

3-2023

## Reforming Prior Conviction Impeachment

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# REFORMING PRIOR CONVICTION IMPEACHMENT

*Anna Roberts\* & Julia Simon-Kerr†*

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## INTRODUCTION

John Thompson spent eighteen years in prison after being convicted of a robbery and a murder.<sup>1</sup> For fourteen of those years, he was on death row.<sup>2</sup> Yet, he had committed neither the robbery nor the later murder.<sup>3</sup> Mr. Thompson's story is in some ways familiar. For example, it involved a notorious prosecutor, Harry Connick Sr., who was found to have "regularly suppressed crucial evidence" including in twenty-five percent of cases in which the defendants were eventually sentenced to death.<sup>4</sup> Withholding of evidence by so-called "tough on crime" prosecutors is a known source of wrongful convictions.<sup>5</sup> But there is another aspect of Thompson's wrongful conviction that may be equally common yet is much less remarked: the role of Thompson's prior conviction for robbery in his trial for murder.

Thompson was arrested in 1985 after police received a tip from a man named Richard Perkins accusing Thompson and a man he knew, Kevin Freeman, of committing a carjacking and murder.<sup>6</sup> The police

1. Radley Balko, *John Thompson, an Exoneree and Relentless Voice for Criminal-Justice Reform, Has Died*, WASH. POST (Oct. 4, 2017), <https://www.washingtonpost.com/news/the-watch/wp/2017/10/04/john-thompson-an-exoneree-and-relentless-voice-for-criminal-justice-reform-has-died> [https://perma.cc/828N-XBPB].

2. *Id.*

3. *Id.*

4. INNOCENCE PROJECT NEW ORLEANS, STUDY ON THE ORLEANS' DA'S OFFICE 1, <http://pdb.la.gov/Serving%20The%20Public/Reports/txtfiles/pdf/IPNO%20Study%20on%20the%20Orleans%27%20DA%27s%20Office.pdf> [https://perma.cc/HEB7-JFMD] (last visited June 22, 2022); *see also* Balko, *supra* note 1 ("At trial, Thompson showed that even since the 1995 rebuke, and even since the Cousin case, Connick's office continued to withhold exculpatory evidence, almost as a matter of policy.")

5. *See* EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 19 (2019) ("Lawyers who cut ethical corners or played hardball — for example, by withholding evidence until the last minute before trial — could still be promoted.")

6. 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> [https://perma.cc/MC3Y-LJ8P].

arrested both Freeman and Thompson. They found the murder weapon and a ring belonging to the victim in Thompson's possession. Freeman agreed to cooperate with the prosecution and testify against Thompson in exchange for a lighter charge. In the prosecutors' discussions with Freeman, a crucial fact was either not disclosed or ignored: Freeman had recently sold Thompson both the gun and the ring.<sup>7</sup>

After Thompson's arrest, another man saw Thompson's photograph on the news and called the police to accuse him of trying to commit an unrelated robbery.<sup>8</sup> Harry Connick Sr. decided to try Thompson first on the robbery, "knowing that a conviction could be used against him in the murder trial."<sup>9</sup> On the testimony of the robbery victims, all of whom were minors, Thompson was convicted.<sup>10</sup>

Thompson's trial for murder followed. With the evidence of the ring and the gun, and testimony from Freeman and Perkins, Thompson was convicted. What Connick Sr. failed to tell Thompson's lawyer at the time was that blood had been found at the scene of the crime that ruled out Thompson.<sup>11</sup> The existence of this evidence only came to light after an investigator working for Thompson's defense team discovered it in April 1999, thirty days before Thompson's scheduled execution.<sup>12</sup> Defense attorneys also learned that Perkins had been paid \$15,000 by the victim's family.

Back in 1985, however, as predicted by Harry Connick Sr., the robbery conviction did have an effect at Thompson's murder trial. As Thompson himself wrote in 2011:

After [the robbery conviction], my lawyers thought it was best if I didn't testify at the murder trial. So I never defended myself, or got to explain that I got the [incriminating evidence] from Kevin Freeman.<sup>13</sup>

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7. *Id.* See also Alexandra Gross, *John Thompson*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3684> [<https://perma.cc/S4PH-ZVC9>] (last visited June 24, 2022).

8. See Gross, *supra* note 7.

9. See *id.*

10. See *id.*

11. See *id.* Another prosecutor in Connick Sr.'s office admitted on his deathbed years later that he and others prosecuting Thompson were aware of the result of the test on the blood sample and chose not to reveal it. *Id.* The district attorney to whom he made this revelation continued to keep it secret for another five years. *Id.*

12. See *id.*

13. Thompson, *supra* note 6.

From this, it seems that Thompson's attorneys didn't want him to testify at his own murder trial because of the risk that the jury would learn about his prior conviction. If Thompson testified, the prosecutor could impeach his credibility with the prior conviction under Louisiana's prior conviction rule.<sup>14</sup> If Thompson remained silent, the prior conviction would not be admissible. Rather than allow the jury to hear about the robbery conviction, defense attorneys counseled Thompson to give up his chance to offer his own compelling, and more importantly, true explanation for why he was found in possession of the gun used in the murder and the victim's ring.

Why would Thompson's lawyers counsel such a sacrifice? Being impeached by a prior conviction, as evidence rules almost universally permit, seems preferable to being silenced altogether.<sup>15</sup> Yet, as this Article will describe, research suggests that when prior convictions are introduced, jurors do not follow their instructions to use them only to assess the truthfulness or untruthfulness of the defendant. Rather, prior convictions have the effect of lowering the burden of proof and making it easier to convict criminal defendants, particularly in close cases.<sup>16</sup> Defense counsel therefore fear, with justification, that if they allow their clients to testify, and the jury learns about a prior conviction, it will be fatal to the defense.<sup>17</sup> This fear is strong enough to outweigh the possibility that the defendant's decision not to testify will make it impossible to defend against the charges, as happened, with tragic consequences, to John Thompson.

In all but three states, prior convictions are routinely introduced under the rules of evidence in order to impeach the credibility of both defendants and other witnesses.<sup>18</sup> These rules, many mirroring Federal Rule of Evidence (FRE) 609, provide that a witness's "character for truthfulness" may be attacked with evidence of a criminal conviction.<sup>19</sup> If such a conviction is deemed to have involved dishonesty, many

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14. LA. CODE EVID. art. 609.1.

15. 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, 1357 (2009).

16. See *id.*; see also *infra* Section I.E for discussion of this empirical finding.

17. See John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record — Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 493–94 (2008).

18. The states whose rules restrict this practice most tightly are Montana, Hawai'i, and Kansas. See MONT. CODE RULE 609; HAW. REV. STAT. § 609; KAN. STAT. 60-421.

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

evidence codes require that the evidence be admitted.<sup>20</sup> If the conviction doesn't fall into that category, often, though not always,<sup>21</sup> such rules require that judges balance the probative value of such a conviction against the risk of unfair prejudice. If the witness is a criminal defendant, the balancing test often requires that the probative value outweigh the risk of unfair prejudice,<sup>22</sup> whereas for other witnesses, more permissive balancing tests are often used.<sup>23</sup> In many, if not most, jurisdictions, however, such balancing tests have provided little constraint on the practice of prior conviction impeachment.<sup>24</sup>

As evidence scholars, we have each dedicated a good portion of our careers thus far to pointing out the fallacy of this form of impeachment and the serious consequences for those, like John Thompson, who suffer as a result of it.<sup>25</sup> In article after article, we have argued that prior convictions have no established connection to a witness's propensity for truthfulness or untruthfulness. We have also written that this form of impeachment has manifold pernicious consequences. Prior convictions silence defendants, they offer powerful leverage for prosecutors in the context of plea agreements even as they may have little connection to a defendant's conduct, and they unfairly prejudice juries who hear about them. These effects are amplified exponentially for witnesses of color who are disproportionately the bearers of prior convictions. These arguments have not all been new. Much of our own

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20. See, e.g., FED. R. EVID 609(a)(2). Notably, in the federal system, this is the *only* evidence that is not subject to judicial balancing.

21. See, e.g., OR. REV. STAT. § 40.355 (providing for impeachment with prior convictions without any balancing); see also *infra* note 41 (listing other jurisdictions that offer no balancing).

22. See, e.g., FED. R. EVID 609(a)(1)(B).

23. See, e.g., FED. R. EVID. 609(a)(1)(A).

24. See, e.g., 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, 864 (2016) [hereinafter Roberts, *Reclaiming the Importance of the Defendant's Testimony*] (describing perversion of balancing tests in favor of admissibility).

25. See, e.g., Julia Simon-Kerr, *Credibility by Proxy*, 85 GEO. WASH. L. REV. 152 (2017) [hereinafter Simon-Kerr, *Credibility by Proxy*]; Julia Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001 (2012); Julia Simon-Kerr, *Uncovering Credibility*, in OXFORD HANDBOOK OF LAW AND HUMANITIES 583 (Bernadette Meyler et al. eds., 2020); Julia Simon-Kerr, *Credibility in an Age of Algorithms*, 74 RUTGERS UNIV. L. REV. 111 (2021) [hereinafter Simon-Kerr, *Algorithms*]; Anna Roberts, *Defense Counsel's Cross Purposes: Prior Conviction Impeachment of Prosecution Witnesses*, 87 BROOK. L. REV. 1225 (2022) [hereinafter Roberts, *Defense Counsel's Cross Purposes*]; Roberts, *supra* note 24; Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977 (2016) [hereinafter Roberts, *Conviction by Prior Impeachment*]; Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563 (2014) [hereinafter Roberts, *Unreliable Conviction*].

work has echoed over half a century of critique of prior conviction impeachment.<sup>26</sup> Yet, the practice has continued unchanged.

Three years ago, we decided to combine our scholarship with activism. We felt that we had done enough writing into the void and wanted to work for change more directly. As a beginning, we invited fellow evidence scholars who had written about the problem of prior conviction impeachment to participate in a working group. We convened at a conference to think about what the next steps might be towards actual reform. Of course, that conference and the next one moved online, but still we were able to draw on the depth of knowledge within our group, now called the Prior Conviction Impeachment Reform Coalition (the “Coalition”) and gather ideas for a reform effort.<sup>27</sup>

Happily, one of those ideas bore fruit. We wrote to advocacy groups whose mandates might encompass this topic and wound up meeting with Bonnie Hoffman, the Director of Public Defense Reform and Training at the National Association of Criminal Defense Lawyers (NACDL).<sup>28</sup> Through Bonnie, we met with an all-star lineup of the defense bar of Washington State. At that meeting, we heard that most of the lawyers had accepted prior conviction impeachment as a given. While doing superlative work in one of the profession’s most demanding jobs, they did not have the time to plan an attack on an established evidentiary practice. Yet, after seeing scholarship by some Coalition members in preparation for our meeting, they were unanimous in their belief that prior conviction impeachment is unprincipled, and that reform is essential. We are now partnering with them in an attempt to change the rules on prior conviction

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26. See, e.g., *The Evidentiary Use of Constitutionally Defective Prior Convictions*, 68 COLUM. L. REV. 1168, 1171 (1968) (describing as “widely recognized” the fact “that informing a jury of a prior conviction before they retire to reach a verdict may lead to a less accurate factual determination,” particularly if it “deters the defendant from testifying in his own behalf”); *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763, 776 (1961) (“The impeachment doctrine thus effects an anomalous distinction between defendants with and those without a criminal record in the exercise of the right to testify in their own behalf.”).

27. At present, in addition to the authors, the Coalition membership is made up of Professors Jeffrey Bellin (William and Mary Law School), John Blume (Cornell Law School), Bennett Capers (Fordham University School of Law), Montréal 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 School of Law), and Aviva Orenstein (Indiana University Maurer School of Law).

28. Our thanks to Janet Moore for making this crucial suggestion and introduction.

impeachment in Washington State. We have recently seen a portion of a brief that was a direct result of our meeting. It had been filed by the Washington Appellate Project, challenging the admission of a prior conviction and using arguments put forward in Coalition scholarship.<sup>29</sup> In addition, we recently submitted an amicus brief on behalf of members of the Coalition to the Oregon Supreme Court in a case challenging Oregon's extremely permissive approach to prior conviction impeachment.<sup>30</sup>

This Article emerges out of our collaboration with NACDL and is another part of our reform effort. We decided it was important to pull together what we see as the strongest set of arguments for reform and the strongest set of reform proposals. This Article is therefore explicitly designed as an aid to anyone seeking to change the rules or practice on prior conviction impeachment. It builds on our own work and that of many others, but it is constructed as an instrument for activism. For this reason, we have kept the exposition short and to the point. Much more by way of explanation and elaboration is available in the sources that we point to in our footnotes.

Part I of this Article identifies five of the strongest rationales for changing the general approach to prior conviction impeachment in the United States.<sup>31</sup> There is overlap between them, but these rationales emerged from our discussions with the Coalition as distinct ways of framing the need for change.

Part II offers a tiered menu of reform proposals, ranging from eliminating impeachment with prior convictions to less comprehensive modifications.<sup>32</sup> This Part recognizes that different jurisdictions may have different appetites for change. Indeed, within the Coalition there are different views as to the merits of different reform proposals. Nonetheless, the reforms suggested here are strong proposals that would each represent a significant improvement over the status quo.

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29. Brief for Respondent at \*92–112, *Washington v. Gates*, No. 83243 3-1, 2022 WL 2402337 (Wash. Ct. App. 2022).

30. See Brief of Amici Curiae Coalition for Prior Conviction Impeachment Reform, *Oregon v. Aranda*, No. S069641, 2023 WL 1966904 (Or. 2023); *Oregon v. Aranda*, 509 P.3d 152, 153 (Or. Ct. App. 2022). Oregon is one of nine states whose rules provide for the admission of felony convictions other than “crimes of dishonesty” without the requirement that courts do any sort of balancing. See OR. REV. STAT. 609(1)(a); COLO. REV. STAT. § 13-90-101; FLA. STAT. § 90.610(1); IND. R. EVID. 609(a)(1); KY. R. EVID. 609(a); MO. REV. STAT. § 491.050; NEB. REV. STAT. § 27-609(1); N.C. R. EVID. 609(a); VA. R. EVID. 2:609(a), (b).

31. See *infra* Part I.

32. See *infra* Part II.



## I. ARGUMENTS

This Part explores five of the main critiques of prior conviction impeachment. First, much impeachment with prior convictions fails on its own terms because it is substantially less probative than it is unfairly prejudicial.<sup>33</sup> Second, prior conviction impeachment deters defendants from offering valuable testimony and steers them away from trial.<sup>34</sup> Third, prior conviction impeachment compounds the racial bias of the criminal system.<sup>35</sup> Fourth, prior conviction impeachment is a collateral consequence that imposes a lasting, and at times permanent, brand on the character of the person convicted.<sup>36</sup> And finally, this practice compounds the risk not only of unfair prejudice but of wrongful conviction.<sup>37</sup> In this Part, as in the rest of this Article, we will highlight relevant aspects of FRE 609, which has influenced many state rules. We will also highlight states that have taken different approaches.

### A. Prior Conviction Impeachment Creates a High Risk of Unfair Prejudice and Lacks Any Proven Ability to Predict Lying

The stated rationale for admitting prior convictions to impeach witnesses is superficially simple. Most courts assert that it tells us something about witnesses' "propensity for truthfulness."<sup>38</sup> There are two theories for why a prior criminal conviction is predictive of future lying. The first is broad: people who are willing to commit felonies are less likely to obey other legal commandments, like the courtroom oath.<sup>39</sup> The second is narrower and involves the notion that people who have committed certain kinds of crimes have in some way been dishonest and are therefore more likely to lie in future.<sup>40</sup> Many

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33. See *infra* Section I.A.

34. See *infra* Section I.B.

35. See *infra* Section I.C.

36. See *infra* Section I.D.

37. See *infra* Section I.E.

38. Simon-Kerr, *Algorithms*, *supra* note 25, at 116 n.20.

39. See 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, 301–02 (2008) ("As explained by Justice Holmes, the permitted inferential chain is as follows: (i) a felon has exhibited a character flaw that demonstrates a 'general readiness to do evil'; (ii) a failure to testify truthfully is a species of 'evil'; (iii) a person with a general readiness to do evil is more likely to testify falsely than an average witness.") (citations omitted).

40. See, e.g., H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 808–12 (1993) (describing possible rationales for admitting prior convictions depending on whether they "involve dishonesty" and amorphousness of that category).

jurisdictions automatically admit convictions for crimes that are thought to involve dishonesty or false statement.<sup>41</sup> As a result, courts have endlessly debated which subset of crimes fall into these categories.<sup>42</sup> Whether through a direct or indirect theory of character propensity, in many jurisdictions, including the federal system, “all felonies [have been considered] at least somewhat probative of a witness’s propensity to testify truthfully,” and their admission is subject only to a balancing test.<sup>43</sup> This has led courts across jurisdictions to develop a complex jurisprudence dedicated to differentiating the types of crimes that might be more or less probative of a witness’s propensity for truthfulness or untruthfulness.<sup>44</sup>

The probabilistic rationale for admitting prior convictions as evidence of a propensity for untruthfulness is unsound on many dimensions. As an initial matter, prior convictions are not necessarily the outcome of a well-functioning criminal legal system. Lack of financial resources, threats of higher sentences, lengthy waits for trial due to overloaded dockets, detention prior to trial when defendants

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41. See, e.g., ALA. R. EVID. 609(a)(2); ARIZ. R. EVID. 609(a)(2); ARK. R. EVID. 609(a)(2); DEL. R. EVID. 609(a)(2); D.C. CODE § 14-305; FLA. STAT. § 90.610; GA. CODE ANN. § 24-6-609(a)(2); IND. R. EVID. 609(a); IOWA R. EVID. 5.609; MINN. R. EVID. 609; MISS. R. EVID. 609; N.H. R. EVID. 609; N.M. R. EVID. 11-609; N.D. R. EVID. 609; OKLA. STAT. tit. 12, § 2609(A)(2); S.C. R. EVID. 609; SDCL § 19-19-609; UTAH R. EVID. 609; VT. R. EVID. 609(a)(1); WASH. R. EVID. 609(a); WYO. R. EVID. 609.

42. See Stuart P. Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(A)(2) and the Origins of Crimen Falsi*, 90 J. CRIM. L. & CRIMINOLOGY 1087, 1092 (2000) (“[C]ourts have struggled to determine whether offenses such as embezzlement, larceny, blackmail, and extortion should qualify as crimes ‘involving dishonesty or false statement.’”); see also Patti Duncan, *An Analysis of the Phrase Dishonesty or False Statement as Used in Rule 609*, 32 OKLA. L. REV. 427, 431 (1979) (“[I]t appears generally accepted in the majority of federal courts today that the term ‘dishonesty’ . . . is descriptive of only those crimes . . . which include deceit, untruthfulness, or falsification . . . . However, the state courts that have addressed the issue indicate a trend toward a broader definition . . . than that applied by the federal courts.”).

43. *United States v. Estrada*, 430 F.3d 606, 617 (2d Cir. 2005).

44. In *Colorado*, for example, the Supreme Court found that a child found to have shoplifted \$100 in goods from her mother’s store could be impeached with that information when she testified at the sexual assault trial of a man she had accused of assaulting her. See *People v. Segovia*, 196 P.3d 1126, 1131 (Colo. 2008). According to the Court, “conduct seeking personal advantage by taking from others in violation of their rights” is indicative of “dishonesty or truthfulness.” *Id.* at 1132. To offer another example, in the District of Columbia Circuit, a conviction for soliciting prostitution qualifies as a crime involving “dishonesty or false statement” under the D.C. Code of Evidence and can potentially be used to impeach. See *Brown v. United States*, 518 A.2d 446, 447 (D.C. 1986) (citing D.C. CODE § 14-305 (1981)); see also Simon-Kerr, *Credibility by Proxy*, *supra* note 25, for a lengthy discussion of the jurisprudence around which crimes are more or less probative of dishonesty and the connection between this doctrine and historical honor norms.

cannot post bond, and uncertainty about the strength of the prosecution's case against them may all contribute to a defendant's choice to forgo trial in favor of accepting a plea deal.<sup>45</sup>

The connection between convictions and conduct is further attenuated by the realities of plea bargaining itself. Defendants may maintain their innocence while accepting a plea.<sup>46</sup> And defendants may accept plea bargains to crimes that have little connection to their actual conduct, often in order to avoid collateral consequences that might come with pleading guilty to crimes that more closely relate to events on the ground.<sup>47</sup> These considerations mean that a defendant's prior conviction often is not a reliable indicator of their previous actions, let alone their propensity for truthfulness.<sup>48</sup>

Separately, because of discriminatory law enforcement practices and prosecutorial discretion, one defendant may have no prior convictions to be impeached with while another may, even if they have committed similar acts.<sup>49</sup> Again, as we discuss in Section I.C, this is a problem that will systematically disadvantage people of color, who are disproportionately subject to policing, prosecution, and conviction.<sup>50</sup>

Even if a prior conviction were a reliable indicator of actual past conduct, the notion that we can learn something about a witness's propensity for lying from the existence of a previous criminal conviction is unproved. There are, no doubt, individual differences in how honest we are. Some people lie more often and others lie less often. According to personality researchers, the personality trait that corresponds to this, "Honesty-Humility," is a measurable feature of

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45. See Roberts, *Unreliable Conviction*, *supra* note 25, at 582–83.

46. See *id.*

47. Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855, 856–57 (2019).

48. *Id.*

49. See Montré D. Carodine, *Keeping it Real: Reforming the Untried Conviction Impeachment Rule*, 69 MD. L. REV. 501, 541–42 (2010) (“[P]rosecutors have tremendous influence in determining criminal defendants’ ultimate convictions and sentences . . . . While many prosecutors no doubt strive for and in many respects achieve some degree of equity in the criminal process, there is growing evidence indicating that many others use their discretion in ways that yield inequitable results. Often defendants who have committed similar crimes — or even the same crimes — received vastly different treatment . . . .”) (citations omitted).

50. According to the NAACP Criminal Justice Fact Sheet, “[o]ne out of every three Black boys born today can expect to be sentenced to prison, compared 1 out of 6 Latino boys; one out of 17 white boys.” See *Criminal Justice Fact Sheet*, NAACP, <https://naacp.org/resources/criminal-justice-fact-sheet> [https://perma.cc/B4GB-AD2U] (last visited Jan. 14, 2023). In addition, “32% of the US population is represented by African Americans and Hispanics, compared to 56% of the US incarcerated population being represented by African Americans and Hispanics.” See *id.*; see also *infra* Section I.C.

personality that correlates with behavior like rule-breaking for personal profit.<sup>51</sup> And research suggests that people act with some degree of behavioral consistency, such that lying might be a repeated response to certain stimuli.<sup>52</sup> Yet researchers have cautioned that there is a need “on a general level” for “more research” in order to understand the conditions when Honesty-Humility is predictive of dishonesty itself.<sup>53</sup>

Nonetheless, one scholar has suggested it is “plausible to suppose that [those with prior convictions] have a comparative propensity to lie.”<sup>54</sup> This relies on two untested assumptions. First, it assumes that the “Honesty-Humility” trait is correlated with prior convictions. Second, it assumes that having a prior conviction is actually indicative of some persistent behavioral pattern that would arise from a character trait.

These are big and unproved assumptions. Researchers studying “Honesty-Humility” have cautioned that “high Honesty-Humility is less an unconditional unwillingness to lie than an unwillingness to

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51. See Reinout E. de Vries, Anita de Vries & Jan A. Feij et al., *Sensation Seeking, Risk-Taking, and the HEXACO Model of Personality*, 47 PERSONALITY & INDIVIDUAL DIFFERENCES 536, 539 (2009) (indicating that “Honesty-Humility” falls into “[t]he ‘measurable’ space of personality”); Kibeom Lee & Michael C. Ashton, *A Measure of the Six Major Dimensions of Personality, Scale Descriptions*, HEXACO PERSONALITY INVENTORY—REVISED, <https://hexaco.org/scaledescriptions> [<https://perma.cc/PZQ9-BXUY>] (last visited Jan. 14, 2023) (describing people with low scores on a test designed to measure levels of “Honesty-Humility” as “inclined to break rules for personal profit,” and, in some studies, to lie for personal gain).

52. See Urs Fischbacher & Franziska Föllmi-Heusi, *Lies in Disguise — An Experimental Study on Cheating*, 11 J. EUR. ECON. ASS’N 525, 525–47 (2013). For example, one recent study by a group of economists found that “only about one fifth of people lie fully and act in line with the assumption of payoff maximization.” See *id.* In their experimental study, they found that “[a]bout 39% of the subjects seem to resist the monetary incentives to lie and remain honest. Another 20% of the subjects obviously do not tell the truth but do not maximize their payoff either.” See *id.*; see also Benjamin E. Hilbig & Isabel Thielmann, *Does Everyone Have a Price? On the Role of Payoff Magnitude for Ethical Decision Making*, 163 COGNITION 15 (2017) (finding that incentive size matters to dishonest behavior but only to certain corruptible individuals); Daniel W. Heck et al., *Who Lies? A Large-Scale Reanalysis Linking Basic Personality Traits to Unethical Decision Making*, 13 JUDGMENT & DECISION MAKING 356, 357 (2018) (“[T]he empirical picture consistently shows that individuals strongly differ in their willingness to lie . . .”).

53. Christoph Schild et al., *May the odds — or your personality — be in your favor: Probability of observing a favorable outcome, Honesty-Humility, and dishonest behavior*, 15 JUDGMENT & DECISION MAKING 600, 608 (2020).

54. MIKE REDMAYNE, CHARACTER IN THE CRIMINAL TRIAL 198 (Andrew Ashworth ed., 2015).

deceive or exploit for self-interest.”<sup>55</sup> Thus, even those who are generally high in “Honesty-Humility” may lie “for non-selfish reasons.” At the same time, those who are low in “Honesty-Humility” may be truthful if it would serve their self-interest, as in a situation in which it might be obvious to others that a lie is being told or where there is a punishment for lying.

As described above, there is a high degree of noise that accompanies prior criminal convictions as metrics of “Honesty-Humility.” These convictions may have little to do with the behavior or character of their bearers. For all of these reasons, it would be spurious to invoke this line of personality research as support for the proposition that a person with any type of prior felony conviction is per se more likely to lie when testifying as a witness.

The lack of empirical support for a connection between prior convictions and lying on the witness stand is significant because most jurisdictions require judges to assign a probative value to prior convictions before admitting them.<sup>56</sup> For convictions not thought to involve dishonesty or false statement, many jurisdictions hold that for a criminal defendant the probative value of the conviction must be greater than the risk of unfair prejudice from admitting the conviction.<sup>57</sup> If the witness is not a criminal defendant, the conviction is admissible under the federal rule and state rules that follow it if the risk of unfair prejudice does not substantially outweigh the probative value.<sup>58</sup> Importantly, no study that has been done of how fact-finders actually use prior convictions has found any evidence that they are, in fact, used to assess truthfulness.<sup>59</sup> Rather, prior convictions have the pronounced — yet wholly impermissible — effect of lowering the burden of proof in close cases, making it easier to convict those with prior convictions.<sup>60</sup> Thus, even if we hypothesized some increase in our ability to predict lies based on prior convictions, that speculative value

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55. Kibeom Lee & Michael C. Ashton, *Why Six Factors, Why it Matters*, 34 EUR. J. PERSONALITY 562, 568 (2020).

56. See Roberts, *Reclaiming the Importance of the Defendant’s Testimony*, *supra* note 24, at 845–46.

57. See *id.*

58. See FED. R. EVID. 609(a)(1)(A).

59. See Eisenberg & Hans, *supra* note 15, at 1359–61.

60. See *id.* at 1358 (“[T]he threshold for conviction, or the subjective burden of proof, may differ for defendants with . . . criminal records. Jurors may be willing to convict on less evidence if the defendant has a criminal past.”); see also MICHAEL J. SAKS & BARBARA A. SPELLMAN, *THE PSYCHOLOGICAL FOUNDATIONS OF EVIDENCE LAW* 169 (2016) (“[P]rior conviction evidence contributes little or nothing to credibility assessment of defendants who take the witness stand, while at the same time creating the risk that jurors will draw improper propensity inferences.”).

would never outweigh the high known likelihood that a fact-finder would use the information to derive greater moral comfort when convicting the defendant. Indeed, the risk of unfair prejudice almost certainly *substantially* outweighs any possible boost in our ability to predict lying from prior convictions, meaning that even if the prior conviction belongs to a witness, it should fail the more permissive balancing test accorded to witnesses' prior convictions.<sup>61</sup>

This same lack of empirical support also applies to admitting prior convictions that are thought to involve dishonesty or false statement.<sup>62</sup> These convictions are admitted on the theory that they are so probative of dishonesty on the witness stand that they should always come in. But the personality research simply does not support such a claim. Instead, as we discuss in further detail in Section I.D below, prior convictions are not necessarily indicative of events on the ground, let alone a witness's future behavior on the witness stand.<sup>63</sup>

Even when they are thought to involve dishonesty or false statement, such convictions have no proven ability to predict lying on the witness stand. Indeed, based on the personality research, it is likely that a highly nuanced set of information would be needed before we might have any hope of any statistical success in predicting lying by witnesses.<sup>64</sup> The research suggests that we would need to know granular details about each witness, including many of their personality traits, complex situational factors including the likelihood of being believed or detected, and other information like age, for example.<sup>65</sup> Such information would often require not simply a mini trial on a collateral matter, but a huge investment of time and resources directed at gaining a deep understanding of how a given witness has responded to particular situations in the past. Such inquiries would be well beyond the scope of evidence rules. Using prior convictions, whether they are thought to involve dishonesty or not, as a stand-in for such depth and detail is both unjustified and unjustifiable.

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61. See SAKS & SPELLMAN, *supra* note 60.

62. See Roberts, *Reclaiming the Importance of the Defendant's Testimony*, *supra* note 24, at 858–60.

63. See *infra* Section I.D.

64. See, e.g., Schild et al., *supra* note 53, at 600–10.

65. *Id.*

### **B. Prior Conviction Impeachment Deters Valuable (and Constitutionally Protected) Testimony at Trial**

The threat of prior conviction impeachment holds the potential to deter those facing criminal charges from exercising their right to testify in their own defense.<sup>66</sup> If a defendant testifies, the jury may hear about convictions that would otherwise be excluded (for an example, see Part I.E).<sup>67</sup> Also, if they testify, the prosecution's use of their convictions may be more harmful to them than silence: either because it suggests to the jury (as this form of impeachment permits) that they are untruthful, or because it suggests that the person in question has a propensity to commit crimes, or because it spurs beliefs that this person is "bad" and therefore worthy of being convicted and punished.<sup>68</sup>

Legal decision-makers have demonstrated their awareness of the chilling effect of this practice. A factor persuading both Hawai'i and Kansas to prohibit the impeachment of those facing criminal charges, as described in Part II.D, was this chilling effect.<sup>69</sup> Similarly, the leading multi-factor test applied by judges deciding whether to permit prior conviction impeachment of defendants includes consideration of "the importance of the defendant's testimony."<sup>70</sup> Yet the case law is often distorted, treating this as a reason to permit such impeachment, rather than — as was originally envisaged — a reason to prohibit it.<sup>71</sup>

The threat of prior conviction impeachment also holds the potential to deter those facing criminal charges from exercising their right to go to trial at all. If the prospect of impeachment destroys the possibility of testimony, or effective testimony, by them or by one or more of their witnesses, they may conclude that pleading guilty is the safer option. This adds an important form of leverage to the prosecutor's already formidable power to impel guilty pleas. After all, testimony in one's own defense is the testimony that jurors are wanting and hoping to

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66. See Eisenberg & Hans, *supra* note 15, at 1370 (finding a statistically significant association between the existence of a criminal record and the decision to testify); see also Blume, *supra* note 17.

67. See *infra* Section I.E.

68. Empirical support exists for the fact that jurors misuse this evidence, to damaging effect. See Eisenberg & Hans, *supra* note 15, at 1389.

69. The Hawai'i ruling rested on the federal and state rights to testify. See *State v. Santiago*, 492 P.2d 657, 658, 664 (Haw. 1971); see also *infra* Section II.D.

70. See Roberts, *Reclaiming the Importance of the Defendant's Testimony*, *supra* note 24, at 846 (describing the multi-factor test and the origins of the "importance of the defendant's testimony" factor in concern about a chilling effect).

71. See *id.*

hear.<sup>72</sup> Empirical data supports the notion that jurors punish those who do not offer it, and social science suggests that such testimony may have the potential to offer individuating information that might combat juror biases.<sup>73</sup> In addition, those on trial may lack the funds to pay for other kinds of witnesses. Thus, the racial and economic disparity involved in the allocation of criminal convictions compounds economic and race-based hardships inflicted on many of those facing charges, and we see a new twist on the old theme of silencing potential witnesses because of race.<sup>74</sup>

The potential reach of this threat is large — a significant proportion of those on trial have prior convictions, and both prosecutors and judges have been wanton in proffering and admitting them<sup>75</sup> — but the development of empirical support for the existence of this threat (and its devastating consequences) has been a big step forward. In 2008, Professor John Blume published “The Dilemma of the Criminal Defendant with a Prior Record — Lessons from the Wrongfully Convicted.”<sup>76</sup> His study focused on a group of people, eventually found innocent, who had been convicted — some after plea and some after trial. The primary reason given by their defense counsel for their decision not to testify was the fear that they would be impeached with their convictions if they testified. So eager were they to avoid that threat that they declined to testify (and sometimes to go to trial at all) despite their innocence. In this group of cases, innocence eventually came to light, and governmental actors and evidence were eventually able to be scrutinized. In a much larger group of cases, with no defendant testimony and perhaps no trial at all if the defendant takes a plea deal, governmental actors, evidence, and practices evade community scrutiny.

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72. See Eisenberg & Hans, *supra* note 15, at 1370 (“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.”).

73. See Roberts, *Reclaiming the Importance of the Defendant’s Testimony*, *supra* note 24, at 891.

74. 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.”).

75. See James E. Beaver & Stephen L. Marques, *A Proposal to Modify the Rule on Criminal Conviction Impeachment*, 58 TEMP. L.Q. 585, 591 (1985) (reporting that level of impeachment by prior convictions is 72% of all cases in which defendants testify on their own behalf).

76. Blume, *supra* note 17, at 477.



### C. Prior Conviction Impeachment Compounds Racial Bias

Prior conviction impeachment has entrenched a definition of credibility that is not race-neutral. While prior convictions may tarnish credibility in the eyes of laypeople, there is no evidence that people with prior convictions are less likely to tell the truth.<sup>77</sup> And yet, the law invites the introduction of prior convictions under the guise of credibility impeachment. When coupled with this country's record of racist policing<sup>78</sup> and the reality of grossly disproportionate prosecution and conviction of people of color,<sup>79</sup> a policy that introduces prior convictions on the fictional premise that they tell us something about truth must be addressed. Prior conviction impeachment is nothing short of a continuation of policies that barred witnesses from testifying in American courtrooms by virtue of the color of their skin.<sup>80</sup> Our esteemed colleague, Professor Capers, has written that "race is still a factor in credibility determinations."<sup>81</sup> This is true so far as it goes, but we would go further. In today's America, prior convictions are being used systematically to exclude and silence witnesses of color.

More than any other group, African Americans, and in particular African American men, are likely to be impeached in court through prior convictions. The Sentencing Project reports that "in 2010, 8% of all adults in the United States had a felony conviction on their record" but for "African-American men, the rate was one in three (33%)."<sup>82</sup>

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77. See *supra* Section I.A.; see also SAKS & SPELLMAN, *supra* note 60, at 169; Beaver & Marques, *supra* note 75, at 613 ("Neither prevailing psychological theories nor existing empirical data supports the argument that someone who has been found guilty of a criminal offense in the past is more likely to lie on the witness stand than someone who has no prior conviction.").

78. See *What 100 Years of History Tells Us About Racism in Policing*, ACLU (Dec. 11, 2020), <https://www.aclu.org/news/criminal-law-reform/what-100-years-of-history-tells-us-about-racism-in-policing> [<https://perma.cc/EM2A-K9H7>] (examining four incidents highlighting the issue of racism in policing, from 1919 to 2020).

79. Leah Wang et al., *Beyond the Count: A Deep Dive into State Prison Populations*, PRISON POL'Y INITIATIVE (Apr. 2022), <https://www.prisonpolicy.org/reports/beyondthecount.html#demographics> [<https://perma.cc/4Y6G-3JPL>] (describing disproportionate representation of African Americans in state prisons); SENTENCING PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM (2018) <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> [<https://perma.cc/Q5PB-XPJA>] (describing racial disparities in prior convictions).

80. See, e.g., Gonzales Rose, *supra* note 74, at 2255 ("The vestiges of race-based witness competency rules which were based on a 'general distrust of the veracity of blacks' and other people of color persist today.").

81. I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1379 (2010).

82. See SENTENCING PROJECT, *supra* note 79.

While African Americans make up 12% of the population, they make up 34% of the prison population.<sup>83</sup> By contrast, whites make up 62% of the population and only 32% of the prison population.<sup>84</sup> Racially-skewed conviction rates combined with the American legal system's insistence that prior convictions are credibility markers mean that white and Asian-Americans receive a credibility boost in the courtroom while all other groups face a disproportionate risk of being impeached with prior convictions.

Because African Americans are disproportionately likely to have prior convictions, the flaws of impeaching with prior convictions are exacerbated for African Americans, and in particular Black men. As we describe in greater detail in Section I.A above, prior convictions are not predictive of lying in the courtroom.<sup>85</sup> Instead, in cases that go to trial, impeachment with prior convictions has three main effects, none of which relate to believability. First, such impeachment has been shown to lower the burden of proof, making juries more willing to convict defendants with prior convictions.<sup>86</sup> Second, as described in Part I.B above, the threat of such impeachment is an important factor in many defendants' decisions not to testify.<sup>87</sup> And finally, prior conviction impeachment incentivizes defendants to agree to plea bargains rather than face a trial in which they must either remain silent or risk their prior convictions being used to lower the burden of proof and render them less sympathetic in the eyes of the jury.<sup>88</sup> All three of these effects disproportionately affect African Americans.<sup>89</sup>

Prior conviction impeachment also impairs the ability of those in groups with disproportionate rates of conviction and incarceration to vindicate their rights in civil litigation or seek justice when they are the victims of crimes. If people in a particular community are disproportionately likely to have prior convictions, entire

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83. Wang et al., *supra* note 79.

84. *Id.*

85. See *supra* Section I.A; see also SAKS & SPELLMAN, *supra* note 60, at 167–69 (“The research suggests, then, that prior conviction evidence contributes little or nothing to credibility assessment of defendants who take the witness stand, while at the same time creating the risk that jurors will draw improper propensity inferences.”).

86. Eisenberg & Hans, *supra* note 15, at 1358.

87. See Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1461 (2005); see also *supra* Section I.B.

88. Anna Roberts, *Conviction by Prior Impeachment*, *supra* note 25, at 2003; see also Natapoff, *supra* note 87, at 1461–64 (examining impeachment's general silencing of defendants and its effects on plea discussions).

89. See Wang et al., *supra* note 79 (“[E]very race and ethnicity is overrepresented in prisons, except white and Asian people.”).

neighborhoods may be more likely to face impeachment with prior convictions. This means that when friends or neighbors testify at trial on behalf of a person in an overpoliced community, they will be disproportionately impeached through prior convictions. Disproportionate impeachment of witnesses from particular communities, in turn, makes it more difficult for people who live there to vindicate rights in civil court or for the state to prosecute those alleged to have committed crimes against them.<sup>90</sup>

Relatedly, because of disproportionate conviction rates, we are almost certainly losing testimony disproportionately from African American defendants like John Thompson, whose case we described in the Introduction, who choose not to testify in order to preserve their right not to be judged based on their prior convictions.<sup>91</sup> Indeed, African American defendants with prior convictions have been shown to testify less often than white defendants with prior convictions.<sup>92</sup> Yet, when defendants are members of marginalized groups, particularly Black defendants, hearing from them is especially important in order to combat implicit biases and stereotypes that may otherwise introduce unfair prejudice into the factfinders' determinations.<sup>93</sup> This is because humans think by making automatic inferences about others informed by their appearance as well as by social learning.<sup>94</sup> This can lead to

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90. See *United States v. Agostini*, 280 F. Supp. 2d 260, 262 (S.D.N.Y. 2003) (“[K]nowledge of [a] Conviction could potentially prejudice the jurors against [the victim], causing them to evaluate his worth as a witness based on his status as a convicted felon regardless of the actual relevance of the Conviction . . . . The Conviction may even serve to distract the jury from the crime charged against [the defendant] and instead focus on whether [the victim], as a convicted felon, ‘deserved’ to be assaulted . . . .”).

91. See *supra* Introduction.

92. Eisenberg & Hans, *supra* note 15, at 1372 (finding that among defendants with prior criminal convictions “over 60% of white defendants testified [while] less than half of minority defendants testified”).

93. See Montré D. Carodine, *The Mis-Characterization of the Negro: A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 526–27 (2009) (“[R]ace is evidence inside and outside the courtroom, and most often race is used to make predictive character judgments . . . . [I]n criminal cases . . . blackness equates with poor character. When Blacks are unfairly ‘taxed’ in the credit system with perceived criminality, Whites receive an undeserved ‘credit’ with a perceived innocence or worthiness of redemption.”); Teneille R. Brown, *The Content of Our Character*, 126 PA. ST. L. REV. 1, 8 (2021).

94. See Brittany S. Cassidy et al., *Appearance-Based Inferences Bias Source Memory*, 40 MEMORY & COGNITION 1214, 1214–15, 1223 (2012) (“[P]eople spontaneously rely on facial appearance when forming impressions of others. Appearance-based impressions occur in a seemingly instantaneous way and have important outcomes for the actors in question . . . . This suggests that people agree upon initial appraisals of facial characteristics when forming impressions and that these

“systematic discrimination against people with particular, often racialized characteristics.”<sup>95</sup> When factfinders lose the testimony of Black defendants, jurors and judges are forced to rely even more on visible characteristics like race and make assumptions based on these characteristics that, in addition to being invalid as a matter of evidentiary fact-finding, are often “inaccurate and unfair.”<sup>96</sup> These stereotypes often connect Black individuals with “violence, weaponry, hostility, . . . [and] immorality.”<sup>97</sup> Scholars have argued that testimony from Black defendants is an important way to combat such stereotypes, yet impeachment with prior convictions is a persistent barrier to increasing rates of testimony from Black defendants. The result is a system that disproportionately silences Black defendants in the name of credibility impeachment.

#### **D. Prior Conviction Impeachment Treats Conviction as a Lasting or Even Permanent Brand on Character**

The practice of prior conviction impeachment treats a conviction as reliably indicating commission of the named crime. FRE 609 and those state rules that follow it treat the assumed crime as reliably indicating one of two things: either (in the case of “*crimina falsi*”<sup>98</sup>) a lying character or (in the case of qualifying felony convictions) a character that willfully breaks laws, including the law prohibiting perjury. They treat those assumed character traits as long-lasting. Each of these aspects of the practice is vulnerable to critiques.

##### *I. Assumed Commission of the Named Crime*

Justifications of this practice rely on the assumed reliability of convictions. As we suggested earlier,<sup>99</sup> this assumed reliability is undermined by demonstrably wrong results and by aspects of the process leading to convictions. That process includes the pervasiveness

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inferences persist in memory . . . . Appearance-based inferences reflect perceptual biases and overgeneralization of personality characteristics . . . . [I]ndividuals with more stereotypically Black features are more likely to be misremembered as criminals than are nonstereotypical faces . . . . Appearance-based inferences about plaintiffs and defendants can influence jury behavior.” (citations omitted).

95. Brown, *supra* note 93, at 8.

96. *Id.* at 11.

97. See Roberts, *Reclaiming the Importance of the Defendant’s Testimony*, *supra* note 24, at 838.

98. This term is frequently used in this context to refer to crimes of dishonesty or deception. See *Crimen*, BLACK’S LAW DICTIONARY (11th ed. 2019).

99. See *supra* Section I.A.

of bias, the under-resourcing of defense counsel, and the pressures to plead guilty, including the “trial penalty” and pre-trial detention.

One of us has written the following summary of reasons to question this assumed reliability:

The use of convictions as impeachment evidence — and indeed their very admissibility despite their hearsay status — rests on an assumption of their reliability. This assumption of reliability is based on the notion that convictions are the product of a fair fight between relatively evenly matched adversaries, 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. Even if there is, the notion of a fair fight between relatively evenly matched adversaries — or even any fight at all — is increasingly being challenged. The assumption of reliability therefore needs to be reexamined.<sup>100</sup>

## 2. *Assumed Character Traits Associated with Convictions*

Outside of this evidentiary context, reliance on propensity reasoning — the notion that X alleged event reveals your character as a Y-kind of person, and thus it can be assumed that you are more likely to have done Z — is disfavored.<sup>101</sup> The system is said to be committed to imposing judgment and punishment based on acts rather than character. Yet propensity reasoning is the sole justification for prior conviction impeachment. Even if one were to take a conviction for a dishonest act as a reliable indication that a dishonest act had occurred, as described in Section I.A, the notion that it reveals a dishonest character trait that predicts future dishonesty on the witness stand lacks empirical grounding.<sup>102</sup> So does the assumption that a conviction for a felony reveals a character for willful law breaking that predicts dishonesty on the witness stand. Nor does a felony conviction even necessarily require proof — or an admission — of willful law breaking.<sup>103</sup> The incoherence of these rules and their implementation, and their detachment from logic and scientific understandings, make

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100. Roberts, *Unreliable Conviction*, *supra* note 25, at 580–81; *see also* Anna Roberts, *Convictions as Guilt*, 88 FORDHAM L. REV. 2501, 2515 (2020) [hereinafter Roberts, *Convictions as Guilt*]; 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, 933–34 (2020).

101. *See, e.g.*, FED. R. EVID. 404(b)(1).

102. *See supra* Section I.A.

103. *See* Roberts, *Unreliable Conviction*, *supra* note 25, at 621–24.

more sense when the practice is seen as a vehicle for historical and ongoing assumptions about who is worthy of belief.<sup>104</sup>

### 3. *Long-Lasting Brand on Character*

There is no fixed expiration date for impeachment with prior convictions within the federal system.<sup>105</sup> Although in theory it should be harder to impeach with convictions that are more than ten years old, that ten-year marker has been described as arbitrary and too long.<sup>106</sup> Indeed, this kind of lasting brand on character — this translation of the governmental act of conviction into one's lasting identity as a person — is in tension with increased awareness of the opacity, numerosity, severity, and counter-productivity of consequences of conviction that interfere with one's ability to live in ways that are sustainable and protected from stigma. It is also in tension with increased awareness of the racial and economic disparities that attend these consequences, not just because of disparate rates of arrest and charging, but because of disparate resourcing of the lawyers who might aid in prevention or diminution of criminal charges and convictions.<sup>107</sup> Although there is no justification in the rules or case law for this long-lasting, biased imposition of stigma on those with prior convictions who will face impeachment with those convictions potentially forever, this impact is real and profound. Impeachment with prior convictions thus attaches a significant, yet overlooked, collateral consequence to a criminal conviction.

#### **E. Prior Conviction Impeachment Compounds the Risk of Unfair Prejudice and Wrongful Conviction**

At the beginning of this Article, we described the Hobson's choice John Thompson faced in deciding whether to testify at his trial.<sup>108</sup> Because his attorneys feared what jurors would do if they learned of Thompson's prior conviction for robbery, they counseled him not to testify when he was tried for murder. He could either explain himself and allow the jurors to know he had a prior conviction or not explain himself and keep the fact of the prior conviction out of evidence. The significance of prior conviction impeachment is underscored in John Thompson's case because the prosecutor strategically chose to

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104. See Simon-Kerr, *Credibility by Proxy*, *supra* note 25, at 157, 166.

105. See FED. R. EVID. 609.

106. See Roberts, *Unreliable Conviction*, *supra* note 25, at 579.

107. See Roberts, *Convictions as Guilt*, *supra* note 100, at 2538.

108. See *supra* Introduction.

prosecute the robbery before the murder in order to have the leverage of the prior conviction to use in the later prosecution. And in the end, Thompson lost his chance to explain the evidence against him, and the legal system lost crucial information that might have averted a terrible miscarriage of justice.

Empirical work on impeachment with prior convictions makes clear that this same Hobson's choice features frequently in cases that result in wrongful convictions. In an important study conducted by Professor John Blume of exonerees who declined to testify, the predominant reason their attorneys gave for the choice not to testify was fear of being impeached with prior convictions.<sup>109</sup> This decision may seem inexplicable, but it has support in research on how jurors actually use prior convictions. In a seminal study, Ted Eisenberg and Valerie Hans examined over 300 criminal cases to try to understand how jurors use prior convictions in decision-making.<sup>110</sup> According to the rules, prior convictions are admitted solely for the purpose of assessing witness credibility, which courts have understood to mean their propensity for truthfulness. Yet, Eisenberg and Hans were able to find *no evidence* that "criminal records affect defendant credibility."<sup>111</sup> Instead, they found that jurors "appear willing to convict on less strong other evidence if the defendant has a criminal past."<sup>112</sup> In trying to explain this, they theorized that jurors use the information about past convictions to "categorize the defendant as a bad person, a person of poor character."<sup>113</sup> This, in turn, may create a halo effect that causes the jury to assume that the defendant has other negative characteristics.<sup>114</sup> This hypothesis was supported by another finding of the study, which was that jurors reported a lower level of sympathy for the defendant when informed of a prior criminal conviction.<sup>115</sup>

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109. Blume, *supra* note 17, at 491; *see also* Natapoff, *supra* note 87, at 1459–60 ("Defendants do not testify largely because it is so dangerous . . . It . . . allows the government to elicit the defendant's criminal history . . . which may dissuade the jury from hearing the substance of the defendant's story, from having sympathy with the defendant, or from disbelieving the government."); *supra* Section I.B (discussing the silencing of criminal defendants).

110. Eisenberg & Hans, *supra* note 15, at 1353.

111. *Id.* at 1387.

112. *Id.* at 1386.

113. *Id.* at 1357.

114. *Id.* at 1357–58.

115. *Id.* at 1387. Studies involving mock jurors bear out this damning conclusion. They find that jurors' perception of the strength of the evidence against a defendant changes when they know the defendant has a prior conviction. *See, e.g.*, Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 L. & HUM. BEHAV. 67, 76 (1995) ("[M]ock jurors who learned that the defendant had

As with the other problems with prior conviction impeachment, racial disparities within the criminal justice system and racial bias on the part of jurors further compound the problem of juries misusing prior conviction evidence. Eisenberg and Hans found that in addition to disparate rates of prior convictions as between defendants of color and white defendants (71% versus 54%), also “[a]bout 6 in 10 whites with criminal records testified, compared to about 4 in 10 minorities with criminal records.”<sup>116</sup> One theory they offer to explain that disparity is that “[j]uries in minority defendants’ cases were more likely to learn of criminal histories than were juries in white defendants’ cases.”<sup>117</sup> Although Eisenberg and Hans do not elaborate on this, one of us has offered some possible explanations in previous work:

Judges may be more willing to admit prior convictions for black defendants or the prior convictions of black defendants may be more likely to fall into categories deemed relevant to credibility. In addition, prosecutors may make less effective arguments in favor of admitting the evidence in cases with white defendants or defense attorneys may make less effective arguments in favor of their being excluded in cases with minority defendants.<sup>118</sup>

All of these possible explanations are alarming. They highlight the manifold ways in which the problems with prior conviction impeachment are compounded by other racial inequities in the criminal legal system.

## II. POSSIBLE REFORMS

In this Part we lay out a menu of possible reforms. We start with elimination of rules that permit prior conviction impeachment. We then suggest a modification and proposed rule that would continue to allow certain evidence of previous lying under oath to be admissible. Next, we offer a less comprehensive reform, which would continue to permit impeachment with a set list of convictions for crimes involving dishonesty or false statement. Finally, we suggest two reforms focused

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been previously convicted were significantly more likely to convict him of a subsequent offense than were jurors without this information . . . Perhaps the guilty finding by an earlier jury is especially salient to jurors and causes them to make negative inferences about the defendant’s character.”); see Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 L. & HUM. BEHAV. 37, 47 (1985) (“On the basis of the available data, we conclude that the presentation of the defendant’s criminal record does not affect the defendant’s credibility, but does increase the likelihood of conviction.”).

116. See Eisenberg & Hans, *supra* note 15, at 1372.

117. *Id.* at 1374.

118. See Simon-Kerr, *Credibility by Proxy*, *supra* note 25, at 189.



on criminal defendants. The first would prevent only criminal defendants from being impeached with prior convictions. The second would continue to allow criminal defendants the ability to use prior convictions to impeach the witnesses against them.

### A. Eliminate Prior Conviction Impeachment

The most comprehensive solution to the problems with prior conviction impeachment outlined in this Article is to eliminate the practice entirely. As we have shown, prior convictions are a metric that is distorted along racial lines,<sup>119</sup> has dubious claims to probative value,<sup>120</sup> deters valuable testimony in a way that harms accuracy,<sup>121</sup> imposes a lasting brand on character<sup>122</sup> and compounds the risk of unfair prejudice and wrongful convictions.<sup>123</sup> On evidence law's own terms, prior convictions should be inadmissible for this purpose. They have no demonstrated probative value in predicting untruthfulness of witnesses. To the extent that we can extrapolate from social science research into personality and draw conclusions about the predictive nature of prior convictions, they may increase our ability to predict lying to a small extent. Yet, in studies of how fact-finders use prior conviction evidence, it is clear that they are not thinking about them for what they might tell us about credibility, but that instead they serve — improperly — to lower the burden of proof.<sup>124</sup> Under these conditions, prior convictions should already be excluded at most trials because they fail all but the most permissive balancing test. And yet, courts continue to admit them under the guise of informing fact-finders about the untruthfulness of witnesses.

As one of us has suggested in past work, prior conviction impeachment may have endured because it “allow[s] us to declare our opposition to propensity evidence without having to face the consequences of such a prohibition.”<sup>125</sup> Yet, providing a backdoor for propensity evidence is not a legitimate reason for impeaching with prior convictions. It is an even worse rationale for perpetuating a doctrine rife with confusion and bias that almost certainly has negative consequences for the fact-finding process when it forces defendants

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119. *See supra* Section I.C.

120. *See supra* Section I.A.

121. *See supra* Section I.B.

122. *See supra* Section I.D.

123. *See supra* Section I.E.

124. RONALD J. ALLEN ET AL., AN ANALYTICAL APPROACH TO EVIDENCE 337 (7th ed. 2022).

125. *See* Simon-Kerr, *Credibility by Proxy*, *supra* note 25, at 219.

into silence. Although there are different paths to reform described here, the cleanest and most effective path is to stop permitting impeachment with prior convictions altogether. This could be done very simply and effectively by eliminating FRE 609 and any state analogues.<sup>126</sup> While there may be increased attempts to admit prior convictions under spurious routes like FRE 404(b) or FRE 608, courts should be alert to such work-arounds and find them impermissible.

### **B. Permit Impeachment with Evidence of Lying under Oath**

One of us has previously proposed that both impeachment with prior convictions *and* impeachment with prior bad acts be eliminated.<sup>127</sup> That proposal is worth mentioning here because it includes a rule that maintains the possibility of impeachment for one class of witness. These are repeat players who tell lies under oath in the courtroom:

Repeat players are important enough to the system that if we hope to keep them honest (and thereby reach accurate conclusions), we may need additional safeguards against the possibility that they will lie. For this reason, in the absence of impeachment rules we may need some mechanism by which to reveal the fact that the repeat witness has lied in similar circumstances before. Particularly in the case of players with institutional power, among them police officers who lie but are not sanctioned or charged with perjury, allowing that information to come to light in a subsequent trial may have salutary effects beyond fact-finding in court, such as incentivizing better behavior.<sup>128</sup>

Thus, reform-minded bodies may wish to consider a modified rule tailored to the problem of repeat players. Such a rule might read as follows:

**EVIDENCE OF LYING UNDER OATH.** A witness, not the defendant, may be impeached with evidence that he or she was untruthful about a material matter when making a statement under oath within the past ten years. This provision does not apply to past testimony by a witness as a defendant.<sup>129</sup>

This proposed rule would retain one form of prior conviction impeachment. It would permit a witness, not the defendant, who has

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126. Defense counsel would still be able to argue that the right to confront might in some circumstances protect the ability to conduct prior conviction impeachment. See Roberts, *Defense Counsel's Cross Purposes*, *supra* note 25, at 1239.

127. Simon-Kerr, *Credibility by Proxy*, *supra* note 25, at 221–25.

128. *Id.* at 222.

129. *Id.*

been convicted of perjury within the past ten years to be impeached with that conviction.

In addition, the proposed rule would target certain repeat players, who could be impeached with evidence of past lying under oath. For example, although police oversight is notoriously lacking, a push for greater accountability may yield more findings suggesting that officers have lied during previous judicial proceedings.<sup>130</sup> Improved record keeping in the wake of scandals surrounding police conduct may make it easier to track and access such findings and bring them to bear when those same police officers are later testifying at trials.<sup>131</sup> The proposed rule might also encompass experts who testify regularly in court. If such experts were found to be untruthful in past testimony, they would be subject to impeachment.<sup>132</sup> And the proposed rule could also have some bite for frequent litigants, whether litigious pro se plaintiffs or corporate CEOs.

The standard for applying this form of impeachment would be the conditional relevance standard that applies anytime a prior bad act is sought to be introduced in court.<sup>133</sup> Under FRE 104(b) and state analogues, the judge should admit prior acts if there is “proof . . . sufficient to support a finding that the fact does exist.”<sup>134</sup> Thus, the proponent of admission would need to show “that the prior testimony was both material and untruthful.”<sup>135</sup> Extrinsic evidence would be permissible so long as it was otherwise admissible at trial, and

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130. See, e.g., Christopher Slobogin, *Testifying: Police Perjury and What to Do about It*, 67 U. COLO. L. REV. 1037 (1996); Christina Koningisor, *Public Undersight*, 106 MINN. L. REV. 2221 (2022) (describing inadequacy of public record-keeping on police and both internal and movement-based efforts to increase oversight and transparency); see also CITY OF N.Y. COMM’N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCS. OF THE POLICE DEP’T, COMMISSION REPORT 36 (1994) (describing police lying, or “testilying,” as “probably the most common form of police corruption facing the criminal justice system”).

131. Of course, this makes record-keeping about prior lies in judicial proceedings paramount, and police departments have been reluctant to keep such records. The Law Enforcement Accountability Project is one attempt to rectify this by keeping and making accessible records of lying and other malfeasance by law enforcement. See generally Julie Ciccolini, *Law Enforcement Accountability Database Project*, NAT’L. ASS’N OF CRIM. DEF. L. (Aug. 19, 2020), <https://www.nacdl.org/Document/Law-Enforcement-Accountability-Database-Project> [<https://perma.cc/GLH2-ER2S>].

132. See Simon-Kerr, *Credibility by Proxy*, *supra* note 25, at 223. Such findings might be made judicially or by a professional review board. *Id.* At least in theory, this should exclude such experts from trial proceedings altogether as parties would be unwilling to hire them.

133. See *Huddleston v. United States*, 485 U.S. 681,690 (1988).

134. FED. R. EVID. 104(b).

135. Simon-Kerr, *Credibility by Proxy*, *supra* note 25, at 223.

the fact-finder would have an opportunity to determine whether the material lie took place. As one of us explained when proposing this rule, it is:

sufficiently limited in scope . . . that coupled with judicial authority to limit the number of witnesses on a subject, it should not represent a substantial burden on trials. And any burden will be de minimis in comparison with the time spent and cost incurred currently by impeachment with prior crimes, bad acts, reputation, and opinion.<sup>136</sup>

Finally, the proposed rule's carveout for defendants must be explained. Defendants are excluded from impeachment under this rule because of the problem that "the jury should (and will) instead focus on the intertwined question of guilt."<sup>137</sup> In other words, as a United Kingdom court explained when it severely restricted impeachment of defendants with prior convictions, "whether or not a defendant is telling the truth to the jury"<sup>138</sup> will often depend on "whether or not he committed the offense charged."<sup>139</sup> Jurors' assessment of whether the defendant is lying is inextricable from their assessment of guilt whether or not there is prior conviction evidence, and, as studies have shown jurors will take prior convictions as evidence of guilt.<sup>140</sup> Thus, impeachment with evidence of lying under oath is not really possible for criminal defendants because fact-finders are unable to separate the question of lying from the question of guilt.

### C. Permit Impeachment with Prior Convictions Involving Dishonesty or False Statement

Of course, the wholesale reforms just described may be too comprehensive to be palatable. One less comprehensive approach might be to preserve impeachment with prior convictions in which the underlying crime of conviction involves a dishonest act or false statement. This form of impeachment is permitted without any balancing under FRE 609(a)(2) and many state analogues.<sup>141</sup> This

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136. *Id.*

137. *Id.* at 211.

138. *Id.* (citing *R v. Campbell* [2007] EWCA (Crim) 1472 [30]). This important opinion foreclosed impeaching defendants with prior convictions in most situations in the United Kingdom. See REDMAYNE, *supra* note 54, at 6.

139. *Id.*; see also REDMAYNE, *supra* note 54, at 6.

140. See Roberts, *Conviction by Prior Impeachment*, *supra* note 25.

141. Twenty states have rules that very closely follow the federal model. See ALA. R. EVID. 609(a)(2); ARIZ. R. EVID. 609(a)(2); ARK. R. EVID. 609(a)(2); DEL. R. EVID. 609(a)(2); D.C. CODE § 14-305; FLA. STAT. § 90.610; GA. CODE ANN. § 24-6-609(a)(2); IND. R. EVID. 609(a); IOWA R. EVID. § 5.609; MINN. R. EVID. 609; MISS. R. EVID. 609; N.H. R. EVID. 609; N.M. R. EVID. 11-609; N.D. R. EVID. 609; OKLA. STAT. tit. 12, §

approach may be appealing in the sense that it offers a wider lane for admission of the types of prior convictions that are most widely seen as probative of a witness's truthfulness or untruthfulness. There are two main difficulties with such an approach. First, courts have engaged in unending debates over how to define the crimes that involve dishonesty or false statement.<sup>142</sup> Second, other than lying previously in court, such prior convictions have just as little demonstrated empirical connection to predicting lying on the witness stand as any other types of convictions.<sup>143</sup>

Thus, if taking this route, we recommend a rule that is as narrowly tailored as possible. It should take a specific subset of crimes and categorize those as convictions that may be used for later impeachment, leaving no room for debate about the inclusion of other crimes in the category. The drafters of the FRE provide a helpful list, describing crimes that clearly fall into this category as "perjury or subordination of perjury, false statement, criminal fraud, embezzlement or false pretense."<sup>144</sup> This list can serve as a starting point for discussion about what crimes to include. The inclusion of fraud makes this a fairly capacious definition, and may also introduce ambiguity into the rule, depending on a jurisdiction's definition. Ultimately, we advise any jurisdiction contemplating such a reform to carefully consider its criminal code and select a subset of crimes that are easily defined and narrowly tailored. Such tailoring could focus on convictions that require a showing of intentional lying, such as perjury or false statement.<sup>145</sup> The tailoring could also exclude convictions that

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2609(A)(2); S.C. R. EVID. 609; SDCL § 19-19-609; UTAH R. EVID. 609; VT. R. EVID. 609(a)(1); WASH. R. EVID. 609(a); WYO. R. EVID. 609. Still others are equally, if not more, permissive but structure their rules differently. *See, e.g.*, COLO. REV. STAT. § 13-90-101 (permitting impeachment with any prior felony conviction not subject to judicial balancing); LA. CODE EVID. art. 609.1 (permitting witness impeachment in criminal cases with any prior conviction not subject to balancing); OR. REV. STAT. § 40.355 (permitting impeachment with any prior felony conviction not subject to judicial balancing).

142. *See supra* Section I.A; *see also*, Green, *supra* note 42, at 1116 ("Although Rule 609(a)(2) was intended to clarify the scope of the common law rule of impeachment, the use of the phrase 'dishonesty or false statement' has had the opposite effect.").

143. *See supra* Section I.A.

144. FED. R. EVID. 609; NOTES OF COMMITTEE ON THE JUDICIARY, S. REP. NO. 93-1277.

145. Of course, sometimes lying is altruistic, as in the case of a parent who falsely takes responsibility for a criminal act committed by a child. But a jurisdiction wishing to connect prior crimes involving dishonesty with future lying on the witness stand would not have the luxury of exploring the cause of the dishonest criminal activity.

are the result of plea bargains, given the tenuous connection between facts on the ground and convictions that are the result of a plea.<sup>146</sup>

However lines are drawn if choosing this path, clear lines are essential if a jurisdiction wishes to avoid a doctrinal morass. The drafters of the FRE did not stop at a defined list of crimes that are impeachable under FRE 609(a)(2). Instead, they included “any other offense, in the nature of *crimen falsi* the commission of which involves some element of deceit, untruthfulness, or falsification.”<sup>147</sup> Many states followed suit in their codes of evidence.<sup>148</sup> This vague and expansive list has created an interminable debate in the doctrine attempting to distinguish crimes with an element of untruthfulness from those that lack such an element. Such parsing in some sense reduces to the question whether any form of criminalized behavior is somehow “dishonest,” and if not, where the lines should be drawn. For some courts, it has proved difficult to see a distinction. For example, the South Carolina Court of Appeals once included any form of stealing within the category of crimes that are automatically admissible for impeachment because they involve dishonesty or false statement.<sup>149</sup> The court explained tautologically that “[s]tealing is defined in law as larceny,” and “[l]arceny involves dishonesty.”<sup>150</sup>

Limiting impeachment exclusively to crimes involving dishonesty or false statement will put enormous pressure on the category. Even without such pressure to admit the crimes, courts are split on whether petty theft, such as shoplifting, is related to dishonesty.<sup>151</sup> For example, the Colorado Supreme Court has held, citing “common experience,” that “a person who takes the property of another for her own benefit is acting in an untruthful or dishonest way.”<sup>152</sup> This meant that a

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146. Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013).

147. FED. R. EVID. 609; NOTES OF COMMITTEE ON THE JUDICIARY, H. REP. NO. 93-1597.

148. See ALA. R. EVID. 609(a)(2) (mirroring FRE 609, but judicially expanded to cover additional crimes); ARIZ. R. EVID. 609(a)(2); ARK. R. EVID. 609(A)(2); DEL. R. EVID. 609(A)(2); D.C. CODE § 14-305; FLA. STAT. § 90.610; GA. CODE ANN. § 24-6-609(A)(2); IND. R. EVID. 609(A); IOWA R. EVID. § 5.609; MINN. R. EVID. 609; MISS. R. EVID. 609; N.H. R. EVID. 609; N.M. R. EVID. 11-609; N.D. R. EVID. 609; OKLA. STAT. tit. 12, § 2609(A)(2); S.C. R. EVID. 609; SDCL § 19-19-609; UTAH R. EVID. 609; VT. R. EVID. 609(A)(1); WASH. R. EVID. 609(A); WYO. R. EVID. 609.

149. *State v. Al-Amin*, 578 S.E.2d 32, 41 (S.C. Ct. App. 2003), *overruled by* *State v. Broadnax*, 779 S.E.2d 789 (S.C. 2015).

150. *Id.*

151. Simon-Kerr, *Credibility by Proxy*, *supra* note 25, at 197.

152. *People v. Segovia*, 196 P.3d 1126, 1132 (Colo. 2008) (en banc).

complaining child witness in a sexual assault case could be impeached with evidence that she had stolen \$100 in goods the previous summer. At the same time, District of Columbia courts have held that drug possession involves dishonesty and false statement within the meaning of the D.C. Code of Evidence.<sup>153</sup> In fact, the D.C. Code's legislative history suggests that all crimes involve dishonesty or false statement unless they are crimes "of passion and short temper, such as assault."<sup>154</sup> We could give more examples of the doctrinal chaos and potential for courts to slot almost any crime into the category of one involving dishonesty or false statement, but that work has mercifully already been done.<sup>155</sup>

Our point is simply that a jurisdiction wishing to provide meaningful reform must be extremely clear about what subset of crimes are admissible as crimes involving dishonesty or false statement. There can be no ambiguity and the only discretion should be for the judge, who can still exclude the evidence if the risk of unfair prejudice outweighs its probative value. A sample rule along these lines is offered below:

IMPEACHMENT BY EVIDENCE OF A CRIMINAL CONVICTION. A witness, not the defendant, may be impeached with evidence that he or she was convicted of perjury or subordination of perjury, false statement, embezzlement or false pretense within the past ten years if the probative value of the conviction outweighs the risk of unfair prejudice.

We include a simple probative versus prejudicial balancing test in this rule for the reasons given earlier in this Article.<sup>156</sup> Prior convictions are unfairly prejudicial. Jurors may take them to be an indication that a witness is a bad person rather than for what they might show about a witness's truthfulness. This is particularly problematic for defense witnesses, whose prior convictions may tarnish the defendant by association. At the same time, prior convictions have only speculative probative value on the question of truthfulness or untruthfulness. Thus, a judge should make sure that the speculative probative value outweighs the very real danger of unfair prejudice before admitting the prior conviction. We also exclude defendants from the ambit of the rule for the reasons outlined in greater length in

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153. Simon-Kerr, *Credibility by Proxy*, *supra* note 25, at 201.

154. *Durant v. United States*, 292 A.2d 157, 160-61 (D.C. 1972); *see also* Simon-Kerr, *Credibility by Proxy*, *supra* note 25, at 201.

155. *See* Simon-Kerr, *Credibility by Proxy*, *supra* note 25, at 196-203 for more examples.

156. *See supra* Section I.A (describing how prior convictions generally lack probative value on the question of truthfulness or untruthfulness).

the previous subsection. In short, factfinders are unable to separate the question of whether a defendant is lying from the question of the defendant's guilt. To repeat the explanation offered when United Kingdom courts largely abandoned the practice of impeaching criminal defendants with prior convictions, jurors will believe that whether or not a defendant is telling the truth depends on whether or not the defendant has committed the charged offense.<sup>157</sup> Thus, guilt and untruthfulness are logically conflated in many trials, and impeachment with prior convictions, even those that involve dishonesty, is not possible for criminal defendants.

#### **D. Prohibit Impeachment of Criminal Defendants with Prior Convictions**

A different approach to reform might seek to ameliorate the effect on defendants of impeachment with prior convictions. This approach might insist that, whatever (if anything) might be permitted when impeaching witnesses *in general* with prior convictions, this practice must be prohibited as regards the impeachment of those facing criminal charges.

First, while many of the criticisms of this practice apply across the board — for example, the weight and meaning given to criminal convictions, and the way in which this practice contributes to the vast array of lasting reminders of criminal convictions<sup>158</sup> — many carry most weight as regards the impeachment of criminal defendants. For example, deterrence of the testimony of criminal defendants appears more likely than that of other witnesses<sup>159</sup> — and arguably is more problematic. So, too, the risk of propensity reasoning, and/or activation of feelings of contempt toward the witness, is most troubling in the case of someone facing criminal charges. The risk that the evidence will be taken as substantive evidence of guilt and thus propel a guilty verdict and its consequences is unique to defendant-witnesses.<sup>160</sup> The experimental evidence suggesting improper uses by

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157. *R v. Campbell* [2007] EWCA (Crim) 1472 [30]. This important opinion foreclosed impeaching defendants with prior convictions in most situations in the United Kingdom. See REDMAYNE, *supra* note 54, at 6.

158. See Roberts, *Defense Counsel's Cross Purposes*, *supra* note 25, at 1235.

159. Complainants, for example, can be compelled to testify. See, e.g., Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 203 (2008).

160. This risk was part of what motivated the Hawai'i Supreme Court to change Hawai'i's practice of impeachment with prior convictions. See *State v. Santiago*, 492 P.2d 657, 659 (Haw. 1971).



jurors of this kind of evidence has been focused on the context of jury assessments of those facing criminal charges.

Second, those facing criminal charges are endowed with a set of constitutional protections to which other witnesses are not entitled. Criminal defendants have the right to a fair trial, to due process, to put on a defense, to testify, to an impartial jury, and to equal protection; state constitutions may mirror or go above the federal threshold in their protections. This helps remind us that even though the allure of “symmetrical” arrangements may be strong, the criminal system is fundamentally asymmetrical in its protections as in the stakes involved.<sup>161</sup> One also sees recognition of the importance of asymmetry in the federal regime, which involves a more protective balancing test when it is the impeachment of criminal defendants being contemplated.

Three states have (with some caveats) prohibited the impeachment of criminal defendants with their convictions: Kansas and Hawai’i, which permit some impeachment of other witnesses with their convictions,<sup>162</sup> and Montana, which has prohibited this for all witnesses.<sup>163</sup> The Hawai’i Supreme Court precipitated this change with a finding of a state constitutional violation,<sup>164</sup> and it may be that analogous federal constitutional arguments are now even stronger than they were (the Supreme Court has now articulated more squarely a

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161. As one of us has written, “the criminal justice system is filled with asymmetries that correspond to the vast difference in situation between the defense and the prosecution.” Roberts, *Conviction by Prior Impeachment*, *supra* note 25, at 2034–35.

162. HAW. REV. STAT. § 609 (“General rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is inadmissible except when the crime is one involving dishonesty. However, in a criminal case where the defendant takes the stand, the defendant shall not be questioned or evidence introduced as to whether the defendant has been convicted of a crime, for the sole purpose of attacking credibility, unless the defendant has oneself introduced testimony for the purpose of establishing the defendant’s credibility as a witness, in which case the defendant shall be treated as any other witness as provided in this rule.”); KAN. STAT. § 60-421 (“Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his or her credibility. If the witness be the accused in a criminal proceeding, no evidence of his or her conviction of a crime shall be admissible for the sole purpose of impairing his or her credibility unless the witness has first introduced evidence admissible solely for the purpose of supporting his or her credibility.”).

163. MONT. CODE RULE 609 (“For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible.”) In all three states, this form of impeachment may be permitted if the defendant is found to have opened the door to it. Roberts, *Convictions as Guilt*, *supra* note 100, at 2028.

164. See *Santiago*, 492 P.2d at 661 (“[T]o convict a criminal defendant where prior crimes have been introduced to impeach his credibility as a witness violates the accused’s constitutional right to testify in his own defense.”).

constitutional right to testify in one's defense).<sup>165</sup> The Hawai'i Supreme Court relied in part on fears that jurors do not use this evidence correctly, even when instructed on how to do so,<sup>166</sup> subsequent studies have added support to those fears.<sup>167</sup> And Washington Supreme Court justices have proposed following the lead of these states, in part for constitutional reasons.<sup>168</sup>

Advancing this kind of proposal may well require addressing some of the common arguments in support of permitting impeachment of those facing criminal charges. These arguments include the notion that without this form of impeachment, jurors will lack vital information, and will wrongly assume that the person on trial is a "Mother Superior."<sup>169</sup> The pages above help reveal some of the weaknesses in these arguments. For example, jurors commonly assume the guilt of the person charged.<sup>170</sup> Scholars have suggested that jurors may also assume a criminal background when they assess defendants,<sup>171</sup> and particularly Black defendants. Jurors also have every reason to doubt the veracity of defendant testimony, and the prosecution can attempt many other kinds of impeachment. To hear about a conviction and thus to have the defendant-witness branded less credible than others

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165. See *Rock v. Arkansas*, 483 U.S. 44, 44 (1987).

166. See *Santiago*, 492 P.2d at 660.

167. See Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 323–24 (2013) (finding "no data-based reason" to conclude that it is more difficult for jurors to follow instructions regarding confessions — an area in which the Supreme Court has acknowledged that jury instructions may fail to cure prejudice — than with respect to prior convictions).

168. See *State v. Burton*, 676 P.2d 975, 986 (Wash. 1984) (Brachtenbach, J., dissenting) ("Furthermore, even if prior convictions were relevant to credibility, I question whether ER 609 can be applied to the defendant in a criminal action without seriously prejudicing his right to a fair trial."); *id.* at 988–89 ("I conclude that our present ER 609 should be abandoned and replaced with a rule modeled after the Kansas, Hawaii, Georgia and Montana rules. At a minimum, this new rule should provide that no prior convictions shall be admissible to impeach the credibility of a defendant in a criminal action, unless the defendant has first introduced evidence solely for the purpose of supporting his credibility. See KAN. STAT. ANN. § 60–421 (1976). I suggest we go one step further and adopt Montana's proscription against impeaching any witness with any prior conviction. This would relieve our courts of the pointless exercise of attempting to determine which crimes involve 'dishonesty or false statement,' or otherwise impugn the credibility of the witness. I would, however, add to the Montana rule a clause expressly providing that any prior conviction could be introduced to impeach the testimony of a witness who had first introduced evidence to support his own credibility.").

169. See Roberts, *Conviction by Prior Impeachment*, *supra* note 25, at 1999.

170. *Id.* at 2000.

171. See Larry Laudan & Ronald J. Allen, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. CRIM. L. & CRIMINOLOGY 493, 527 (2011).

who have not been so impeached is to erase the race — and class — disparities inherent in the doling out of convictions; in addition, if studies suggesting that we all commit multiple felonies daily are accurate,<sup>172</sup> it could be argued that any witness testimony *without* prior conviction impeachment conveys a misleading impression of law-abiding behavior. Studies indicate that jurors use this evidence not for the permitted purpose, but for prohibited purposes.<sup>173</sup> And the threat of prior conviction impeachment may lead to a guilty plea, in which case jurors get *no information at all*, because no trial occurs. One scholar has also suggested that if defendants portray themselves as law-abiding, they might be found to have triggered FRE 404(a)(2)(A), thus allowing the government to respond with evidence to rebut a law-abiding trait.<sup>174</sup>

One of us has proposed a model statute that states advancing this priority might wish to consider:

In a criminal case where the defendant takes the stand, the prosecution shall not ask the defendant or introduce evidence as to whether the defendant has been convicted of a crime for the purpose of attacking the defendant's credibility. If the defendant denies the existence of a conviction, that denial may be contradicted by evidence that the conviction exists.<sup>175</sup>

### **E. Maintain Criminal Defendants' Ability to Impeach the Witnesses Against Them**

Another approach — not necessarily inconsistent with the previous proposal<sup>176</sup> — is to insist that whatever (if anything) is permitted as regards impeachment by civil parties or by the prosecution, those facing criminal charges not be prohibited from impeaching the witnesses against them.

One way to achieve this is through a rule that refers explicitly to the fact that the defense may be able to claim a constitutional right to conduct this sort of impeachment. A model exists in FRE 412, which generally excludes certain evidence about complainants in cases alleging sexual misconduct, but carves out evidence “whose exclusion

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172. See Roberts, *Unreliable Conviction*, *supra* note 25, at 589.

173. See Eisenberg & Hans, *supra* note 15, at 1358.

174. Rachel Moran, *Contesting Police Credibility*, 93 WASH. L. REV. 1339, 1392 (2018).

175. Roberts, *Conviction by Prior Impeachment*, *supra* note 25, at 2036.

176. Things get complicated when someone facing criminal charges seeks to impeach a co-defendant.

would violate the defendant's constitutional rights."<sup>177</sup> In neither context is an explicit statement of this sort strictly necessary, since constitutional protections exist regardless of evidentiary rules, but an explicit carveout serves as a reminder, and perhaps as a catalyst for litigation relating to the constitutional contours. Thus, a rule of this sort might state that impeachment by prior conviction is prohibited, except where the exclusion of such evidence would violate the defendant's constitutional rights.

The regime in Montana illustrates the fact that where a rule appears to prevent this form of impeachment by the defense, litigation under the Confrontation Clause will follow. Defense claims of a Confrontation Clause violation have been rejected in that state,<sup>178</sup> but they might be more successful if other states were to prohibit this form of impeachment. When explaining its decision to prohibit this form of impeachment as to all witnesses, the Montana Commission responsible for drafting this rule noted that "because both the Montana Constitution and a state statutory provision provided that 'when a person is no longer under state supervision, his full rights of citizenship are restored,' there would be little use to a rule like FRE 609, which would permit the impeachment of only a small category of people: 'those persons serving a sentence in prison, suspended sentence or on parole.'"<sup>179</sup> Confrontation Clause arguments might have more traction in a state where there is more for the defense to lose.

Of course, regardless of the approach taken to prior conviction impeachment, defendants may always seek to introduce prior convictions of witnesses if they are relevant to proving the witness's bias or if they show inconsistencies in a witness's testimony, for example. Such evidence is generally admissible — subject to balancing under FRE 403 or state analogues — because it is relevant through a non-propensity theory. There is no need for a special rule permitting impeachment with prior convictions when prior convictions will be introduced to show bias or inconsistencies, or otherwise serve as direct, rather than propensity, evidence that there is reason to be mistrustful of a witness. Thus, defendants' ability to show that witnesses against

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177. FED. R. EVID. 412(b)(1) (stating that in a case involving alleged sexual misconduct certain evidence relating to the complainant is generally inadmissible, but may be admitted in a criminal case where "exclusion would violate the defendant's constitutional rights").

178. *See* *State v. Doyle*, 160 P.3d 516, 526–27 (Mont. 2007) (resolving state and federal confrontation right objection to Montana regime by 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).

179. *See* *Roberts, Conviction by Prior Impeachment*, *supra* note 25, at 2027.

them are biased because of a plea agreement in exchange for testimony, for example, does not depend on a rule permitting impeachment by prior conviction.

### CONCLUSION

In describing our reform project in the law review literature, we hope to offer an example of how one might seek to translate one's ideas into concrete change. We also hope that by highlighting what we see as the central areas of concern here — including the stultified nature of this evidence rule, its racially disparate impact, and its contributions to the universe of wrongful convictions and collateral consequences — we can ally ourselves with others working on the same kinds of concerns in different contexts. Finally, even as we strive toward reform proposals that we see as superior to the status quo, we take seriously the abolitionist warning that our system may be too far gone to be a fit candidate for reform, and indeed that reform may entrench.<sup>180</sup>

The success of our efforts remains unwritten. We hope that at least we might inspire others to try.

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180. See, e.g., Amna A. Akbar & Marbre Stahly-Butts, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544 (2022).