explaining that unlike reentry courts' attempt "to address the special problems of former prisoners returning to the community," criminal courts "traditionally find the facts and apply the law" with little concern for "the effect of their actions on defendants, their families and their victims").

82. *E.g.*, Dancig-Rosenberg & Gal, *supra* note 79, at 2315.

83. *Id.*

84. *Id.*

85. For example, 18 U.S.C. § 3553(a) requires judges to consider not only the need for deterrence, protection of the public, and punishment, but also the needs of the defendant and the defendant's history and characteristics. *See* 18 U.S.C. § 3553(a) (2012). The jurisprudence of U.S. District Court Judge John Gleeson illustrates how restorative justice principles can guide sentencing. *See, e.g.*, United States v. Dokmeci, No. 13-CR-00455, 2016 WL 915185 (E.D. N.Y. March 9, 2016); United States v. Holloway, 68 F. Supp. 3d 310 (E.D.N.Y. 2014); United States v. Leitch, No. 11-CR-00609, 2013 WL 753445 (E.D.N.Y. Feb. 28, 2013).

As one scholar has noted, restorative justice aims to "make amends" after a violent event or crime.[86] Critical to the restorative process is the goal of rebuilding relationships within the broader community, not simply between an individual offender and a victim.[87] Ultimately, a truly restorative approach to criminal justice transcends punishment and rehabilitation and achieves a broader peace or a "fundamental at-rightness and well-being of relationships" in a type of "transformative social vision" featuring truly peaceful communities.[88]

Reentry programs designed to assist returning citizens effectively combine the characteristics of the traditional punitive model and the restorative model.[89] Such programs are often designed with the dual objective of reducing recidivism and ameliorating the societal harms caused by mass incarceration.[90] Reentry programs exist in myriad forms through the state and federal criminal justice systems.[91] At their core, they share a common theme of striving to break the cycle of reoffending through a variety of practices designed to help returning citizens resume productive, law-abiding lives within the broader community.[92]

For example, one of the earliest reentry programs to address violent crime was formed in the Eastern District of Pennsylvania in 2007.[93] Known as STAR, or Supervision to Aid Reentry, the program offers a wide array of services to help returning citizens overcome obstacles to successful reentry in areas such as accountability, employment, healthcare, legal services, housing assistance, education, family life, decision making, and social networks.[94] One study has

86. Denk, *supra* note 7, at 5 (citing Tony F. Marshall, *Restorative Justice: An Overview*, *in* A RESTORATIVE JUSTICE READER 28, 28 (Gerry Johnstone ed., 2003)).

87. *See id.* at 7.

88. *Id.* at 8.

89. *See* Dancig-Rosenberg & Gal, *supra* note 79, at 2315.

90. *See* Gottschall & Armour, *supra* note 8, at 37.

91. *See* NAT'L INST. OF CORR. INFO. CTR., *supra* note 2, at 4–9 (listing reentry programs); RAUMA, *supra* note 6, at 3 (describing prisoner reentry as "an amorphous concept that can encompass many aspects of a former prisoner's reintegration," including "[e]mployment, sobriety, family stability, mental health, and criminal associations"); Gottschall & Armour, *supra* note 8, at 42–55 (discussing examples of federal reentry courts that "vary greatly in terms of participants and structure"); Jamie M. Ware, *The Supervision to Aid Reentry (STAR) Program: Helping Previously Incarcerated Federal Prisoners Succeed in Transitioning Back to the Community*, PHILA. SOC. INNOVATIONS J., May 2011, at 6–7 (describing the creation of initial "state- and-county-level jurisdiction reentry courts" and the subsequent expanded use of reentry courts).

Other courts seek to address similar issues in "no reentry" courts that focus on assisting a defendant before sentencing and sometimes result in dismissal of charges or non-custodial sentences. *See, e.g.*, United States v. Dokmeci, No. 13-CR-00455, 2016 WL 915185 at *3 (E.D.N.Y. March 9, 2016) (describing "no reentry" drug court in the Eastern District of New York).

92. *See* Gottschall & Armour, *supra* note 8, at 38–39 (arguing that reentry courts are an "enormous departure" from the normal criminal justice model, which fails to concern "the effect of their actions on defendants, their families[,] and their victims"); Ware, *supra* note 91, at 6 ("Reentry courts are based on a therapeutic model of justice.").

93. Gottschall & Armour, *supra* note 8, at 40 n.34, 48–51.

94. Taylor, *supra* note 6, at 759–62; Kristin Brown Parker, *The Missing Pieces in Federal Reentry Courts: A Model for Success*, 8 DREXEL L. REV. 397 (2016); Ware, *supra* note 91, at 7–9; Friedman-

found that the STAR Program decreased the odds of supervision revocation by sixty-one percent, increased employment, and reduced the excessive costs and criminogenic effects of continued imprisonment.[95] Such positive results have led former U.S. Attorney General Eric Holder to promote the STAR reentry model throughout the nation.[96]

The focus of reentry programs on providing returning citizens with a fresh start stands in stark contrast with Rule 609(a)(1)'s premise that returning citizens possess an evil character flaw that makes them inclined to lie. Impeachment using a felony conviction is more than simply posing a question to a returning citizen. Rather, it rekindles a psychological barrier to a returning citizen's full integration into the community by labeling the witness as possessing bad character.[97] Each time a person who has successfully reentered our community is impeached with a prior felony unrelated to truthfulness, society renews its condemnation of that person's character and undermines restorative efforts aimed at rehabilitation and healing.

Any marginal relevance of such impeachment fails to justify the ongoing punishment of returning citizens called to testify in our courts. Unlike the restorative approach, Rule 609(a)(1) impeachment focuses on a theory of

Rudovsky, *supra* note 4.

95. TAYLOR, *supra* note 6, at 16–17.

96. *See Outreach this Quarter*, U.S. ATT'Y'S Q. (Office of the U.S. Att'y for the Eastern Dist. of Pa.), Winter 2014, at 3, http://www.justice.gov/sites/default/files/usao-edpa/legacy/2014/10/22/Winter%202014%2C%20Publication%2017.pdf [http://perma.cc/8CU4-JX4G] (discussing Attorney General Holder's visit to the Eastern District of Pennsylvania's STAR Program); Press Release, Dep't of Justice, Office of Pub. Affairs, Attorney General Eric Holder Convenes Inaugural Cabinet-Level Reentry Council (Jan. 5, 2011), http://www.justice.gov/opa/pr/attorney-general-eric-holder-convenes-inaugural-cabinet-level-reentry-council [http://perma.cc/527S-RSTB] (explaining that Holder convened cabinet-level Reentry Council to "leverage resources across agencies to reduce recidivism and victimization; identify evidence-based practices that advance the council's mission; promote changes to federal statutes, policies and practices that focus on reducing crime; and identify federal policy opportunities and barriers to improve outcomes for the reentry community"); *id.* ("In Fiscal Year 2010, the Department of Justice awarded $100 million to support 178 state and local reentry grants to provide a wide range of services."); Press Release, Dep't of Justice, Office of Pub. Affairs, Attorney General Eric Holder Speaks About the Department of Justice's Priorities and Mission (Apr. 25, 2011), http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-about-thedepartment-justice-s-priorities-and-mission [http://perma.cc/7DSK-G4HJ] (discussing the "economic imperative" and "moral obligation" to provide "support to those who've served their time and are struggling to rejoin and contribute to their communities").

The White House has also recognized the benefits of the STAR Program. *See* Fed. Interagency Reentry Council, *supra* note 8, at 53 (outlining the comprehensive reentry efforts of the STAR Program and highlighting its impact on two program graduates).

97. *See* Ted Chiricos et al., *The Labeling of Convicted Felons and Its Consequences for Recidivism*, 45 CRIMINOLOGY 547, 547, 572 (2007) (arguing that labeling a person as a felon "could increase the likelihood of recidivism" and increase stigmatization effects); Andrea Noble, *Justice Department Program to No Longer Use 'Disparaging' Terms 'Felons' and 'Convicts'*, WASH. TIMES (May 4, 2016), http://www.washingtontimes.com/news/2016/may/4/justice-dept-no-longer-use-terms-felon-convict/ [http://perma.cc/J57Z-GSLN] (noting the psychological barriers that labels such as "felony" and "convict" have on reentry).

relevance based exclusively on criminal propensity. Continuing to stereotype returning citizens as having a propensity to lie based on past crimes, as codified in Rule 609(a)(1), undermines the restorative goal of healing within the broader community impacted by crime. Once an offender accepts punishment and serves a sentence, the restorative model helps to ensure a smooth return to the community and to limit the risk of recidivism.[98] Impeachment with a prior felony, however, impedes that restorative process by imposing an ongoing stigma that burdens the returning citizen with reminders of a criminal past.[99]

A restorative justice approach to Rule 609 would acknowledge society's changing understanding of crime and returning citizens and finally discard the outdated historical premise of evil character upon which Rule 609(a)(1) rests. Eliminating Rule 609(a)(1) will conform Rule 609 to the Federal Rules of Evidence's overall ban on the use of propensity evidence and will move our nation a step closer to achieving a truly restorative criminal justice system that sheds dehumanizing labels and practices associated with punishment for past offenses.[100]

98. See *supra* notes 81–92 and accompanying text for a discussion of the advantages of the restorative model.

99. *See* MCHUGH, *supra* note 19, at 191 (noting that it is meaningless to preach reconciliation to prison inmates if the individual finds upon release that he or she "has no place in the community"). Such collateral consequences create barriers that "persist long after an individual has served his or her sentence" and can have adverse impacts. Fed. Interagency Reentry Council, *supra* note 8, at 10 (discussing the negative impact of the collateral consequences of criminal convictions on "employment, education, mental and behavioral health services, housing, social services, public benefits, and occupational licenses").

100. *See* MCHUGH, *supra* note 19, at 163 (acknowledging that as prisoners, individuals "often come to accept the dehumanizing labels which are pinned on them," and noting that there "are few easily won victories" in the effort to transform the criminal justice system).