

# Getting Clamorous About the Silence Penalty

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## I. INTRODUCTION

Those of us who labor in the cotton rows of our nation's criminal justice system owe Professor Jeffery Bellin<sup>1</sup> a huge debt of gratitude for his new article in the Iowa Law Review, *The Silence Penalty*.<sup>2</sup> The purpose of his article, in his own words, is to “reanimate the academic discourse on defendant testimony.”<sup>3</sup> My purpose is quite different, but hopefully complimentary: to bring the practical experience of my more than 40 years presiding in federal criminal jury trials to the important discussion framed by Professor Bellin. His penetrating and exceptionally well-written article focuses on a simple question—with an extraordinarily complex and incomplete answer: When should the accused in a criminal trial decide to testify? It is the singularly most important and difficult question that every accused and defense counsel face in every criminal trial in state or federal court.<sup>4</sup> The abstract of *The Silence Penalty* starts: “In every criminal trial, the defendant possesses the right to testify. Deciding whether to exercise that right, however, is rarely easy.”<sup>5</sup> My experience in our nation's criminal justice system confirms Professor Bellin's observation.

Parts II, III, and IV of this piece briefly summarize and offer insights on what Professor Bellin labels the silence, prior offender, and parallel penalties. The parallel penalty being a combination of the silence and prior offender penalties. Part V critiques the four implications Professor Bellin drew from his research and analysis of the parallel penalty. Part VI discusses an overlooked issue in *The Silence Penalty*. Finally, Part VII provides what *The Silence Penalty* does not: meaningful suggestions for reform. These suggestions are practical, reasonable, and achievable.

## II. THE SILENCE PENALTY

The crux of the silence penalty comes from two principles Professor Bellin clearly articulates: (1) A defendant who decides not to testify normally prevents the prosecution's introduction of the accused's prior criminal record; and (2) that silence comes at a stiff price: “Jurors penalize defendants who fail to testify by inferring guilt from silence.”<sup>6</sup> I disagree with the first

1. Professor Jeffery Bellin is the William H. Cabell Research Professor at William & Mary Law School.

2. Jeffery Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395 (2018).

3. *Id.* at 6.

4. Of course, as Professor Bellin notes “the choice to testify belongs to the defendant alone . . . .” *Id.* at 5. In my experience, with more than 300 criminal jury trials spanning three districts in two circuits, while the right exclusively belongs to the accused, the decision is nearly always made in consultation with the guiding hand of counsel. On many occasions, counsel makes a record with the accused, outside the presence of the jury, on whether or not the accused will testify and on the advice offered by counsel.

5. *Id.* at 1.

6. *Id.* at 1, 14–16.

premise. As discussed more fully in Part VI, *The Silence Penalty* ignores the impact of the prosecution's ability to introduce evidence of other crimes, wrongs, or acts in their case-in-chief pursuant to the Federal Rule of Evidence 404(b).<sup>7</sup>

I know firsthand from hundreds of jury selections that many prospective jurors expect an innocent defendant to testify—notwithstanding the presumption of innocence and the accused's Fifth Amendment right not to testify. Prospective jurors candidly indicate they will hold it against an accused who does not testify precisely because, if they were in the accused's shoes, you could not keep them off the witness stand.<sup>8</sup> That is the reason I ask the prospective jurors to list legitimate reasons why the accused, especially one who is innocent, might not want to testify. I then solicit a pledge from potential jurors to see if they believe they can give the accused the full benefit of the presumption of innocence and honor the Fifth Amendment right not to testify. When they cannot, or are unsure of their ability to do so, they are excused for cause with no effort to rehabilitate them. Judicial rehabilitation of potential jurors is easy, but unwise. No matter how biased a potential juror professes to be, virtually any judge, even those of modest skill or less, can persuade (I think coerce) the juror into claiming that they can now follow the law in the judge's instructions. The problem is that most trial judges find rehabilitation of potential jurors to be a part of their job description. Most judges also maintain too high a standard for excusing for cause a juror who is not fully committed to giving the accused the full benefit of the presumption of innocence—especially if the accused does not testify. This dual dynamic unintentionally, but unfairly, enhances the silence penalty.<sup>9</sup>

### III. THE PRIOR OFFENDER PENALTY

Professor Bellin notes: “only about half of criminal defendants take the witness stand.”<sup>10</sup> If the silence penalty was not problematic enough, the genius of Professor Bellin's article is his melding of the “prior offender penalty” with the silence penalty. There is a well-recognized exception to the general evidence rule that excludes evidence of the accused's prior criminal

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7. FED. R. EVID. 404(b).

8. My view on this is not idiosyncratic. Professor Bellin writes: “The apparently widespread belief that an innocent defendant would testify looms ominously over jury deliberations involving silent defendants.” Bellin, *supra* note 2, at 14.

9. These observations of what other state and federal trial court judges do comes from my experience in training more than 1500 state and federal trial court judges and more than 5000 lawyers from Alaska to Florida about implicit bias in the courtroom, including the relationship between the presumption of innocence and implicit bias.

10. Bellin, *supra* note 2, at 4; see also Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules That Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851, 852 (2008) (“Although the exact numbers vary by jurisdiction, studies reveal that up to half of all criminal defendants who proceed to trial elect not to testify on their own behalf, and that this percentage has been increasing since at least the early twentieth century.”).

record.<sup>11</sup> The accused's criminal record, or at least some of it, is often admitted as "impeachment" if the accused testifies.<sup>12</sup> When the jury hears the impeachment evidence, they are "more likely to convict."<sup>13</sup> Professor Bellin labels this the "prior offender penalty."<sup>14</sup>

Federal Rule of Evidence 609 comes into play when discussing the prior offender penalty.<sup>15</sup> The rule generally provides that prior felony convictions are admissible for impeachment of the defendant's character for truthfulness if the defendant testifies.<sup>16</sup> This is subject to the following balancing test: Is the probative value greater than the prejudice to the defendant?<sup>17</sup> In addition, if the prior crime has an element of dishonesty or false statement, then it is admissible without applying the balancing test.<sup>18</sup>

Professor Bellin carefully musters and critically analyzes social science academic research on the prior offender penalty, his own study of a 400-mock juror trial simulation, and data from actual trials to support one of his theses that prior conviction evidence "substantially damages defendants' chances for acquittal" because jurors consider prior offender evidence for criminal propensity (an impermissible purpose) rather than for impeachment (a permissible purpose).<sup>19</sup>

#### IV. THE PARALLEL PENALTY

The "parallel penalty" is Professor Bellin's term for the interplay between the "prior offender" and "silence" penalties.<sup>20</sup> Professor Bellin attributes the low rate of defendants testifying to the parallel penalty.<sup>21</sup> Part 1 of *The Silence Penalty*, especially the mock juror studies analyzed, "suggest[s] that (1) jurors will convict more readily when they learn that a defendant has a prior criminal record; and (2) jurors will penalize defendants who do not testify."<sup>22</sup>

Professor Bellin's own empirical study of 400 mock jurors fills a gap in the social science research by comparing the effect of two types of impeachment evidence (prior similar felony for the crime charged with straight false statement or dishonesty convictions) against the decision not to

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11. Bellin, *supra* note 2, at 5.

12. *Id.*

13. *Id.*

14. *Id.*

15. See FED. R. EVID. 609.

16. *Id.*

17. *Id.* R. 609(a)(1)(B).

18. *Id.* R. 609(a)(2).

19. Bellin, *supra* note 2, at 13.

20. *Id.* at 6, 16–20.

21. *Id.* at 5.

22. *Id.* at 16.

testify.<sup>23</sup> This is the precise conundrum that defendants in the real world face. The participants in the study randomly received one of four case scenarios: (1) “defendant did not testify; no prior convictions introduced”; (2) defendant testifies and no prior convictions introduced; (3) defendant testifies and impeached with “fraud” conviction; and (4) defendant testifies and impeached with “robbery” conviction.<sup>24</sup>

The results of the study indicate the following conviction rates for the four scenarios set forth in Professor Bellin’s chart:<sup>25</sup>

Figure 1: Results of Professor Bellin’s Study

Defendant Testifies?	Impeachment	Number (n)	Scenario	Guilty
Yes	Robbery	100	4	82%
No	None	96	1	76%
Yes	Criminal Fraud	100	3	73%
Yes	None	97	2	62%

The study supports Professor Bellin’s “parallel penalty” theory.<sup>26</sup> That is, invoking the right not testify and remaining silent imposes a nearly identical penalty as testifying and being impeached.<sup>27</sup> Most important however, is the unique insight gleaned from the study that jurors do not use impeachment of prior crimes unrelated to truth and veracity in the way the law intends.<sup>28</sup> In Professor Bellin’s study, the impeachment with the robbery conviction, a crime similar to the store robbery that is the crime charged in the study, produced a greater conviction rate than impeachment with the truth and veracity offense, the fraud conviction.<sup>29</sup> This established that the mock jury considered the robbery conviction for the impermissible purpose of propensity to commit the store robbery.<sup>30</sup> While this empirical evidence is both illuminating and distressful, it comes as no surprise to me or, I assume, other judges. It confirms what I believe most judges, prosecutors, and defense counsel have already intuitively learned from their courtroom experience

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23. *Id.* The precise experimental design of Professor Bellin’s study is articulated in the article. *Id.* at 16–18.

24. *Id.* at 18.

25. *Id.*

26. *Id.* at 20.

27. *Id.*

28. *Id.* at 19.

29. *Id.*

30. *Id.*

trying criminal cases: Jurors routinely impermissibly use impeachment evidence as propensity evidence that the defendant committed the crime(s) charged.

It is true that jurors may be given limiting instructions that theoretically reduce the prejudice from the parallel penalty. My experience teaches that appellate judges reading a cold record have much greater faith in the efficacy of limiting instructions than trial-court judges and trial lawyers.<sup>31</sup> Social scientists have recognized that “the majority of extant empirical research indicates that jurors do not adhere to limiting instructions.”<sup>32</sup>

## V. A CRITIQUE OF PROFESSOR BELLIN’S IMPLICATIONS AND CONCLUSION

Professor Bellin discusses four implications from his findings. (1) defendants should testify more often; (2) the ineffectiveness of legal doctrines governing defendant testimony; (3) distortions of jury fact-finding; and (4) incentivizing guilty pleas and exacerbating discriminatory impacts.<sup>33</sup>

A serious weakness of *The Silence Penalty* is the absence of meaningful solutions. Professor Bellin seemingly raises an academic white flag by stating in his conclusion: “There are no easy solutions.”<sup>34</sup> This is perplexing because when writing on similar topics, his articles have suggested specific solutions.<sup>35</sup> In Part VII, I propose a variety of solutions.

I offer the following observations with parts of each of the four implications.

### A. DEFENDANTS SHOULD TESTIFY MORE

First, I agree that the parallel penalty may inhibit a defendant’s constitutional right to testify. Yet, Professor Bellin fails to recognize another simple and often powerful reason why defendants do not testify. In my experience, most are guilty, and skilled cross-examination by a prosecutor is frequently devastating to a defendant’s acquittal chances. Professor Bellin’s own cited data suggests this—he notes in one study that 40% of trial

31. Compare *United States v. Gomez*, 763 F.3d 845, 860–61 (7th Cir. 2014) (noting that a limiting instruction *may* be helpful in limiting the prejudice of other crime evidence with suggestions for improving limiting instructions), with *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (“The naive assumption that prejudicial effects can be overcome by instructions to the jury all practicing lawyers know to be unmitigated fiction.” (citation omitted)).

32. Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL’Y & L. 677, 703 (2000).

33. Bellin, *supra* note 2, at 30–37.

34. *Id.* at 38.

35. See Bellin, *supra* note 10, at 880–96 (suggesting two alternative proposals to encourage defendants to testify); 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, 335–40 (2008) (proposing an alternative analytical framework for applying Rule 60g).

defendants who do not testify have no prior record.<sup>36</sup> Professor Bellin claims that these defendants could testify and avoid both the silence and prior offender penalties.<sup>37</sup> He is right, they could. I suggest the primary reason they do not is the “cross-examination penalty!” Professor Bellin recognized as much in a prior article when he wrote:

A premise of the American jury system is that false testimony will be exposed when subjected to the “crucible” of the adversary process. This premise is particularly forceful in the case of a defendant’s testimony, which will be tested by cross-examination and the presentation of rebuttal evidence by a prosecutor possessing investigatory resources limited only by the prosecuting agency’s estimation of the significance of the case.<sup>38</sup>

The failure of *The Silence Penalty* to consider the “cross-examination penalty” in the analysis of “defendants should testify more often” undermines this first implication.<sup>39</sup> After all, a defendant’s right to remain silent was so important to the founders that the concept was incorporated into the Fifth Amendment of the United States Constitution. After twenty-three years of presiding over federal criminal cases, I believe most defendants do themselves more harm by exposing themselves to skilled cross-examination than by remaining silent. Consequently, *The Silence Penalty* overstates the effect of the parallel penalty.

#### B. THE INFLUENCE OF LEGAL DOCTRINES GOVERNING TESTIMONY

This implication argues legal doctrines designed to eliminate the parallel penalty are ineffective. I agree. The notion that jurors faced with a defendant’s prior crimes can magically not consider them as propensity evidence is sheer fantasy, even with a limiting instruction. The notion that jurors should not draw an adverse inference from the defendant’s decision not to testify is folly, too, unless trial judges do much more to ameliorate this concern, as I suggest in Part VII.

#### C. DISTORTIONS OF JURY FACTFINDING

*The Silence Penalty* argues that a defendant who exercises the Fifth Amendment right not to testify distorts the jury finding process.<sup>40</sup> This is understandable, if at all, only as just another way to describe the silence penalty. Professor Bellin claims: “in many cases defendants decline to testify to avoid prior conviction impeachment.”<sup>41</sup> While this may be true, we do not

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36. Bellin, *supra* note 2, at 30.

37. *Id.*

38. Bellin, *supra* note 10, at 856 (footnote omitted).

39. Bellin, *supra* note 2, at 30.

40. *Id.* at 34–35.

41. *Id.* at 34.

know the actual magnitude of the effect because *The Silence Penalty* fails to consider the admissibility of prior crimes pursuant to Rule 404(b).

D. INCENTIVIZING GUILTY PLEAS AND EXACERBATING DISCRIMINATORY  
IMPACTS

Here is where I find Professor Bellin's analysis most troubling. He asserts a correlation between the rising number of criminal defendants with prior impeachable offenses with the rising guilty plea rate.<sup>42</sup> From these trends, which I have no reason to doubt, he argues this creates increased prior offender penalties, thus, increasing guilty pleas.<sup>43</sup> He claims this data fits nicely into the unsettling narrative of mass incarceration,<sup>44</sup> something I have written and publicly spoken about on many occasions.<sup>45</sup> To his credit, Professor Bellin candidly concedes "causation is likely impossible to show as the variables are overlapping and interrelated."<sup>46</sup> I suggest causation is impossible to establish with the scintilla of data Professor Bellin cites. While there is a correlation with the data, there is simply no evidence of causation. There is likely the same correlation, but no causation, with comparing the rise of guilty pleas with the increased sales of bottled water or the increase of sushi restaurants opening in Iowa. A more plausible explanation for increased plea bargaining is the dramatic increase in the length of sentences during this time and the increased application of mandatory minimum sentences.<sup>47</sup>

VI. AN OVERLOOKED ISSUE IN *THE SILENCE PENALTY*

*The Silence Penalty* does not consider the effect of Rule 404(b) evidence of other crimes, wrongs, or acts, that is introduced in the prosecution's case-in-chief, on a defendant's decision to testify or not.<sup>48</sup> In the real world of federal criminal trials, my experience teaches, Rule 404(b) evidence is admitted much more frequently than evidence of prior offender crimes under Rule 609. This is why Rule 404(b) "has become the most cited evidentiary rule on appeal."<sup>49</sup> For *The Silence Penalty* to offer a more complete understanding of the issue of a defendant testifying, the mock juror

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42. *Id.* at 36–37.

43. *Id.* at 35–37.

44. *Id.* at 36–37.

45. See generally Mark W. Bennett, *A Slow Motion Lynching? The War on Drugs, Mass Incarceration, Doing Kimbrough Justice, and a Response to Two Third Circuit Judges*, 66 RUTGERS L. REV. 873 (2014) (focusing on federal sentencing in crack cocaine cases); Mark Osler & Mark W. Bennett, *A "Holocaust in Slow Motion?" America's Mass Incarceration and the Role of Discretion*, 7 DEPAUL J. SOC. JUST. 117 (2014) (discussing the war on drugs as a holocaust); *The House I Live In*, BBC (Jan. 14, 2013), <http://www.bbc.co.uk/programmes/b01pzz6g> (featuring an appearance from the author discussing the war on drugs).

46. Bellin, *supra* note 2, at 37.

47. Osler & Bennett, *supra* note 45, at 146–49.

48. FED. R. EVID. 404(b).

49. *United States v. Davis*, 726 F.3d 434, 441 (3rd Cir. 2013).



experiment could have obtained this data. This data could illuminate if a defendant's testimony could minimize the effect on guilty verdicts when Rule 404(b) evidence is admitted in the prosecution's case-in-chief. Without this information, the discussion of parallel penalty remains uncertain and incomplete.

## VII. REFORM SUGGESTIONS

### A. INTRODUCTION

As an avid reader and prolific author of law review articles, I find a constant, recurring theme: The traditional penultimate section— suggestions for reform or solutions to the issues raised in the article— fails to articulate practical and plausible reform proposals or solutions.<sup>50</sup> The principal surprise of *The Silence Penalty* is that it does not offer suggestions for reform or solutions to the critical problems it so ably illuminates. As I indicated earlier, this is puzzling given Professor Bellin's proposed reforms and solutions in his two prior related articles—which would all apply to *The Silence Penalty*.<sup>51</sup>

The first sentence of *The Silence Penalty* starts with a historical observation: “For much of American history, criminal defendants could not testify.”<sup>52</sup> The last paragraph of *The Silence Penalty* concludes that the current state of the law concerning a criminal defendant's right to testify is “broadly harming criminal defendants and undermining the criminal justice system, itself.”<sup>53</sup> It then concludes that there is now a “rational basis for prohibiting sworn defendant testimony.”<sup>54</sup> What? That alleged remedy is far worse than the problem. Besides, it is unconstitutional.<sup>55</sup>

What follows are my suggestions for reform.

### B. REFORMING THE SILENCE PENALTY

In large part, jurors impose a silence penalty because trial court judges fail to do enough in voir dire to commit jurors to giving a criminal defendant the full benefit of the presumption of innocence. One of Professor Bellin's

50. For example, I was reading a law review article a few years ago by a member of the academy criticizing the United State Sentencing Guidelines— something I have frequently done in my judicial opinions and law review articles. When it came to the solution section of the article, all the academic proposed was abolishing the Guidelines. That's not happening. It's not a realistic proposal. The name of the author, title of the article, and publishing journal are not provided to protect the guilty.

51. See generally Bellin, *supra* note 10 (suggesting two alternative proposals to encourage defendants to testify); Bellin, *supra* note 35 (proposing an alternative analytical framework for applying Rule 609).

52. Bellin, *supra* note 2, at 3.

53. *Id.* at 38.

54. *Id.*

55. Professor Bellin recognizes as much in a string cite of legal and academic authorities, including two cases from the United States Supreme Court. Bellin, *supra* note 2, at 3 n.4.

suggestions in a prior article is for judges to give favorable jury instructions for silent defendants.<sup>56</sup> It is a fine suggestion, but every state and federal trial judge I know already does this. It is beyond naive to think that simply instructing jurors on the presumption of innocence or saying a few platitudes about it during voir dire will empower jurors to overcome the silence penalty. Study after study indicates jurors do not understand the presumption of innocence.<sup>57</sup> Indeed, one study established “that 49.9% of people *who had previous jury experience* agreed that defendants had to prove their innocence.”<sup>58</sup> It is clear that trial judges have to do much more in jury selection than what most currently do. I have long thought about this problem and have developed innovative strategies to attempt to overcome the silence penalty.<sup>59</sup> It is important for trial judges to discuss in depth with prospective jurors their beliefs about a defendant not testifying.<sup>60</sup> It is the duty of trial judges, criminal defense lawyers, and, yes, prosecutors to ensure they do everything they can to help jurors overcome the silence penalty. If trial judges and lawyers performed their duties, it would not have been necessary for Professor Johnson to write her article exploring whether fundamental fairness requires voir dire questions about the presumption of innocence and burden of proof.<sup>61</sup> Of course, it does.

### C. REFORMING THE PRIOR OFFENDER PENALTY

As I previously noted, *The Silence Penalty* offers no reform suggestions. However, I agree with Professor Bellin’s suggestion, in 2008, that the analytical framework for interpreting Rule 609 should be revised to be more consistent with Congress’s original intent to make the Rule one of exclusion,

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56. Bellin, *supra* note 10, at 875–76.

57. See, e.g., Vida B. Johnson, *Presumed Fair? Voir Dire on the Fundamentals of our Criminal Justice System*, 45 SETON HALL L. REV. 545, 555–59 (2015). See generally Mitchell J. Frank & Dr. Dawn Broschard, *The Silent Criminal Defendant and the Presumption of Innocence: In the Hands of Real Jurors, Is Either of Them Safe?*, 10 LEWIS & CLARK L. REV. 237 (2006) (using survey data to argue that jurors do not comprehend the presumption of innocence instruction); Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77 (1988) (arguing that jurors try but often fail to follow jury instructions); David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478 (1976) (arguing that jurors do not apply the presumption of innocence in their deliberations).

58. Johnson, *supra* note 57, at 557.

59. Mark W. Bennett, *The Presumption of Innocence and Trial Court Judges: Our Greatest Failing*, 39-Apr. CHAMPION 20 (April 2015) (discussing my longstanding technique of leaving the bench during jury selection on the presumption of innocence to shake hands with the accused. I then face the prospective jurors to explain I just shook hands with someone who is absolutely not guilty unless and until the government can prove it beyond a reasonable doubt. I then invite all prospective jurors who are unable for any reason to give the defendant the full benefit of the presumption to leave).

60. See Bennett, *supra* note 58, at 3.

61. Johnson, *supra* note 56, at 546–49.

not inclusion.<sup>62</sup> His other suggestion, in a companion article, proposes amending Rule 609 itself to decrease both silence and prior offender penalties.<sup>63</sup> The amendment would simply prohibit the prosecution from impeaching “a defendant’s credibility with prior convictions, eliminating the strongest disincentive to defendant testimony.”<sup>64</sup> Both Professor Bellin and I agree there should be one exception: allowing the prosecution to use this evidence to contradict any statements made by the testifying defendant.<sup>65</sup> I disagree with Professor Bellin that this prohibition should apply also to impeachment under Rule 609(a)(2) for crimes of dishonesty or false statements. No other form of impeachment is so directly related to credibility. If not applied to defendants in criminal cases, it would immunize defendants from impeachment over all other witnesses. Thus, creating a perverse dichotomy.

Professor Bellin’s final suggestion from a prior article is: more robust motions in limine trying to preclude the prosecution’s impeachment evidence.<sup>66</sup> This adds little to the discussion because, in my experience, better trial lawyers have long practiced it.

Ironically, *The Silence Penalty* is “silent” with similar problems in the jurisprudence of Rule 404(b) that Professor Bellin so ably establishes regarding Rule 609. Unlike Rule 609, which deals only with impeachment, Rule 404(b) evidence of other crimes, wrongs, or acts applies to evidence admissible in the prosecution’s case-in-chief.<sup>67</sup> Rule 404(b) does not inhibit a defendant from testifying. However, because courts have so broadly interpreted the exceptions to the rule to swallow the rule, it has the same impact on the jury’s view of the defendant as the prior offender penalty. Just as jurors rely on prior convictions, not just for impeachment but as evidence

62. Bellin, *supra* note 35, at 335–40.

63. Bellin, *supra* note 10, at 880–90.

64. *Id.* at 883.

65. *Id.*

66. *Id.* at 890–96.

67. The text of FED. R. EVID. 404(b) Crimes, Wrongs, or Other Acts states:

(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.

(2) *Permitted Uses; Notice in a Criminal Case.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

FED. R. EVID. 404(b).

of a defendant's propensity to commit the crime(s) charged, so does Rule 404(b) evidence.<sup>68</sup>

Rule 404(b) prohibits the admission of other crimes, wrongs, or acts to prove character or propensity.<sup>69</sup> However, such evidence is admissible under Rule 404(b)(2) to prove: motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.<sup>70</sup>

Rule 404(b) has endured unrelenting critiques from the academy.<sup>71</sup> The rule's "coherence has degraded so badly that the justifications for the rule and the tools for applying it are anemic in all but the clearest cases. . . . [I]t is degrading for the American criminal trial system to continue to flog this decrepit rule."<sup>72</sup>

The problem with 404(b) evidence is that the exceptions, almost always, swallow the rule. In other words, a fair random reading of 404(b) cases would lead to the conclusion that "courts routinely admit bad acts evidence precisely for its relevance to defendant propensity."<sup>73</sup> Indeed, the vast majority of 404(b) cases I have read quote the litany of exceptions, e.g., intent, motive, knowledge, etc., without ever attempting to explain how an exception applies to the facts of the case.

The Seventh Circuit Court of Appeals recently changed its 404(b) analysis by rejecting its prior four-part test "in favor of a more straightforward rules-based approach."<sup>74</sup> This approach was developed by Judge David Hamilton in an earlier opinion.<sup>75</sup> Instead of focusing on the general existence of the litany of exceptions to the Rule (e.g., motive, opportunity, intent, preparation, plan, etc.) in a case, a court should focus on the following question: "How does this evidence prove intent?"<sup>76</sup> Unless there is a specific answer to this question, "then the real answer is almost certainly that the evidence is probative only of propensity."<sup>77</sup>

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68. Bellin, *supra* note 2, at 10.

69. See, e.g., *United States v. Gomez*, 763 F.3d 845, 852 (7th Cir. 2014) (en banc).

70. *Id.*

71. See, e.g., Deena Greenberg, Note, *Closing Pandora's Box: Limiting the Use of 404(B) to Introduce Prior Convictions in Drug Prosecutions*, 50 HARV. C.R.-C.L. L. REV. 519, 526 (2015) ("Numerous scholars have critiqued the introduction of prior convictions under Rule 404(b)."); Antonia M. Kopeć, Comment, *They Did It Before, They Must Have Done It Again; The Seventh Circuit's Propensity to Use a New Analysis of 404(b) Evidence*, 65 DEPAUL L. REV. 1055, 1069 (2016) ("However, the rule has come under much criticism by courts and legal scholars." (footnotes omitted)).

72. Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 GA. L. REV. 775, 776 (2013).

73. Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181, 184 (1998).

74. *Gomez*, 763 F.3d at 853.

75. *United States v. Miller*, 673 F.3d 688, 696–700 (7th Cir. 2012).

76. *Id.* at 699.

77. *Id.*

If more courts adopt the reasoning of the Seventh Circuit, 404(b) evidence will be excluded more often and lessen the likelihood that jurors are convicting on impermissible propensity evidence. This is a superior solution to unlikely amending Rule 404(b) to rein in the admissibility of other crimes, wrongs, or acts that are so often a proxy for propensity to commit the charged crime(s).

#### VIII. CONCLUSION

Everyone interested in our nation's criminal justice system and the unfairness created by the silence and prior offender penalties owe Professor Bellin a deep debt of gratitude for his carefully researched and extremely well-written article: *The Silence Penalty*. I owe the University of Iowa Law Review a personal debt of gratitude for publishing this response online. I hope my insights and comments help animate further clamorous discussion among judges and lawyers, in addition to the academy, on these important issues.