IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. STEPHEN ANDREW ARANDA, Defendant-Appellant, Respondent on Review.	Lane County Circuit Court Case No. 19CR07375 A171800 S069641

BRIEF OF *AMICI CURIAE* COALITION FOR PRIOR CONVICTION IMPEACHMENT REFORM, BOSTON UNIVERSITY CENTER FOR ANTIRACIST RESEARCH, AND CRIMINAL JUSTICE REFORM CLINIC AT LEWIS & CLARK LAW SCHOOL

On Review of the Decision of the Court of Appeals
on Appeal from a Judgment of the Circuit Court for Lane County,
Honorable Charles M. Zennache, Judge

Opinion Filed: April 20, 2022
Author of Opinion: Kamins, Judge
Concurring Judge: Aoyagi, Judge
Before: James, Presiding Judge, Lageson, Chief Judge,
and Kamins, Judge.

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I. INTEREST OF *AMICI CURIAE*

Professors John Blume (Cornell Law School), Bennett Capers (Fordham University School of Law), Montré Carodine (University of Alabama School of Law), Jasmine Gonzales Rose (Boston University School of Law), Lisa Kern Griffin (Duke University School of Law), John D. King (Washington and Lee University School of Law), Colin Miller (University of South Carolina), Aviva Orenstein (Indiana University Maurer School of Law), Anna Roberts (Brooklyn Law School), and Julia Simon-Kerr (The University of Connecticut School of Law) are all members of the Coalition for Prior Conviction Impeachment Reform (the "Coalition"). The Coalition is a group of law professors, each of whom has written about prior conviction impeachment, and each of whom is convinced of the need for change in this area of the law. Collectively, the Coalition's scholarly work has criticized this form of evidence for, among other things, its low probative value, extreme prejudice, racial injustice, and silencing of witnesses. The Coalition was formed so that its academic research could help bring about change. The Coalition has a keen interest in challenging the Oregon rule, whose provisions—among the most problematic in the country—exemplify the need for reform.

The Boston University Center for Antiracist Research (the "Center") is a nonpartisan, nonprofit university-based center that seeks to facilitate antiracist policies and practices by unifying research, policy, narrative, and advocacy efforts. The Center's Evidence Equity Project seeks to eliminate racist evidentiary practices and promote evidentiary fairness in courtrooms across the country. Accordingly, the Center has a keen interest in challenging evidentiary rules—like those allowing for impeachment based on prior convictions—which are premised on racist ideas and disparately harm people of color. The Center joins this brief to emphasize that prior conviction impeachment impedes factfinding and amplifies the impact of racial bias in policing and prosecution. Since Oregon's prior conviction impeachment rule does not even permit these harms to be mitigated through judicial discretion, it stands out as among the worst in the country and contradicts principles of due process and fairness. The Center does not, in this brief or otherwise, represent the official views of Boston University.

The Criminal Justice Reform Clinic ("CJRC") at Lewis & Clark Law School is a legal clinic dedicated to students receiving hands-on legal experience while engaging in a critical examination of and

participation in important issues in Oregon's criminal justice system. Under the supervision of Lewis & Clark Law School faculty, CJRC students work on a variety of cases and issues, including for clients that are currently or were formerly incarcerated. In addition to direct client casework, CJRC also works in collaboration with attorneys and organizations in Oregon on various research reports, data-driven projects, and legal briefs, all designed to understand and improve Oregon's criminal justice system.

II. SUMMARY OF ARGUMENT

Oregon Evidence Code ("OEC") 609 is rooted in policies that historically barred witnesses from testifying in American courtrooms based on racism, sexism, classism, and other forms of bigotry. Today, rules allowing for impeachment by prior convictions replicate witness competency laws by systematically silencing witnesses with criminal records—who are disproportionately people of color, due to racial bias at each stage of policing and criminal proceedings.

Rules like OEC 609 are not only racist; they are also ineffective. These rules impede the core courtroom function of factfinding by introducing evidence of low probative value, admitting evidence that is highly prejudicial, and silencing potential witnesses. The rationale

for admitting prior convictions for the purpose of impeachment is that a prior conviction tells us about witnesses' "credibility," but this premise is unsupported by empirical research. At the same time, the risk of unfair prejudice is extreme. Research shows that jurors tend to rely on prior convictions for the improper purpose of assessing a criminal defendant's culpability, rather than their credibility, thereby lowering the prosecution's burden of proof. The rule also subjects criminal defendants to a high risk of propensity-based reasoning—especially where, as here, the prior convictions are similar to the charged crime. Prior convictions can also trigger implicit and explicit biases among factfinders. Given the lack of probative value of prior conviction evidence, impeaching defendants with highly prejudicial evidence of prior convictions is harmful and counterproductive to the goals of a truth-seeking evidentiary regime.

Oregon's rule allowing for impeachment by prior convictions is more unjust than most, because it does not allow for a judicial check on the prejudicial nature of the prior conviction evidence presented. Under this Court's current interpretation of the rule, OEC 609 requires automatic admission of felony convictions, precluding trial courts from conducting an initial balancing assessment that weighs

the probative value of the evidence against the danger of unfair prejudice. The lack of any balancing analysis amplifies the most prejudicial aspects of OEC 609, and violates principles of due process, fairness, justice, and equity.

For these reasons, Oregon should end the practice of prior conviction impeachment outlined in OEC 609(1)(a), or join other states that do not permit impeachment with prior convictions for criminal defendants. Alternatively, at a minimum, Oregon must stop mandating the admission of prior felony convictions for impeachment and require that judges weigh their probative value against the risk of unfair prejudice, admitting the prior convictions only if the probative value substantially outweighs the risk.

III. ARGUMENT

A. Evidentiary Rules Allowing for Impeachment by Evidence of Prior Convictions Are Grounded in Racist Ideas and Disparately Harm People of Color

Rules like OEC 609 are reminiscent of historical race-based witness competency restrictions in that they serve to silence witnesses because of racist ideas about who they are, not because those witnesses are more likely to lie on the stand. As discussed further below, there is no empirical basis for the claim that prior

convictions indicate a person's character for truthfulness or untruthfulness. *See infra* Part II. Rules allowing for impeachment by prior convictions are not grounded in logic or fact; they are grounded in the idea that prior convictions indicate a witness's inferiority. These rules function like competency restrictions because they disparately impact witnesses of color, who are more likely to be impacted by prior convictions due to racial biases in policing and prosecution.

1. Prior Conviction Impeachment Has Roots in Rules Barring Defendants and Witnesses of Color from Testifying

Prior conviction impeachment is a continuation of policies that barred witnesses from testifying in courtrooms in the United States based on racism, sexism, classism, and other forms of bigotry. Although these patently unconstitutional witness competency laws are gone, prior convictions are still used systematically to exclude and silence witnesses with prior convictions who—due to racism at

each stage of criminal proceedings—are disproportionately witnesses of color.[1]

a. Witness Incompetency Laws Were Grounded in Racist and Classist Ideas About Honor

The practice of impeachment with prior convictions is indebted to age-old assumptions that certain types of people should not be believed. These assumptions undergirded witness competency rules that evolved in England in the sixteenth and seventeenth centuries and were imported into the American colonies along with the common law.[2] Competency rules served to disqualify certain classes of witnesses, such as criminal defendants and in several states Black, Native American (including Mexican American), and Asian witnesses from offering testimony. These rules were intended to "keep from the witness stand anyone whose temptation or inclination to lie was greater than average."[3]

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[1] The discussion in this section is largely based on an article by one of this brief's authors. *See* Julia Simon-Kerr, *Credibility by Proxy,* 85 Geo. Wash. L. Rev. 152 (2017).

[2] George Fisher, *The Jury's Rise as Lie Detector*, 107 Yale L.J. 575, 624–25 (1997).

[3] *Id.* at 625.

Under competency doctrine, some people were excluded from testifying based on their relationship to a case or their prior convictions—but only certain prior convictions. As an early treatise writer explained, both "a legal interest in the result of the cause" and "[t]he infamy of [a person's] character" would "wholly disqualify a person as a witness."[4] Thus, one group of "likely perjurers" who were prevented from testifying were parties who would be tempted to lie in order to achieve a favorable outcome.[5] Another group were people who had no particular reason to lie in the case at hand, but were considered probable liars because of their status or their prior criminal behavior. Courts viewed these people as "stigmatized" by their convictions and thus generally incompetent as witnesses.[6] This exclusion was limited to convictions that were considered "infamous" or, in other words, dishonorable.

Not all people with convictions were stigmatized and rendered incompetent, however. The English common law limited

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[4] 2 Thomas Starkie, *A Practical Treatise on the Law of Evidence* *393 (Bos., Wells & Lilly 1826).

[5] Fisher, *Jury's Rise* at 625.

[6] *Taylor v. Beck*, 24 Va. (3 Rand.) 316, 348 (Va. 1825) (Coalter, J., concurring).

disqualification to a category of crimes whose convictions carried an "infamous punishment."[7] This punishment test was later modified in the competency context to emphasize the infamous nature of the crime. Infamy was defined as a "state which is produced by the conviction of crime and the loss of honor," which in turn "renders the infamous person incompetent as a witness."[8] Thus, crimes that produced dishonor, or a "loss of character or position," would render a witness so unworthy of belief that he would be excluded from testifying altogether.[9]

Treatise writers routinely used language sounding in honor and morality when describing competency rules. For example, Thomas Starkie identified the crimes that would have this effect as "Crimes against the common Principles of Honesty and Humanity."[10] Similarly, Simon Greenleaf wrote that "[t]he basis of the rule seems to be, that such a person is morally too corrupt to be trusted to

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[7] James Q. Whitman, Harsh Justice: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 187 (2003).

[8] 2 John Bouvier, BOUVIER'S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA 1554 (Francis Rawle ed., 8th ed. 1914).

[9] *Id.*

[10] Jeffrey Gilbert, THE LAW OF EVIDENCE 142 (London, Henry Lintot 1756).

testify; so reckless of the distinction between truth and falsehood, and insensible to the restraining force of an oath, as to render it extremely improbable that he will speak the truth at all."[11]

The rule that "infamous" crimes could disqualify a witness established an overarching proxy for credibility that substituted dishonor, or infamy, for untruthfulness. Courts and attorneys did not debate whether particular crimes were predictive of lying. Instead, they focused on whether a crime was infamous at common law. Thus, competency doctrine developed a tautology revolving around honor and worthiness. A person convicted of committing a crime considered particularly offensive was unworthy of belief because he or she had been dishonored by the conviction. That dishonor had originally come from the nature of the punishment for the crime, such as a whipping or hard labor, which were low-status punishments.[12] Later, it was attached to the crime itself without reference to the punishment. In either case, the witness was considered unworthy of belief because they were considered unworthy of social regard.

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[11] 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 372, 523 (Bos., Little, Brown & Co., 9th ed. 1858).

[12] Whitman, HARSH JUSTICE at 187.

A final and essential piece of competency doctrine unique to United States law was the use of certain racial categories as a blanket disqualification from testifying in many states. In all southern states and some beyond the south, "negroes," "mulattoes," and "mustizoes" [sic] were, by statute, rendered incompetent as witnesses.[13] In some states, the statutory exclusions extended to persons with Native American ancestry[14] (which included Mexican Americans)[15] and Asian[16] ancestry. These disqualifications were bound up with attitudes towards the personhood of enslaved people

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[13] *See, e.g.*, An Act Concerning Witnesses and Prescribing the Manner of Obtaining and Executing Commissions for Taking Their Depositions in Certain Cases (1792), *reprinted in* A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, OF A PUBLIC AND PERMANENT NATURE, AS ARE NOW IN FORCE 278 (Richmond, Samuel Pleasants & Henry Pace 1803) ("No negro, mulatto or Indian, shall be admitted to give evidence, but against or between negroes, mulattoes or Indians.") (emphasis omitted); *see also United States v. Dow*, 25 F. Cas. 901, 902 (C.C.D. Md. 1840) (No. 14,990) (applying Maryland statute providing "no negro or mulatto slave, free negro, or mulatto born of a white woman . . . or any Indian slave, or free Indian, native of this or the neighboring provinces, be admitted or received as good and valid evidence in law").

[14] *See, e.g.*, *Dow*, 25 F. Cas. at 902.

[15] See Ian F. Haney Lopez, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE 66 (2009).

[16] *People v. Hall*, 4 Cal. 399, 399 (1854).

and people with African American or Native American ancestry.[17] They reflected a view that without personhood, these groups lacked credibility. The tautological reasoning behind the status-based exclusion was that subordinated racial groups were not honorable in the eyes of those in power and were therefore unworthy of belief.[18] In states with race-based incompetency provisions, whole swaths of the population could not be heard in court, denying them the possibility of credibility.

By focusing on "dishonorable" prior convictions and certain racial categories, early competency rules were tailored to ensure that jurors did not hear from witnesses whom those in power believed were unworthy of belief. For these witnesses, their status, whether

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[17] By suggesting that people are not autonomous moral agents, slavery is itself, by many accounts, antithetical to personhood. *See, e.g.*, Joanne Pope Melish, DISOWNING SLAVERY: GRADUAL EMANCIPATION AND "RACE" IN NEW ENGLAND 150 (1998).

[18] Cecil J. Hunt, II provides a particularly cogent explanation for this in *No Right to Respect: Dred Scott and the Southern Honor Culture*, 42 NEW ENG. L. REV. 79, 95 (2007). Hunt contends that honor culture was the defining feature of southern existence at this time and that enslavement of Black people was a necessary corollary to honor for White people.

assigned by racialization or by their conviction for a specific criminal act, disqualified them from being heard in courts of law.

b. Witness Impeachment Practices Are Informed by the Same Racist and Classist Assumptions that Undergirded Witness Competency Laws

When legislatures and courts removed race-based and other incompetency provisions from their laws, they did not revisit the basic assumptions that gave competency doctrine its substance. These cultural assumptions about the dishonor that appertained to certain crimes created the impeachment jurisprudence that emerged from this transitional period. Central to this doctrine was the belief that moral degeneration would render a witness unworthy of being believed. States' early impeachment doctrines focused on impeaching with prior convictions that were understood to be particularly immoral, such as crimes indicating a lack of sexual virtue in women or oath-breaking or disloyalty in men.[19] This tailoring ultimately evolved into a hodgepodge of rules at common law through which states had divergent and complex interpretations of which types of prior convictions would be admissible for

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[19] Julia Simon-Kerr, *Credibility by Proxy*, v.

impeachment. This jurisprudence remained indebted to the basic structures of incompetency doctrine in focusing on the crimes deemed most morally deviant.[20]

When Congress adopted the federal rules of evidence in 1974, which were soon followed by many states, it marked another inflection point for the doctrine surrounding prior conviction impeachment. As one scholar has described it, the debate over impeachment with prior convictions "turned into a debate about the need for crime prevention and the need to protect criminal defendants' constitutional rights."[21] For example, one member of the Senate judiciary committee proposed a version of the impeachment rule that provided for admission without balancing, mirroring Oregon's current rule. His reasoning invoked the deeply-entrenched notion that "criminals" are not worthy of belief:

> We have gone pretty far already in trying to protect criminals and granting every advantage to them against society. … [W]hy should one who has already been convicted of rape or murder and is later being tried for armed robbery, not be able to be

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[20] *Id.*

[21] Montré Carodine, *"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 Ind. L.J. 521, 544 (2009).

> questioned about his previous crimes, so that a jury might properly evaluate the credibility of the testimony he is giving—properly determine if he should be believed?[22]

This reasoning becomes clear as his remarks continued:

> Should a jury be denied that right? Should society be denied the opportunity, in trying to protect itself, in its effort to discover the truth, to show that the witness before it is a man who has committed such a crime and, therefore, might be willing to now lie to a jury? I think not.[23]

Evidence scholars have contextualized this argument as one that plays on the "stereotype of the Black criminal."[24] During the twentieth-century development of rules surrounding impeachment with prior convictions, Black people were targeted by policies of criminalization, such that "there was substantial overlap between convicted felons, criminal defendants, and Blacks."[25] Because of this, "one must keep in mind that most people at that time—as is true today—saw a Black face when they thought about the criminal element in society."[26] Thus, when states enacted formal rules

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22 120 CONG. REC. 37,075–76 (1974).

23 *Id.*

24 Carodine, *Mis-Characterization* at 547.

25 *Id.*

26 *Id.* at 549.

permitting impeachment with prior convictions, they accepted the age-old proposition that those with prior convictions lack moral uprightness and are unworthy of belief. And this was likely at least partly because legislators had in mind Black people as the main "criminals."

Today, just as English common law initially focused on whether a witness had been sentenced to an "infamous punishment" in determining competency to testify, Oregon's rules declare that for a huge swath of crimes it is the potential punishment that matters in impeachment.[27] This regime not only looks like early competency doctrine, it has similar effects. The through line to today's impeachment jurisprudence is the continued salience of race and perceived criminality and immorality to discrediting certain voices in court. As the following sections will show, prior conviction impeachment silences witnesses who fear that jurors will be prejudiced by learning of their prior convictions—witnesses who are disproportionately people of color, due to racial biases at each stage of criminal policing and proceedings. Moreover, prior convictions are

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[27] Whitman, HARSH JUSTICE at 187.

not a tested metric of truthfulness or untruthfulness. Instead, they continue to signify which witnesses are deemed unworthy of being heard or believed.

2. Due to Racial Bias in Policing and Prosecution, Prior Conviction Impeachment Rules Like Oregon Evidence Code 609 Have a Disparate Impact on Witnesses of Color.

The racially disparate impact of OEC 609 follows from racial bias in the criminal legal system more broadly, which has manifested in the mass incarceration of Black, Brown, and Indigenous people in the United States. In the criminal legal context, "a combination of police practices and legislative and executive policy decisions" treat Black people and other people of color more harshly than White people.[28] As a result, people of color are more likely to have a criminal record—and thus are more likely to be negatively impacted by OEC 609's silencing effect.[29]

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[28] Michael Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, 39 Crime & Just. 273, 274 (2010).

[29] Gonzales Rose, *Toward a Critical Race Theory of Evidence*, *supra*, at 2272; Montré D. Carodine, *"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 Ind. L.J. 521, 535-36 (2009).

Racial biases in policing and prosecution are well-documented.[30] Black, Latino/a/e, and Indigenous people are more likely than White people to be stopped, frisked, arrested, charged, indicted, pressured to plead guilty, and convicted.[31] Black people are more likely than White people to be pulled over while driving,[32] to be arrested for drug offenses,[33] and to be wrongfully convicted of murder

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[30] *See, e.g.*, Khalil Gibran Muhammad, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 4 (2010); *Elizabeth Hinton & DeAnza Cook, The Mass Criminalization of Black Americans: A Historical Overview*, 4 Ann. Rev. Criminology 261, 270 (2021).

[31] Gonzales Rose, *Race, Evidence, and Epistemic Injustice*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EVIDENCE, *supra*, at 382; *see also* Sent'g Project, *Report to United Nations on Racial Disparities in the U.S. Criminal Justice System* (Apr. 19, 2018), https://www.sentencingproject.org/reports/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system (citing 2016 FBI Uniform Crime Reporting).

[32] Ashley Nellis, Sent'g Project, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* 14 (2021), https://www.sentencingproject.org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf (citing Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 Nature Hum. Behaviour 736, 736-745 (2020)).

[33] Nellis, *supra*, at 14 (citing Jonathan Rothwell, *Drug Offenders in American Prisons: The Critical Difference Between Stock and Flow*, Brookings Inst. (Nov. 25, 2015), https://www.brookings.edu/blog/social-mobility-

due to police misconduct.[34] Accordingly, it is no surprise that as of 2010, six percent of non-Black people in the United States have felony convictions, whereas the percentage of Black people with felony convictions is nearly four times that amount (twenty-three percent) and the number is even higher for Black men, one-third of whom have felony convictions.[35]

Oregon is no exception to these national trends. Although drug use and possession by White people and people of color are equivalent in Oregon, Native Americans are convicted of felony drug possession at five times the rate of White people, and Black Americans are convicted of the same offense at two to three times the rate of White people, depending on the substance.[36] For Measure 11

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memos/2015/11/25/drug-offenders-in-american-prisons-the-critical-distinction-between-stock-and-flow/).

[34] Samuel R. Gross et al., Nat'l Registry of Exonerations, *Race and Wrongful Convictions in the United States 2022* at 6 (Sept. 2022), https://www.law.umich.edu/special/exoneration/Documents/Race%20Report%20Preview.pdf.

[35] *See* Sarah K. S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948-2010*, 54 Demography 1795, 1807 (2017).

[36] Wright Gazaway, *New Oregon Measure 11 Report Outlines Racial Disparities in Indictments, Sentences*, KPIC 4 (Mar. 8, 2021) https://kpic.com/news/local/oregon-criminal-justice-commission-releases-measure-11-report (citing Kelly Officer, Siobhan McAlister

offenses generally, the indictment rate for Black men is 4.4 times higher than for White men, and the indictment rates for Latino and Native American men are 1.6 times higher.[37] Oregon also disproportionately incarcerates people of color.[38] The effects of this racial bias in the criminal legal system are compounded by Oregon's assignment of evidentiary value to prior convictions where, as Amici will show later in this brief, there is none.

OEC 609 disproportionately harms people of color by curtailing their ability to testify and by limiting their ability to be believed if they do. In this way, prior conviction impeachment remains true to its racist origins, outlined above.

& Katherine Tallan, Or. Crim. Just. Comm'n, *Updated Measure 11 Indictments, Conviction, and Sentencing Trends: 2013-2018* (Mar. 2021), https://www.oregon.gov/cjc/CJC%20Document%20Library/M11%20Final%20Draft.pdf).

[37] *Id.*

[38] Or. Crim. Just. Comm'n, *Racial and Ethnic Impact Statement: Historical Data* 5, https://www.oregon.gov/cjc/CJC%20Document%20Library/AdultCJSystemRacialandEthnicStatementBackground.pdf.

B. Evidentiary Rules Allowing for Impeachment by Evidence of Prior Convictions Impede Factfinding

Evidentiary rules allowing impeachment by prior conviction impede the core courtroom function of factfinding by introducing evidence of low probative value, admitting evidence that is highly prejudicial, and silencing potential witnesses.[39]

1. Prior Convictions Have No Probative Value Regarding a Person's Character for Truthfulness.

The stated rationale for admitting prior convictions to impeach witnesses is that a prior conviction tells us about witnesses' credibility. In Oregon, prior convictions supposedly are probative of whether a witness has a propensity for truthfulness or untruthfulness—whether they are "worthy of belief."[40] There is no evidentiary basis for the claim that the convictions made mandatorily admissible by 609(1)(a) have any bearing on the likelihood that a person will lie in court.

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[39] *See* Jasmine B. Gonzales Rose, *Race, Evidence, and Epistemic Injustice*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EVIDENCE, Oxford University Press 381-84 (Christian Dahlman, Alex Stein & Giovanni Tuzet eds., 2021).

[40] *State v. Phillips*, 367 Or. 594, 609, 482 P.3d 52, 60 (2021) (internal citations omitted).

a. Empirical Research Does Not Support a Predictive Connection Between Prior Convictions and Lying on the Witness Stand

There are two theories for why a prior criminal conviction is predictive of lying on the witness stand. The first such theory is broad: people who are willing to violate the law are less likely to obey other legal commandments, like the courtroom oath. The second is narrower and involves the notion that people who have committed prior crimes have in some way been dishonest and are therefore more likely to lie in the future. As discussed below, neither of these theories has any empirical basis.

Social science research has debunked the fundamental premise underlying prior conviction impeachment, that a person has a character for truthfulness or untruthfulness. A landmark study from the 1920s illustrated that honesty is not a fixed character trait, but rather a situation-based behavior.[41] Subsequent research has further demonstrated not only a low correlation between personality and behavior, but also a low correlation between situation and

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[41] 1 Hugh Hartshorne & Mark A. May, STUDIES IN THE NATURE OF CHARACTER: STUDIES IN DECEIT 381 (1928) (study of children finding that under a range of situations, very few children were either always honest or always dishonest).

behavior.[42] The current consensus is that behavior is determined by a combination of personality and situation. Researchers have found that we all have "stable, distinctive, and highly meaningful patterns of variability" in the way we behave across different types of situations.[43] In other words, human character traits are an amalgam "highly sensitive to different features of situations and can adjust their causal activity from one activity to the next."[44] Accordingly, most researchers in this area reject a view of people as having traits of character, such as honesty.[45]

Personality research does not support the empirical claim at the heart of Oregon's approach to prior conviction impeachment, which is the proposition that a person with any type of prior conviction is per se more likely to lie when testifying as a witness. To

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[42] *See* Funder & Ozer, *Behavior as a Function of Situation*, 44 J. Personality & Soc. Pscyh 107 (1983); Sabini & Silver, *Lack of Character? Situationism Critiqued*, 115 Ethics 535 (2005).

[43] Walter Mischel, *Toward an Integrative Science of the Person*, 55 Annual Rev. Psych. 1, 8 (2004).

[44] Christian B. Miller, CHARACTER AND MORAL PSYCHOLOGY 100 (2014).

[45] Walter Mischel, *Toward an Integrative Science of the Person*, 55 Annual Rev. Psych. 1, 18 (2004).

the contrary, personality researchers agree that only "[b]y measuring a great number of trait-relevant responses for each individual" can we hope to be able to predict future behavior.[46] Furthermore, we can only hope to predict "the mean response that each individual will exhibit over a great number of future observations."[47] In other words, we would have to observe many prior acts very closely in order to make a prediction about how a witness will behave, and that prediction would only tell us something about a general pattern of future behavior, not any one particular future act, such as lying on the witness stand. Given the level of specificity needed to predict human behavior, the very breadth of the claim that having a prior felony conviction predicts lying on the witness stand makes it suspect. In the United States, the criminal law targets actions so diverse that there is no unifying theory of what behavior is defined as criminal or what subset of that behavior will fall into the "felony" category.[48] Hence, a prior felony conviction indicates, at best, simply

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[46] Lee Ross & Richard E. Nisbett, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY 110 (2011).

[47] *Id.*

[48] *See, e.g.*, Douglas N. Husak, Retribution in Criminal Theory, 37 San Diego L. Rev. 959, 985 (2000) ("[T]he criminal laws of today are

that the person has knowingly or unknowingly broken a criminal law in a way categorized as a felony. Further, as discussed earlier in this brief, if anything, prior convictions are predictors of race and poverty.

b. The Truthfulness of an Accused Person's Testimony is Impacted by The Circumstances of their Case Far More than Any Supposed Fixed Propensity to Lie.

A person who has been accused of a crime is likely to lie or tell the truth based on the facts of the case and the nature of the accusations against them—not their prior convictions. This simple observation prompted courts in England to significantly limit prior conviction impeachment of criminal defendants.[49] Their commonsense reasoning was that a person's likeliness to lie or tell the truth is so closely tied to the circumstances of their case that no separate inference about their honesty can be drawn from their prior convictions. In other words, telling the jury about prior convictions does not make sense when perceptions of a defendant's truthfulness or untruthfulness are almost always inextricable from the ultimate question of guilt or innocence. As the United Kingdom appellate

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too varied to be amenable to a simple, unifying theory."). *See also infra* n. 103.

[49] *Campbell*, 2 Cr. App. R 28 (2007).

court recognized, no jury instruction can undo the fundamental logic that interlaces a defendant's credibility with that person's culpability.[50]

c. Prior Convictions Are Not Reliable Indicators of Prior Conduct, and Prior Conviction Impeachment Compounds Racial Bias in the Criminal Legal System by Giving Biased Outcomes of that System Evidentiary Value

Justifications for prior conviction impeachment assume the reliability of convictions, but this assumption has little basis. [51] As discussed above, many criminal convictions result from racially biased policies, practices, and decisions. *See supra* Part Ib. Additional factors undermining the reliability of criminal convictions include the under-resourcing of defense counsel, and the pressures to plead guilty, including the "trial penalty" and pre-trial detention. The assumption of reliability underlying prior conviction impeachment is based on the notion that convictions are the product of a fair fight between relatively evenly matched adversaries,

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[50] *Id.*

[51] Anna Roberts, *Impeachment by Unreliable Conviction*, at 580-81; *see also* John D. King, *The Meaning of a Misdemeanor in a Post-Ferguson World: Evaluating the Reliability of Prior Conviction Evidence*, 54 Ga. L. Rev. 927 (2020).

culminating in a finding of proof beyond a reasonable doubt. In the vast majority of convictions, however, there is no finding of proof beyond a reasonable doubt because the cases are resolved through the plea bargaining process. Even if there is a finding of proof beyond a reasonable doubt, the notion of a fair fight between relatively evenly matched adversaries—or even any fight at all—is increasingly being challenged.[52]

Given the unreliability of prior convictions, rules allowing for prior conviction impeachment are problematic on two grounds. The first is that prior convictions are not indicative of any prior conduct, thus even if such conduct were related to truthfulness—which, as discussed above, it is not—prior convictions are not reliable evidence of that conduct. The second is that rules like OEC 609 allow lawyers to deploy convictions to prove that witnesses—disproportionately witnesses of color—are not worthy of being believed, thereby giving

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[52] *See* Anna Roberts, *Convictions as Guilt*, 88 Fordham L. Rev. 2501, 2510-30 (2020); Emily Bazelon, Charged: The New Movement to Transform American Prosecution and End Mass Incarceration (2019).

false evidentiary value to the results of racially biased criminal legal outcomes.

2. Prior Convictions Are Highly Prejudicial

Evidence of a witness's prior convictions is not only non-probative, but also strongly prejudicial. This is especially true where the witness is a criminal defendant, given the demonstrated tendency of factfinders to consider prior convictions for the purportedly improper purpose of evaluating the defendant's guilt or innocence. Prior convictions also function as racial character evidence and can trigger implicit and explicit biases among factfinders. In addition, research shows that factfinders who learn of a defendant's prior convictions will frequently lower the burden of proof or seek to further punish the defendant for past conduct. The risk of unfair prejudice is extreme under a rule like Oregon's that categorically admits prior convictions for the purpose of impeachment. Given the lack of probative value of prior conviction evidence, as discussed above, impeaching defendants with their prior convictions is unjustifiable in a truth-seeking evidentiary regime.

a. Prior Convictions Are Used as Evidence of Guilt

Studies show that where criminal defendants testify and are impeached with their prior convictions, jurors tend to rely on the prior convictions to assess the person's culpability rather than their credibility, despite instructions to the contrary.[53] This effectively lowers the State's burden of proof, making it easier to convict those with prior convictions.

In one study of over 300 criminal cases, researchers found that jurors "appear willing to convict on less strong other evidence if the defendant has a criminal past."[54] The scholars hypothesized that jurors may use prior crimes to "categorize the defendant as a bad person, a person of poor character" and that this may create a halo effect that causes the jury to assume the defendant has other negative characteristics.[55] The researchers also found that jurors reported a lower level of sympathy for the defendant when informed

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[53] Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and On Trial Outcomes*, 94 Cornell L. Rev. 1353, 1371, 1373, 1381-83 (2009).

[54] *Id.*

[55] *Id.* at 1357-58.

of a prior criminal conviction.[56] Against this backdrop, it is no surprise that, as discussed further below, prior conviction impeachment deters defendants with prior convictions from testifying, effectively impeding their right to present a defense.

The pernicious effects of prior conviction impeachment are not limited to criminal defendants. In particular, the potential impeachment of witnesses with prior crimes may serve as a deterrent to the prosecution of particular types of crimes. For example, an issue that has become part of the public conversation in the wake of recordings of police violence against Black men is "prosecutions based on the use of excessive force in poor, minority

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[56] *Id.* at 1387. Mock juror studies also bear this out. They find that jurors' perception of the strength of the evidence against a defendant changes when they know the defendant has a prior record. *See, e.g.*, Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 Law & Hum. Behav. 67, 76 (1995) (finding in a mock juror study that prior records increased convictions compared to no prior convictions); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 Law & Hum. Behav. 37, 47 (1985) (finding same).

communities, or civil suits seeking damages. . . ."[57] One reason these cases may not be brought or may be hard to win is that "many of the witnesses to the use of police brutality, including the victim, will themselves be marked as. . . less credible witnesses" by their prior convictions.[58]

If an accused person decides not to testify for fear of jurors being prejudiced by his prior convictions, he is not shielded from the harmful effects of OEC 609, since juries are more likely to render verdicts of guilt when a defendant does not testify.[59] Accordingly, OEC 609 puts criminal defendants who have prior convictions in a position where they may face the prejudicial effects of prior conviction impeachment whether they testify or not.

b. Prior Convictions Function as Racial Character Evidence

Prior convictions are also often employed as a type of "racial character evidence" that conjures racial stereotypes in the courtroom.

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[57] Bennett Capers, *Crime, Legitimacy,* Our *Criminal Network, and* The Wire, 8 OHIO ST. J. CRIM. L. 459, 466 (2011).

[58] *Id.* at 466-467.

[59] Jeffrey Bellin, *The Silence Penalty*, Iowa L. Rev. 395, 409, 411 (2018).

Racial character evidence "describes how race—in tandem with racial stereotypes and biases—is relied upon or emphasized to establish the person's character propensity to be peaceful, violent, truthful, deceptive, or a variety of other traits."[60] Research shows that people unconsciously and unwarrantedly associate Blackness with criminality and violence.[61] Thus, factfinders may make more pronounced negative assumptions about a Black, Indigenous, or Latino/a/e witness's criminal propensity, dangerousness, and trustworthiness, than they would if the witness were White.

Notably, research has illustrated that defendants of color with prior convictions are less likely to testify than White defendants with

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[60] Jasmine B. Gonzales Rose, *Racial Character Evidence in Police Killing Cases*, 2018 Wis. L. Rev. 369, 371 (2018).

[61] *See, e.g.*, Katherine B. Spencer, Amanda K. Charbonneau & Jack Glaser, *Implicit Bias and Policing*, 10 Soc. & Personality Psych. Compass 50, 55 (2016); Sophie Trawalter et al., *Attending to Threat: Race-Based Patterns of Selective Attention*, 44 J. Experimental Soc. Psych. 1322, 1322 (2008); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. Personality & Soc. Psych. 876, 878, 889-891 (2004); Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 Am. J. Socio. 717, 718 (2001); Darrell Steffensmeier, Jeffery Ulmer & John Kramer, *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 Criminology 763, 769 (1998).

prior convictions.[62] Researchers hypothesized that this disparity may be due to a phenomenon whereby "[j]uries in [Black and Hispanic] defendants' cases were more likely to learn of criminal histories than were juries in White defendants' cases."[63] There are several potential explanations for this phenomenon, all of which are suggestive of racial bias. First, judges may be more willing to admit prior convictions for defendants of color. Second, the prior convictions of defendants of color may be more likely to fall into categories deemed relevant to credibility in jurisdictions employing balancing tests. Third, prosecutors may make less effective arguments in favor of admitting the evidence in cases with White defendants or more effective arguments in cases with defendants of color. Fourth, defense attorneys may make less effective arguments in favor of prior convictions being excluded in cases with defendants of color.

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[62] Eisenberg & Hans at 1372.

[63] *Id.* at 1374-75. This result was slightly below statistical significance because, as the authors explain, their cases did not include enough White defendants. *Id.* It nevertheless suggests that discretion to exclude prior conviction evidence may be racially skewed in favor of White defendants. It is also possible that lawyers are more likely to counsel minority defendants not to testify, either because of the increased risk that the conviction will be disclosed or for some other reason, such as attorney bias.

Any explanation suggests that racism enhances the impermissible negative impacts of prior conviction impeachment.

c. Prior Conviction Impeachment Subjects Criminal Defendants to Propensity Reasoning.

Impeachment with prior convictions provides a gaping exception to the prohibition on propensity evidence.[64] This is particularly true in Oregon, where evidence of prior convictions is admitted without the crucial check provided by judicial balancing. Oregon has decreed that all felonies are relevant to credibility based on the assumption that "felons" are rule-breakers who are more likely to lie.[65] Yet, the true function of prior convictions when introduced against a criminal defendant will be to lead the jury to believe the defendant has a propensity to commit crimes, or a propensity to commit the specific crime charged.

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[64] *See, e.g.*, 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, 296 (2008) (describing scholarly consensus that prior conviction impeachment is "nothing more than a thinly veiled effort by prosecutors . . . to introduce otherwise prohibited evidence of a defendant's criminal propensities").

[65] *State v. Phillips*, 367 Or. 594, 606, 482 P.3d 52, 58 (2021).

Other courts have acknowledged the risk that prior convictions will be used for improper propensity purposes. For example, the Washington Court of Appeals recently explained that in cases where "the defendant is the witness [prior conviction evidence] tends to shift the jury focus from the merits of the charge to the defendant's general propensity for criminality. If the jury learns that a defendant previously has been convicted of a crime, the probability of conviction increases dramatically."[66] Similarly, as Justice Jackson famously wrote about character evidence more generally:

> The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.[67]

These dangers are all the more stark in cases like this one, in which both Mr. Aranda's prior convictions and the crime with which he was charged were sex offenses. Courts and commentators have

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[66] *State v. Vazquez*, 198 Wash.2d 239, 252-53 (2021).

[67] *Michelson v. United States*, 335 U.S. 469, 475-76 (1948).

cautioned that "prior convictions for the same or similar crimes [should be] admitted sparingly."[68] Indeed, "where . . . the prior conviction is sufficiently similar to the crime charged, there is a substantial risk that all exculpatory evidence will be overwhelmed by a jury's fixation on the human tendency to draw a conclusion which is impermissible in law: because he did it before, he must have done it again."[69] Finally, prior conviction impeachment introduces the risk that the jury will simply conclude that the defendant is the kind of person who should be incarcerated, regardless of the conduct for which he is on trial.[70]

d. Prior Conviction Impeachment Silences Potential Witnesses, Impinging on Due Process and the Right to Present a Defense.

The threat of prior conviction impeachment chills the exercise of the constitutional right to testify in one's defense.[71] Studies of

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[68] 4 Weinstein's Federal Evidence at § 609.05[3][d] at 609-42.

[69] *United States v. Bagley*, 772 F.2d 482, 487 (9th Cir. 1985).

[70] *See* Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony* at 841.

[71] Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1357 (2009) (finding statistically significant association between the

wrongful convictions and first-hand accounts offered by exonerees who chose not to testify at their trials describe the decision as motivated by a fear of being branded in the eyes of the jury by their prior convictions.[72] Prior conviction impeachment has also encouraged those facing criminal charges—including those subsequently exonerated—to waive the right to trial and take a guilty plea.[73] As one scholar writes, "the criminal defendant

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existence of a criminal record and the decision to testify); John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. Empirical Legal Stud. 477, 493 (2008).

[72] John Thompson, Opinion, *The Prosecution Rests, but I Can't*, N.Y. Times (Apr. 9, 2011), https://www.nytimes.com/2011/04/10/opinion/10thompson.html (describing Thompson's own inability to tell his story at the trial at which he was wrongfully convicted due to a prior conviction); Blume at 493.

[73] *See* Lisa Kern Griffin, *Honesty Without Truth: Lies, Accuracy, and the Criminal Justice Process*, 104 Cornell L. Rev. Online 101, 102, 110 (2018); Blume at 493 ("[T]hreatening a defendant with the introduction of his . . . prior record contributes to wrongful convictions either directly—in cases where the defendant is impeached with the prior record and the jury draws the propensity inference—or indirectly—by keeping the defendant off the stand."); Richard D. Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 UCLA L. Rev. 637, 666 (1991) (discussing a subset of cases in which "failure to take the stand is utterly disastrous, spelling the difference between conviction and acquittal"); *Ferguson v. Georgia*, 365 U.S. 570, 582

impeachment rules serve as 'strong allies' that aid in promoting the plea bargaining system."[74]

One study of people who had been wrongfully convicted and exonerated demonstrated that, despite their innocence, a large number of them waived their right to testify.[75] In almost all cases in which they did not testify, their counsel gave as the primary reason for their waiving this right the fear of prior conviction impeachment.[76]

This chilling effect matters—for those facing criminal charges, for jurors, and for efforts to achieve a fair adjudication and a fairer system. Many evidentiary rules and precepts assume the existence of a meaningful—and vital—opportunity for those facing criminal charges to testify.[77] This is the moment when they can address

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(1961) (noting that the person facing criminal charges "above all others may be in a position to meet the prosecution's case").

[74] Montré D. Carodine, *Mis-Characterization* at 551 (quoting GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 109 (2003)).

[75] Blume, *The Dilemma* at 490.

[76] *See id.* at 491.

[77] *See, e.g.,* Roger Park, *The Rationale of Personal Admissions*, 21 Ind. L. Rev. 509, 516 (1988) ("It is fair to receive an admission [under Federal Rule of Evidence 801(d)(2)] because ordinarily the party who made the admission will have the opportunity to put himself or

crucial components of the case against them, introduce facts undermining the government's evidence, and/or point out relevant law enforcement abuses.[78] Testimony by those on trial also offers the opportunity to bring them to unique life—to individuate them, and thus potentially to mitigate the stereotyping to which many defendants are vulnerable, particularly if they are members of marginalized groups.[79] These opportunities become illusory when

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herself on the stand to explain the statement or to deny having made it") (citing 4 J. Wigmore, Evidence in Trials at Common Law § 1048, at 5 (Chadbourn rev. 1972)); 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (3d ed.1940) (describing cross-examination—a tool unavailable where a witness is kept off the stand—as "the greatest legal engine ever invented for the discovery of truth.")

[78] Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. Rev. 1449, 1499 (2005) (noting that if defendants could speak freely, "[t]he system would . . . obtain more information about law enforcement and how police behave"); Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. Chi. L. Rev. 835, 858-59 (2016); K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 Geo. J. Legal Ethics 285, 295-96 (2014) ("The failure to conduct adversarial hearings and trials insulates police conduct from judicial review, leaving the constitutional rights of all people unprotected." (footnote omitted)).

[79] *See* Roberts, *Reclaiming the Importance of the Defendant's Testimony*, at 863-68; 874-77.

the specter of prior conviction impeachment chills a defendant's testimony.

Jurors want to hear the testimony of those on trial.[80] Jurors rightly sense that testimony from criminal defendants might provide crucial information, and without it they inflict a "silence penalty" on the defense.[81] All of this matters regardless of racial identity. But the ways in which chilling falls unevenly—because of racist law enforcement practices, the disparate distribution of convictions, and the nature of stereotyping—recalls racially disparate witness incompetency laws that we should have left behind.[82]

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[80] *See* Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 Cornell L. Rev. 1353, 1370 (2009) ("In the cases in which defendants testified, judges reported that, on average, defendant testimony was more important than that of the police, of informants, of codefendants, and of expert witnesses.").

[81] Jeffrey Bellin, *The Silence Penalty*, 103 Iowa L. Rev. 395 (2018) (collecting the extant empirical data and presenting new empirical research and analysis).

[82] *See* Jasmine Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2245-46 (2017) ("In the eighteenth through mid-to-late nineteenth centuries, laws barred people of color from testifying in court, especially if the case involved a white person.")

This chilling effect has led some states to prohibit prior conviction impeachment against those facing criminal charges.[83] At a minimum, judges must be able to weigh this risk in deciding whether to admit such convictions.

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In sum, evidence of prior convictions is not probative, is highly prejudicial, and impedes the rights of criminal defendants—particularly defendants of color—to present a defense. In an evidentiary system that makes any pretense of achieving just and

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[83] *See State v. Stokes*, 523 P.2d 364, 366 (Kan. 1974) (stating that the Kansas statute serves the purpose of "permit[ting] a defendant to testify in his own behalf without having his history of past misconduct paraded before the jury"); *State v. Werkowski*, 556 P.2d 420, 423 (Kan. 1976) (mentioning a purpose "to encourage defendants in criminal actions to take the stand, and to prevent the prosecution from smearing rather than discrediting the witness"); *State v. Minor*, 407 P.2d 242, 245 (Kan. 1965) (Fontron, J., dissenting) (same) (quoting advisory committee notes); *State v. Santiago*, 492 P.2d 657, 660-61 (Haw. 1971) (striking down on federal and state due process grounds the prior version of the impeachment rule, in light of the court's assessment that the burdening of the right to testify was not outweighed by any probative value offered by prior convictions); *see also* Mt. R. Evid. 609 Commission's Comments (mentioning among several reasons inspiring the Montana rule the risk of deterring witnesses from testifying, and thus potentially from "present[ing] or defend[ing their] side of the case at all.")

accurate results, prior conviction impeachment should be recognized for what it is: a source of bias and inaccuracy in the trial process.

C. Judicial Balancing is the Bare Minimum Required by Due Process to Mitigate the Harm of Prior Conviction Impeachment.

Oregon Evidence Code 609 is even more unjust than most rules regarding prior conviction impeachment because it does not permit a trial court to balance the probative value and prejudice of the evidence presented. Even where a trial court finds prior conviction evidence to be highly prejudicial—including racially prejudicial—there is no recourse. Judicial balancing provides an opportunity to mitigate racial and other forms of prejudice.[84] Judicial balancing also better protects the due process rights of criminal defendants. For this reason, many states employ such a balancing scheme. If this Court interprets OEC 609 to require such balancing, that would be an incremental step toward a fairer and more equitable evidentiary system in Oregon.

1. Evidentiary Rules Providing for Prior Conviction Impeachment Should Be Abolished

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[84] While judicial discretion might be used to privilege White witnesses compared to similarly situated witnesses of color, the availability of a judicial check on prior conviction evidence is better than none.

Several states have recognized the problems with prior conviction impeachment and one has abolished the practice. In Montana, no witness can be impeached with their convictions.[85] The Montana Commission that made this change in 1976 was moved, among other things, by the power of this evidence to deter testimony and its "low probative value."[86] Additionally, Hawai'i and Kansas have abolished the practice as regards those facing criminal

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[85] Note that it is possible for defendants to open the door to admission of convictions if they are found to have made false statements about them. *See State v. Bingman*, 61 P.3d 153, 161 (Mont. 2002).

[86] Mt. R. Evid. 609 Commission's Comments; Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. Rev. 1977, 2027-28 (2016); *State v. Gafford*, 563 P.2d 1129, 1133 (Mont. 1977) (noting that the earlier rule had permitted impeachment with felony convictions). Rules of this sort are subject to limitations regarding constitutional arguments about the defense's right to confrontation. *See, e.g.*, *State v. Doyle*, 160 P.3d 516, 526-27 (Mont. 2007) (finding that the right to confront was not violated by the court's limitation of cross-examination based on Montana's Rule 609); *see also State v. Gollehon*, 864 P.2d 249, 259 (Mont. 1993) (same); *People v. Redmon*, 315 N.W.2d 909, 914 (Mich. Ct. App. 1982) (finding that a state Rule 609 restriction on impeachment had to yield to the right to confront); *Vasquez v. Jones*, 496 F.3d 564, 574 (6th Cir. 2007) (finding that Michigan courts unreasonably applied Supreme Court jurisprudence in failing to recognize that a prohibition on the defense's desired prior conviction impeachment violated the Confrontation Clause); *State v. Conroy*, 642 P.2d 873, 876 (Ariz. Ct. App. 1982) (reversing conviction where Mr. Conroy was denied his right to confront a material prosecution witness with his felony conviction).

charges—absent a finding that they have opened the door to it—with Hawai'i resting its ruling on due process grounds.[87] Many scholars endorse the rejection of this practice, at least as to defendant-witnesses.[88] Oregon should follow suit. Eliminating prior conviction impeachment rules not only protects the rights of criminal defendants, but also comports with the goals of a truth-seeking evidentiary regime.

2. In the Alternative, Judicial Discretion is the Bare Minimum Required to Mitigate the Harm of Prior Conviction Impeachment.

Where a state allows for prior conviction impeachment, judicial discretion provides a necessary and critical check on the introduction of evidence that is prejudicial and non-probative. Judicial discretion

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[87] *State v. Santiago*, 492 P.2d 657, 660-61 (Haw. 1971) (relying on federal and state right to testify).

[88] *See, e.g.*, Montré D. Carodine, *"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 Ind. L.J. 521, 585 (2009) (criminal defendants); Julia Simon-Kerr, *Credibility by Proxy*, 85 Geo. Wash. L. Rev. 152, 222 (2017) (criminal defendants and all other witnesses except those who were untruthful about a material matter while under oath in the previous ten years); Brian J. Foley, *Until We Fix the Labs and Fund Criminal Defendants: Fighting Bad Science with Storytelling*, 43 Tulsa L. Rev. 397, 413 (2007); Roberts, *Conviction by Prior Impeachment*, at 2036 (defendants); Richard D. Friedman, *Character Impeachment Evidence: The Asymmetrical Interaction Between Personality and Situation*, 43 Duke L.J. 816, 825 (1994) (defendants).

allows courts to weigh the factors highlighted above,[89] and case law provides numerous examples of them doing just that.[90] Indeed, the fear of chilling the testimony of those on trial is so fundamental that "the importance of the defendant's testimony" is one of the factors that judges analyze in most states and many federal circuits as they assess whether a probative/prejudicial balancing permits the admission of a felony conviction.[91] This factor was, in fact, preeminent in early case law developing this doctrine.[92] That same multi-factor test requires judges to consider the probative value of the conviction.[93] Prejudice, including racial unfairness, can also be weighed by judges to whom the evidence regime gives discretion. A

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[89] *See United States v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976) (laying out a canonical list of factors to be applied in balancing probative value and prejudicial effect, namely "(1) The impeachment value of the prior crime. (2) The point in time of the conviction and the witness' subsequent history. (3) The similarity between the past crime and the charged crime. (4) The importance of the defendant's testimony. (5) The centrality of the credibility issue.")

[90] For examples, see Roberts, *Reclaiming the Importance*, at 854-56.

[91] *See United States v. Mahone*, at 929; Roberts, *Reclaiming the Importance*, at 837.

[92] *See* Roberts, *Reclaiming the Importance*, at 845.

[93] *See Mahone* at 929 (first factor is "the impeachment value of the prior crime").

recent district court opinion applying a balancing test to the complaining witness's "attempted assault" convictions included a review of several of the factors highlighted above:[94] the lack of probative value, the prejudice, the chilling effect, and the racial implications of silencing and stigmatizing communities. The opinion granted the motion to prohibit prior conviction impeachment in that case, noting that "many defendants plead guilty to crimes they did not commit,"[95] and that "[w]ere the court to allow cross-examination of the witness on these convictions, it would fail to afford protection to a large population of minorities in New York State who have had contact with the criminal justice system."[96]

Oregon's practice of mandating the admissibility of felony convictions makes it an outlier.

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[94] One was a felony conviction and one a misdemeanor. United States v. Walker, 315 F.R.D. 154, 156 (E.D.N.Y. 2016). Both were said to involve "domestic assaults," and Judge Weinstein noted that undoubted prejudice would result from their admission, given that "[d]omestic violence is a disturbing issue." *Id.*

[95] *Id*. For more on this phenomenon, see Thea Johnson, *Fictional Pleas* 94 Ind. L.J. 855 (2019); Anna Roberts, *Convictions as Guilt*, 88 Fordham L. Rev. 2501 (2020).

[96] *United States v. Walker*, 315 F.R.D. 154, 156 (E.D.N.Y. 2016).

Like the federal system,[97] most states that permit impeachment using felony convictions other than "crimes of dishonesty" have given judges discretion in this process,[98] with only a

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[97] Fed. R. Evid. 609(a)(1).

[98] Ala. R. Evid. 609(a)(1); Ariz. R. Evid. 609(a)(1); Ark. R. Evid. 609(a)(1); *People v. Castro*, 696 P.2d 111, 113 (Cal. 1985) (reading a balancing requirement into California's felony conviction impeachment regime); Conn. Code Evid. § 6-7(a); Del. R. Evid. 609(a)(1); Ga. Code § 24-6-609(a)(1); Idaho R. Evid. 609(a); Ill. R. Evid. 609(a); Iowa Code § 5.609(a)(1); Louisiana v. Tolbert, 849 So.2d 32, 38 (La. 2003) (finding that trial judges have discretion to exclude under state evidence rule 403); Me. R. Evid. 609(a)(1); Md. R. Evid. 5-609(a) (restricted to "infamous crime[s] or other crime[s] relevant to the witness's credibility"); Mass. Guide to Evid. Section 609(a); Mich. R. Evid. 609(a)(2) (applying only to crimes that "contained an element of theft," and requiring a finding of "significant probative" value as to all witnesses and a balancing for criminal defendants); Minn. R. Evid. 609(a)(1); Miss. R. Evid. 609(a)(1); *Whisler v. State*, 116 P.3d 59, 62 (Nev. 2005) (reading in judicial discretion to exclude under the state's rule); N.H. R. Evid. 609(a)(1); N.J. R. Evid. 609(a); N.M. R. Evid. 11-609(A)(1); *People v. Sandoval*, 314 N.E.2d 413, 418 (N.Y. 1974) (judicial balancing is to be done in the trial court's discretion and in the interests of justice); N.D. R. Evid. 609(a)(1); Ohio R. Evid. 609(A); 12 Okl. St. Ann. § 2609(A)(1); R.I. R. Evid. 609(b); S.C. R. Evid. 609(a)(1); S.D. Codified Laws § 19-19-609(a)(1); Tenn. R. Evid. 609(a)(1), (a)(3); Tenn. R. Evid. Adv. Comm'n Comments (noting that even when the rule does not mention balancing, Rule 403 applies); Tex. R. Evid. 609(a); Utah R. Evid. 609(a)(1); Vt. R. Evid. 609(a)(2); Wash. R. Evid. 609(a)(1); W. Va. R. Evid. 609(a)(2)(A); Wis. Stat. Ann. § 906.09(2); Wyo. R. Evid. 609(a)(1).

small number clinging to an approach like Oregon's.[99] Several states do not permit impeachment with felony convictions of this sort, particularly when it is used against the defendant.[100] In some

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[99] Colo. Rev. Stat. § 13-90-101; Fla. Stat. § 90.610(1); Ind. R. Evid. 609(a)(1) (restricting list of admissible convictions to commission or attempt of "murder, treason, rape, robbery, kidnapping, burglary, arson, or criminal confinement"); Ky. R. Evid. 609(a); Mo. Rev. Stat. § 491.050; Neb. § 27-609(1); N.C. R. Evid. 609(a); Va. R. Evid. 609(a), (b). Note, however, that even within these states there are limitations rooted in probative value and/or prejudicial effect. *See, e.g., Jackson v. State*, 25 So.3d 518, 526 (Fla. 1986) (noting that the inquiry is "generally restricted to the existence of prior convictions and the number of convictions, unless the witness answers untruthfully"); *Smith v. State*, 7 So. 3d 473, 500 (Fla. 2000) (inquiry into nature of convictions not permitted); *Huggins v. State*, 889 So.2d 743, 756-57 (Fla. 2004) (applying state evidence rule 403 in context of prior conviction impeachment of a hearsay declarant); Ind. R. Evid. 609(a)(1) (restricting list of admissible convictions); Ky. R. Evid. 609(a) ("The identity of the crime upon which conviction was based may not be disclosed upon cross-examination unless the witness has denied the existence of the conviction."); *State v. Stricklin*, 290 Neb. 542, 560 (2015) ("[O]nce having established the conviction, the inquiry must end there, and it is improper to inquire into the nature of the crime, the details of the offense, or the time spent in prison as a result thereof."); Va. R. Evid. 609(a)(iii) (in all prior conviction impeachment of civil parties or criminal defendants, "the name or nature of any crime of which the party or accused was convicted, except for perjury, may not be shown, nor may the details of prior convictions be elicited, unless offered to rebut other evidence concerning prior convictions.")

[100] Alaska R. Evid. 609; Haw. R. Evid. 609(a); Kan. Stat. Ann. § 60-421; Pa. R. Evid. 609(a); Mont. R. Evid. 609.; W.Va. R. Evid. 609(a)(1) (as regards defendants only).

instances, even if the relevant rule makes no mention of judicial discretion to exclude, courts came to realize that it was essential, and now read it in.[101] The California Supreme Court has held that the state's rule on prior conviction impeachment, whose plain language appeared to make all felony convictions admissible, had to be restricted on due process grounds to those felony convictions that were relevant to truthfulness;[102] on that point, it noted that the codes are "littered" with felonies that are not relevant to truthfulness.[103]

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[101] *People v. Castro*, 696 P.2d 111, 113 (Cal. 1985); *Whisler v. State*, 116 P.3d 59, 62 (Nev. 2005); *Louisiana v. Tolbert*, 849 So.2d 32, 38 (La. 2003).

[102] *Castro* at 118-19.

[103] *Id.* at 119; *see* Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. Rev. 563, 588 (2014) ("Now there are 'numerous felonies, but not all are serious, or *mala in se*, or life-endangering' . . . [T]he family of strict liability offenses is growing and even includes some felonies. Thus, convictions can occur in the absence of any culpable mental state. In addition, mistake of law is typically no defense. Thus, convictions can occur in the absence of any understanding that the law is being broken."); Roberts, *Conviction by Prior Impeachment*, at 1995 ("If there were days when a felony conviction necessarily conveyed a knowing violation of serious legal norms, those days are over."); Alice Ristroph, *Farewell to the Felonry*, 53 Harv. C.R.-C.L. L. Rev. 563, 566 (2018) ("The vast array of crimes now classified as felonies includes many crimes that are not especially exciting or wicked by most measures: record-keeping violations, writing bad checks, copyright infringement, and myriad regulatory offenses. Moreover, violations of felony statutes are so common that these violations cannot all possibly be

That court also held that the rule left intact judicial discretion to exclude prior convictions on the basis of prejudice.[104] Indeed, prejudicial harm can be particularly extreme in the felony context, when what is introduced is (as in this context) "sex offense" convictions,[105] or murder, drugs, robbery, or whatever else. With their discretion protected, judges are also able to factor in—as at least one court has done[106]—the vicissitudes of processes that might leave one person with a felony conviction, another similarly-situated

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prosecuted. Police and prosecutors must select which violations to investigate and which defendants to make into felons. The severity of the particular defendant's conduct sometimes guides these enforcement choices, but frequently other factors--such as race, class, or administrative convenience--determine which of the many of us who violate criminal laws will join the felonry. Membership in the felonry, in short, does not require or reveal any essential evil or extreme wrongdoing.")

104 *Castro* at 113.

105 *See* Julia T. Rickert, *Denying Defendants the Benefit of a Reasonable Doubt: Federal Rule of Evidence 609 and Past Sex Crime Convictions,* 100 J. Crim. L. & Criminology 213, 217 (2010) (mentioning the "exceptionally prejudicial effect of defendants' prior sex crime convictions").

106 *United States v. Lipscomb*, 702 F.2d 1049, 1065 (D.C. 1983) ("[T]he line between felonies and misdemeanors (which are admissible only if they involve dishonesty or false statement) will not always be sharp. A felony conviction could conceivably be based on conduct which would be a misdemeanor in another jurisdiction.")

person with a misdemeanor, and a third with nothing at all.[107] The fundamental arbitrariness of who has prior convictions and which convictions they have also demonstrates both the minimal probative value and the stark racial injustice of this practice.[108] Judicial discretion within clearly-defined parameters is a necessary—while not sufficient—protection.[109]

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[107] *See* Anna Roberts, *Conviction by Prior Impeachment*, at 1994-95 ("[T]he assumption that a conviction conveys not only culpability but also relative culpability—guilt in contrast to the innocence of those who do not have a conviction—is . . . vulnerable to critique, given the selective doling out of arrests, charges, convictions, felony convictions, and expungements.").

[108] *See* Roberts, *Convictions as Guilt*, at 2510-30; Carodine, *Keeping it Real*, at 544 ("It is undeniable that 'prosecutors can [and do] charge a handful of defendants and ignore hundreds of thousands of violators.'" (quoting William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 791 (2006))); *id.* at 527 ("When Blacks are unfairly 'taxed' in the criminal system with perceived criminality, Whites receive an undeserved 'credit' with a perceived innocence or worthiness of redemption.").

[109] Clarity is essential. Many jurisdictions with balancing have developed doctrine that errs in favor of admitting prior convictions. *See* Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. Chi. L. Rev. 835, 845-50 (2016) (describing misapplication of balancing test for exclusion of prior convictions for impeachment purposes). Clarity in the factors that go into balancing and how they should be weighed is essential to avoid complex and unpredictable case law dedicated to differentiating the types of crimes that might be more or less probative of truthfulness or untruthfulness. *See* Simon-Kerr, Credibility by Proxy, 85 Geo.

IV. CONCLUSION

The practice of impeachment by prior conviction is an anachronism that is both indefensible under its stated rationale and a prime perpetuator of racial bias in the legal system. Oregon takes this unfair and racist practice to an extreme by denying judges the discretion to exclude prior convictions when they are introduced for impeachment purposes. Although the stated rationale for impeaching with prior convictions is to shed light on a witness's "credibility," prior convictions have no established predictive connection to a witness's truthfulness or untruthfulness. Instead, the potential for impeachment with prior convictions silences defendants and deters or diminishes vital witness testimony. When admitted, prior convictions do not help factfinders make better judgments about witnesses' honesty. To the contrary, prior convictions prejudice juries that hear about them, lowering the State's burden of proof. These effects are amplified exponentially for witnesses of color who are disproportionately the bearers of prior convictions due to racism in

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Wash. L. Rev. 152, 192-203 (2017) (describing contradictory and complex nature of doctrine identifying which prior convictions are more or less probative in impeachment).

policing and prosecution. In this way, Oregon's evidence law has become a vehicle for imposing a serious and overlooked collateral consequence on those with prior convictions, one that does a disservice to both truth-seeking and the pursuit of justice writ large.

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CERTIFICATE OF COMPLIANCE

Pursuant to ORAP 5.05(1)(d), I certify that this Amicus Brief complies with the word-count limitation in ORAP 5.05(1)(b) because it contains 11,092 words. I further certify that this brief complies with the legibility and readability requirements of ORAP 5.05(3)(b) because it uses proportionately-spaced type that is not smaller than 14 point for both the text of the brief and footnotes.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on January 4, 2023, I electronically filed the foregoing document with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system.

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