5-17-2009

'The Mis-Characterization of the Negro': A Race Critique of the Prior Conviction Impeachment Rule

Montré Denise Carodine
University of Alabama - School of Law, mcarodine@law.ua.edu

"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule

Montré D. Carodine

84 Indiana Law Journal 521 (2009)

"The Mis-Characterization of the Negro":† A Race Critique of the Prior Conviction Impeachment Rule

MONTRÉ D. CARODINE*

The election of Barack Obama as the nation's first Black President was a watershed moment with respect to race relations in the United States. Obama's election removed what to many seemed a nearly insurmountable racial barrier. Yet as he transitions into his historic role and his family becomes the first Black occupants of the White House, scores of Blacks are housed in jails and prisons across the country. The mass incarceration of Blacks, among other serious issues, demonstrates that race still matters in the United States. As then-presidential candidate Obama acknowledged in the speech that many viewed to be pivotal in his campaign, race is still an issue in this country, an issue that we cannot afford to ignore. Obama's words ring true particularly in the area of criminal justice. Indeed, several months before Obama's speech on race, the "Jena Six" case, which sparked what many are calling the new civil rights movement, reminded us that the criminal justice system is still a two-tiered system that is, in many ways, racially biased. The system and society at large have criminalized the very fact of being Black. The construction of Black criminality is facilitated in the justice system largely through racially biased rules.

This Article critiques one such rule—the deeply entrenched evidentiary rule that allows prosecutors to impeach the credibility of criminal defendants with their prior convictions. This Article demonstrates that the prior conviction impeachment rule gives evidentiary value to race through its reliance on a criminal justice system that imposes the "Black tax," an unjustified disadvantage to Blacks, and granting the "White credit," an undeserved benefit to Whites. This Article argues that prior convictions are therefore unreliable hearsay. Though scholars have condemned the prior conviction impeachment rule because of the grave potential that jurors will misuse the convictions as evidence of criminal defendants' guilt, they have merely assumed, without analysis, that prior convictions are inherently reliable. Prior convictions fit the classic definition of hearsay. The rule that provides for their admissibility exists as an exception to the rule against hearsay only because convictions are deemed inherently reliable. The presumption of reliability stems from the fact that the convictions are pronouncements from other courts.

---

† The title of this Article is based on CARTER G. WOODSON, THE MIS-EDUCATION OF THE NEGRO (AMS Press 1977) (1933).

* Assistant Professor, University of Alabama School of Law. I would like to thank Dean Kenneth Randall, my colleagues on the University of Alabama School of Law faculty, and the Alabama Law School Foundation for their generous support of my research. Additionally, I would like to thank the participants at the University of Virginia School of Law Faculty Workshop, the participants at the 2007 Mid-Atlantic People of Color Conference, Dean Peter Alexander, and Professors Dorothy Brown, Joseph Colquitt, Brandon Garrett, Ronald Krotoszynski, Jr., Joan Shaughnessy, and Melissa Waters for their invaluable comments on earlier drafts of this Article. I would also like to thank Mr. Bob Elliott, Mr. Stephen McNeill, and Ms. Erika Walker-Cash for their excellent research assistance. I would finally like to acknowledge the law faculty at Washington and Lee University as well as the Frances Lewis Law Center of Washington and Lee University for support during the early development of this Article when I was a member of the law faculty at Washington and Lee.

Scholars have critiqued the prior conviction rule as if it operates in a race neutral manner. This Article challenges the notion that prior convictions are inherently reliable, arguing that the mounting evidence of racial bias in the criminal justice system renders prior convictions so unreliable that they raise serious due process concerns for criminal defendants. This Article also offers solutions. Congress and state legislatures should eliminate the use of prior convictions against criminal defendants. Unless or until there is legislative intervention, courts should require prosecutors to establish the reliability of the convictions that they offer for impeachment and also allow defendants to "impeach" the credibility of the criminal justice system, which is the hearsay "declarant."

INTRODUCTION

This Article seeks to expose and eliminate the racially biased operation of Rule 609 of the Federal Rules of Evidence, which provides for impeachment of criminal defendants with their prior convictions.

The election of Barack Obama as the nation's first Black President removed what to many seemed a nearly insurmountable racial barrier. Yet, as he transitions into his historic role and his family becomes the first Black family to occupy the White House,

scores of Blacks are housed in jails and prisons across the country. It might be suggested that the election of a Black President means that we have moved into a post-racial society, one in which race simply does not matter.[1] But the mass incarceration of Blacks, among many other issues, demonstrates that race remains one of the major issues in the United States. As one commentator aptly observed the day after the momentous election of Obama, "the larger reality is the profound disparity between [B]lack and [W]hite Americans that will persist even under the glow of an Obama presidency."[2] In a sense, it is the best of times and the worst of times. Instead of a post-racial society, at which we have not arrived, today we find ourselves in a transitioning-racial society. We have a Black President, but race still matters.

Indeed, under fire after the widespread circulation of his former pastor's sermons, then-presidential candidate Obama was forced to deal with the issue of race, an issue that he largely managed to avoid in the earlier part of his campaign for the Democratic Party's nomination. In a poignant speech in which he denounced his former Black pastor's racially charged and purportedly divisive statements, Obama also readily acknowledged that "race is an issue that I believe this nation cannot afford to ignore right now."[3] In the area of criminal justice, those words ring particularly true. Indeed, only a few short months before Obama's powerful speech, the notorious case of the "Jena Six" sparked what many have called the new civil rights movement.[4] In that case, five members of a group of six Black Louisiana teens were charged as adults with attempted murder for what many people viewed as a school-yard-type fight with a White teen. The case garnered international media attention and "became a call to action for activists on the Internet and college campuses, who saw it as proof that [B]lack youths in America still face a double standard in the American legal system."[5] The fight occurred after several race-related incidents involving school children in the small town of Jena, Louisiana.[6] The incidents began when White teens hung nooses from what was considered a "White only" tree after a Black freshman indicated that he would like to sit there.[7] The White students who hung the nooses received three days' suspension; and White students involved in off-campus "racially charged" fights were given "minimal punishment."[8]

The sentiment among many across the country was that there was blatantly unfair and disproportionate treatment of the Black teens, dubbed the "Jena Six." In a

---

1. *See* Shelby Steele, Op-Ed., *Obama Seduced Whites with a Vision of Their Racial Innocence Precisely to Coerce Them into Acting Out of a Racial Motivation*, L.A. TIMES, Nov. 5, 2008, at A31, *available at* http://www.latimes.com/news/opinion/commentary/la-oe-steele5-2008nov05,0,6553798.story.

2. *Id*.

3. Senator Barack Obama, Presidential Candidate, Democratic Party, Speech on Race in Philadelphia (Mar. 18, 2008), *available at* http://www.cnn.com/2008/POLITICS/03/18/obama.transcript/index.html [hereinafter Obama speech].

4. Reed Walters, Op-Ed., *Justice in Jena*, N.Y. TIMES, Sept. 26, 2007, at A27.

5. Miguel Bustillo, *'Jena Six' Teenager Is Freed on Bail*, L.A. TIMES, Sept. 28, 2007, at A10.

6. *Id*.

7. *Id*.

8. *Id*.

remarkable scene, reminiscent of the civil rights days of the 1960s, more than 20,000 people descended upon Jena, Louisiana, from all over the country to protest the perceived disparate treatment of the Black teens in the criminal justice system.[9] The Jena Six case was symbolic of the much larger problem of race and the criminal justice system. The case was reflective of the unfair treatment of Blacks in the criminal justice system as a whole across the country. This unfair treatment has historical roots and persists today, largely perpetuated by racially biased rules of law. This Article deals with one of those rules: the deeply entrenched evidentiary rule providing for the admissibility of prior felony convictions to attack the credibility of witnesses. If we are to move from our current state of race relations toward a truly post-racial society, we must reexamine rules like the prior conviction impeachment rule and eliminate this and other rules that have the power to perpetuate racial injustice.

Under Rule 609 of the Federal Rules of Evidence, and similar state versions of the rule, an accused in a criminal case can be impeached with his prior convictions if he decides to exercise his right to testify at trial.[10] That is, the prosecution can argue that the defendant is untrustworthy because he was previously convicted of an unrelated crime in prior proceedings. The policy underlying this rule is what Professor H. Richard Uviller once described as the "ancient assumption" that "[f]elons of all descriptions are forever afterward less truthful than other folk on any subject."[11]

Rule 609 is one of the most controversial, if not *the* most controversial, of all of the rules of evidence.[12] In fact, the use of prior convictions for impeachment purposes has been the subject of numerous law review articles and other legal commentary, much of which harshly criticizes the rule and its underlying premise.[13] It is widely known and accepted that a criminal defendant whose prior criminal record is revealed to a jury is highly likely to be convicted based on that prior record.[14] Indeed, a criminal defendant with a record is much more likely to be convicted than one without a record.[15] Scholars and judges largely recognize prior convictions to be highly prejudicial to criminal

---

9. *Id*.

10. FED. R. EVID. 609.

11. H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 803–04 (1993).

12. Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2295 (1994) ("No provision of the Federal Rules of Evidence has sparked more controversy than Rule 609 . . . ."); Alan D. Hornstein, *Between Rock and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 VILL. L. REV. 1, 6 (1997) ("The issue [of impeachment through prior convictions] is perhaps one of the most controversial in the law of evidence.").

13. *See, e.g.*, Teree E. Foster, *Rule 609(a) in the Civil Context: A Recommendation for Reform*, 57 FORDHAM L. REV. 1 (1988); Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637 (1991); Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b), and 609(a)*, 38 EMORY L.J. 135 (1989); Uviller, *supra* note 11.

14. Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1, 3 (1999) ("It is widely accepted that in all likelihood a jury will consider the evidence for improper purposes.").

15. *See id.* at 38–40, 41 n.421 (noting that prior records "increase the likelihood of conviction" and that jurors who know about prior convictions are "significantly more likely to convict" a defendant than jurors without such information").

defendants.[16] The current scheme under Rule 609 places a criminal defendant in a no-win situation. The defendant can remain silent and not testify—thus prejudicing him in the eyes of the jury for failing to tell his side of the story—or he can face certain prejudice by testifying and being impeached with his convictions. Effectively, then, Rule 609 impeachment provides prosecutors a route to "efficient" convictions.[17] Given the degree of criticism of the rule, its failure to ascertain credibility with any measure of certainty, and the grave potential to cause prejudice to criminal defendants, it is baffling why it remains a part of evidence law.

This Article fills a gap in the legal scholarship on impeachment with prior convictions, providing a race critique of the practice and suggesting that race plays a role in the continued viability of the "ancient assumption" that once someone is convicted of a crime, he is forever untrustworthy. This Article also contributes to the legal scholarship on race and the criminal justice system, which has not given enough attention to the impact of evidentiary rules on the overrepresentation of minorities in the criminal justice system. Because of the mass incarceration of minority defendants, particularly Black defendants, race should be of paramount concern to scholars critiquing the theory and practice of impeachment with prior convictions. It is simply not enough to critique the rule as if it were race neutral.

Recent statistics reveal that nearly half of all inmates in state or federal prisons and local jails are non-Hispanic Blacks.[18] In terms of raw numbers, there are more than one million Blacks in prison or jail on any given day.[19] These numbers are staggering, and unfortunately, they seem to be rising. Commentators have offered various compelling theories explaining the disproportionate number of incarcerated Blacks, including the following: the "over-policing" of Black communities,[20] the "war on drugs" (which

---

16. *See, e.g.*, Margaret Meriwether Cordray, *Evidence Rule 806 and the Problem of Impeaching the Nontestifying Declarant*, 56 OHIO ST. L.J. 495, 498–99 (1995) ("Rule 609 of the Federal Rules of Evidence provides one of the most potent, and potentially prejudicial, methods of impeachment. . . . In a criminal case, when the defendant is impeached with his prior convictions, it is widely recognized that the defendant faces a unique, and often devastating, form of prejudice.").

17. Dodson, *supra* note 14, at 4 ("Current rules generally allowing prior conviction evidence place a premium on efficiently convicting people.").

18. *See* Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693, 1694 (2006) (noting that "Blacks, who make up less than thirteen percent of the U.S. population, now comprise nearly half of all people in prison").

19. *See, e.g.*, Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 849 n.62 (2000) (asserting that if Delaware's entire population were Black, it could represent the number of Blacks in prison on any given day and citing a study finding that half of the 1.5 million incarcerated persons in the United States are Black); Kevin R. Reitz, *American Law Institute, Model Penal Code: Sentencing, Plan for Revision*, 6 BUFF. CRIM. L. REV. 525, 585 (2002) (estimating that in 2000, "roughly one million [Blacks] were housed in prisons and jails across the country"); Michael Selmi, *Getting Beyond Affirmative Action: Thinking About Racial Inequality in the Twenty-First Century*, 55 STAN. L. REV. 1013, 1039 (2002) (noting that Black men alone make up almost half of the two million people who are incarcerated in the United States); Monroe Anderson, *War on Drugs Kills Blacks*, Op-Ed., CHI. SUN-TIMES, May 27, 2007, at B7 ("Right now, there are more than 1 million [Black] men in prison . . . .").

20. Imani Perry, *Post-Intent Racism: A New Framework for an Old Problem*, 19 NAT'L

unfairly targets minorities),[21] prosecutorial bias,[22] and other flaws and biases in the trial process that result in Blacks receiving harsher treatment than Whites and innocent minority defendants being convicted.[23] These well-supported theories contradict the notion that Blacks are simply more prone to committing crimes. To the contrary, Blacks are more prone to being swept up in a criminal justice system that is, in many respects, hostile to and biased against them. A rule such as Rule 609, which almost ensures convictions based simply on a defendant's prior record, is particularly disturbing when one considers the plight of Blacks in the criminal justice system. Once a Black person is convicted of a crime (a likely scenario given the current statistics), that conviction will help to convict him again if he is ever charged with another crime (another very likely outcome given the "repeat offender" statistics for Blacks).[24] Rules such as Rule 609 keep Blacks ensnared in the criminal system, perpetuating the criminalization of a staggering percentage of the Black population.

Drawing on the rich scholarship dealing with race and the criminal justice system, I will offer a critique of the practice of using prior convictions from the minority perspective, particularly focusing on the Black experience in the criminal justice system. I argue that given the bias against Blacks and in favor of Whites in the system, prior convictions lack the type of reliability that the evidentiary rules strive to ensure and thus raise serious due process concerns.

Part I of this Article considers the general problem of race as predictive character evidence. I argue that race is evidence inside and outside the courtroom, and most often race is used to make predictive character judgments. In considering race as predictive character evidence, I discuss what race scholars and commentators call the "Black tax," which is the notion that there are extra costs—monetary and non-monetary—for Blacks in their daily lives because of their race. I focus particularly on the Black tax in criminal cases and its connection to the idea that blackness equates

---

BLACK L.J. 113, 133 (2007).

21. Kevin R. Johnson, *Taking the "Garbage" Out in Tulia, Texas: The Taboo on Black-White Romance and Racial Profiling in the "War on Drugs"*, 2007 WIS. L. REV. 283, 306 (2007) ("Even though the available statistical data suggests that [W]hites, [B]lacks, Latinos, and Asian Americans use illicit drugs at roughly comparable rates, the war on drugs has had a devastating impact on minority communities.").

22. *See* Note, *For the Good of the Child, For the Good of Society: Using Scotland and Jamaica as Models to Reform U.S. Juvenile Justice Policy*, 115 HARV. L. REV. 1964, 1968 (2002) (discussing prosecutorial bias as a potential source of racial bias in the criminal justice system).

23. *See infra* Part III.C.

24. David Cole, *What's Criminology Got to Do with It?*, 48 STAN. L. REV. 1605, 1618 (1996) (citing and discussing a Georgia case study where prosecutors "sought life sentences over 16 times more often for [B]lack repeat offenders than for [W]hite repeat offenders"); Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557, 1575 (2004) (noting that "three strikes"-type laws contribute to the disproportionate numbers of Blacks incarcerated); Ronald K. Noble, *Between Complicity and Contempt: Racial Presumptions of the American Legal Process*, 72 N.Y.U. L. REV. 664, 679 n.106 (1997) (citing findings of disparate punishment for Black "repeat offenders" in comparison with Whites in the context of drug offenses); Note, *Judicial Approaches to Direct Democracy*, 118 HARV. L. REV. 2748, 2768 (2005) (raising the possibility that "a three strikes criminal sentencing scheme . . . may embody animus toward minority groups").

with poor character. I also argue that the Black tax has a corollary, which is the "White credit." When Blacks are unfairly "taxed" in the criminal system with perceived criminality, Whites receive an undeserved "credit" with a perceived innocence or worthiness of redemption. Against this backdrop, I consider the embodiment of race as predictive character evidence in Rule 609.

Part II looks in depth at Rule 609 in theory and in practice. First, I look at the historical roots of the prior conviction impeachment practice. The rule came about after the liberation of the competency rules that did not allow criminal defendants and felons to testify. After considering its history, I then look at the actual operation of Rule 609 in depth. I also consider the legislative history of Rule 609, which demonstrates that for some members of Congress, Rule 609 was more about crime fighting than truth-seeking. I then reconsider the history of prior conviction impeachment in the context of the historical treatment of Blacks in the criminal justice system. Just as criminal defendants and convicted felons were not competent to testify, historically, Blacks were deemed incompetent witnesses as well. Indeed, there was substantial overlap in the categories of persons not competent to testify, since Blacks were disproportionately represented in the criminal justice system and viewed by many as criminal by nature. I finally address the issue of whether Rule 609 is actually a real problem for criminal defendants today. I demonstrate that Rule 609 is indeed problematic for defendants. I discuss a recent empirical study establishing that a substantial number of convicted felons, later determined to have been actually innocent, decided not to testify at their trials for fear that they would be impeached with their prior convictions. Moreover, I argue that even though the vast majority of criminal cases do not go to trial and result in plea bargains, defendants often accept plea deals because they believe that the ability of the prosecutor to impeach them with their priors substantially weakens their case.

Part III further deconstructs the evidentiary principles underlying Rule 609 and considers the interplay between those evidentiary principles and the racial bias in the criminal justice system. I discuss prior convictions as hearsay, admissible only through Rule 609, which is actually an exception to the rule against hearsay. Commentators almost always ignore the hearsay nature of prior convictions and simply proceed on the assumption that the convictions are inherently reliable. But exceptions for hearsay—such as prior convictions, or judgments from other courts generally—exist because they are thought to cover evidence that is sufficiently reliable despite being hearsay. I address modern biases against Blacks in the criminal process, and discuss specific studies that demonstrate that Blacks are often unfairly and disproportionately targeted by the criminal justice system. I argue that, from the perspective of Black criminal defendants and the Black community at large, such hearsay is not reliable.

This lack of reliability, moreover, raises serious due process concerns with respect to the admissibility of prior convictions against Black defendants. I discuss the due process issues in Part IV, where I also offer solutions for reform. I propose that Congress amend Rule 609 by eliminating the practice of impeaching criminal defendants altogether. I argue that Congress is the more appropriate branch to consider the arguments that I have outlined regarding the unreliability of prior convictions from a race perspective, and address the serious due process concerns that they raise. I alternatively argue that courts should fully analyze the reliability of prior convictions before admitting them, giving full consideration to biases in the criminal process and how they shape the perception, or misperception, of Black defendants. Courts will likely be apprehensive about declaring a jurisdiction's criminal convictions unreliable,

because such a declaration is more of a political determination. Until Congress acts, however, courts should require prosecutors to establish the reliability of the convictions that they offer for impeachment. Courts should also allow criminal defendants to put on evidence to "impeach" the credibility of the criminal justice system as a hearsay declarant. If prior convictions are admitted, juries should hear about potential or probable sources of bias in the system that could have led to the defendant's criminal conviction.

I. HOW THE COLOR OF SKIN DEFINES THE CONTENT OF CHARACTER: RECOGNIZING RACE AS CHARACTER EVIDENCE INSIDE AND OUTSIDE OF THE COURTROOM

Race is evidence. Rule 609 permits juries to infer that witnesses with prior convictions, including criminal defendants, have poor character for truthfulness. And studies show that jurors often go even further and misuse the prior conviction as evidence of bad character generally. As I establish later in this Article, Rule 609 embodies the concept of race as character evidence and, more specifically, it perpetuates the use of race as evidence of *bad* character.

In this Part, I discuss race more generally as predictive character evidence. In doing so, I am not limiting the discussion to race as predictive character evidence in the courtroom. While it is important to think of the evidentiary value of race in the courtroom, it is just as important, if not more so, to think of the evidentiary value of race outside the courtroom. After all, evidence—like that which leads to convictions that can be used for impeachment under Rule 609—is gathered and processed outside the courtroom; and it is outside the courtroom that ideas about race are largely shaped.

This Part begins by briefly considering the broad conceptualization of evidence as traces of past events. We use evidence to connect us to the past. We in turn use past events, based on our understanding of evidence, to make predictive judgments (as with character evidence). This Part considers race as "predictive character evidence."

Historically, Blacks were "mischaracterized" using negative stereotypes as a means to control them socially. Today, the formal barriers of discrimination have been removed, but the mischaracterization of Blacks remains and manifests itself in what many race scholars and other commentators have called the "Black tax." The Black tax refers to the extra penalty that Blacks must pay in their daily lives for being Black. The Black tax is said to pervade every aspect of the lives of Blacks and is particularly costly to criminal defendants. This Part discusses the Black tax generally and then connects its existence to the perceived bad character of Blacks that existed historically and remains today.

This Part also discusses the corollary of the Black tax, which I call the "White credit." If Blacks are assessed with the Black tax, then it must follow that someone is enjoying a benefit—either from the extra penalty that Blacks pay, from the freedom of not being taxed, or both. The existence of the White credit is consistent with notions that whiteness is a property right.

A. Learning from the Past: The Predictive Nature of Character Evidence

The evidence rules reflect the legal system's beliefs about the best means by which to ascertain "truth." As Professor Uviller eloquently put it, "The means by which our legal facsimile of truth is recreated is the production of 'evidence.' . . . [E]vidence remains alive in American legal parlance and thought because the rules express some

usable ideas about one of the main concerns of the lawyer: the establishment of a fact as true."[25] The idea of evidence in the general sense is not limited to use by lawyers. "We all are in the proof business, one way or another."[26]

Evidence, in the broad sense, is "the means from which an inference may logically be drawn as to the existence of a fact. . . . Evidence is the demonstration of a fact."[27] In constructing our evidence, we are all guided by the footprint theory, according to which "the past is preserved in the present by altered surfaces of matter and mind."[28] The theory is sound because events leave "durable marks in the physical world and imprints on the minds of witnesses. Detect, inspect, collect, and resurrect these little clues, then, and the truth is proved."[29] In other words, nothing happens without leaving some sort of trace.

In addition to considering traces to construct the truth based on past events, we can also look to predictive evidence. That is, we can take into account certain details as predictors of actions and occurrences.[30] Predictive evidence is the "primal ancestor" of trace evidence.[31] The two are logically related because our predictions are based on our experiences with trace evidence.[32] Professor Uviller illustrated this point in the following passage:

> Consider: why is the footprint relevant to the foot's passage? Having observed feet pressed into smooth wet sand, having observed muddy shoes walking on clean floors, having had a variety of experience with similar events involving the track of feet, we are prepared to say that, because a foot pressed to a surface *will* leave a characteristic imprint, therefore such a print *was* in all likelihood made by a foot. Thus, while we appear to be reasoning backward from the trace, we are actually applying experience with many half-forgotten similar events that have taught us to expect co-existing or sequential phenomena. It is, in short, the predictive lesson of experience that accords validity to judicial retrospective reasoning.[33]

We use character as a form of predictive evidence. Character evidence is one of the most powerful and frequently used types of evidence, both inside and outside the courtroom. We assess character on a daily basis, making predictive determinations based on past experiences.[34] Generally, however, the rules of evidence prohibit the use of character evidence to show that a person acted in conformity with her character on a particular occasion.[35] In other words, the character-propensity ban prohibits retrospective reasoning based on a person's character. The problem with character

---

25. H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 845–46 (1982).

26. *Id*. at 846.

27. James B. Thayer, *Presumptions and the Law of Evidence*, 3 HARV. L. REV. 141, 142 (1889).

28. Uviller, *supra* note 25, at 846.

29. *Id*. at 847.

30. *Id*.

31. *Id*. at 848.

32. *Id*.

33. *Id*. (emphasis in original).

34. *Id*.

35. *Id*. at 850.

evidence is not that it is thought to be irrelevant.[36] To the contrary, the general ban against character is based on the concern that jurors might give too much weight to character evidence and will decide the case based largely or solely on a person's character.[37] As I will discuss in Part II, Rule 609 is a specific exception to the character-propensity ban that permits a jury to consider a prior conviction as evidence of untruthfulness, though not as evidence of general bad character.

Though the rules of evidence have adopted a general policy against the use of character evidence, they do not really account for or address the more subtle ways that character evidence is introduced to the jury. A juror could form a positive or negative opinion regarding a person's character simply based on the way that person looks. Attorneys are well aware of this fact and will often advise their clients on how to dress, how to sit, and how to look at the jury, the judge, and other participants in the trial. A particularly difficult and troubling subset of this issue of informal character assessment by the jury is how jurors perceive the race of parties and other participants in the trial. Jurors, of course, come from the real world where race does matter.

B. Viewing Character Through a Racially Biased Lens: Assessing the "Black Tax" and Granting the "White Credit"

If the footprint theory of evidence is indeed sound, then the fact of a person's race is predictive evidence of something and will factor into retrospective reasoning. That predictive evidence is shaped by trace evidence—some type of experience, be it the learning of stereotypes, some first-hand experience, or maybe both—that left an impression or imprint in our minds. The following questions then arise: What type of footprint does race leave today? How is this footprint used to predict behavior?

1. Race as Predictive Character Evidence

In our society, blackness often connotes bad character. Race generally—as used in American society—has relevance in day-to-day assessments of character. When Dr. Martin Luther King, Jr. famously told America of his dream for its future—his dream that his "four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character"[38]—he identified just why racism is fundamentally unfair. It is unfair because it is a means of circumventing an accurate assessment of character. His use of the word "judged" is significant because often the idea of judging connotes the forming of an opinion "through careful weighing of evidence and testing of premises" or the drawing of conclusions "after inquiry and deliberation."[39] The word "judge" can also have a more negative connotation, meaning "to criticize or condemn somebody on moral grounds"[40] without an adequate basis.

---

36. *See* Michelson v. United States, 335 U.S. 469, 475–76 (1948).

37. *Id*. at 476.

38. Martin Luther King, Jr., I Have a Dream 3 (Aug. 28, 1963), *available at* http://www.stanford.edu/group/King/publications/speeches/address_at_march_on_washington.pdf.

39. Merriam-Webster Online, http://www.merriam-webster.com/dictionary/judge.

40. MSN ENCARTA DICTIONARY (2007), http://encarta.msn/dictionary_/judge.html.

When a Black person is judged by the color of her skin, it is often a condemnation that is not the result of either careful weighing of evidence and testing of premises or inquiry and deliberation. The efficient but invidious judgment based on race is often the result of previous consideration of stereotypes regarding Blacks from the media or other sources—or maybe even prior experiences. But to use such information and judge an individual nevertheless leads to the type of judgment that Dr. King dreamed of which Blacks could be free. That famous phrase from Dr. King's speech, which noted two possible ways that a Black person would be judged—one the foundation of his dream and the other the foundation of Black oppression—implies that race has evidentiary value. If one can be judged by the color of his skin, then in the evidentiary sense, skin color has probative value.

Rule 401 of the Federal Rules of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[41] Applying this definition, race in America historically had, and currently has, evidentiary relevance.

2. The Historical Use of Race as Predictive Character Evidence

During the slavery era, race was of consequence to the determination of a person's status as a slave or a free person. In nearly every jurisdiction, one could legally presume upon encountering a person who was "evidently" Black that he or she was a slave (though this presumption could be proven wrong).[42] For example, in *Gentry v. McMinnis*, a Kentucky court discussed the evidentiary value of a person's race: "[A] [B]lack or mulatto complexion is *prima facie* evidence that the person of such color is a slave . . . . [B]eing a [W]hite person, or having less than a fourth of African blood, is *prima facie* evidence of freedom."[43]

In terms of relevance, the person's race had a tendency to make it more probable that he was a slave. Beyond the issue of slave status, race was widely used in the criminal justice system to determine severity of penalties. Blacks were subject to

---

41. FED. R. EVID. 401.

42. *See* Jason A. Gillmer, *Suing for Freedom: Interracial Sex, Slave Law, and Racial Identity in the Post-Revolutionary and Antebellum South*, 82 N.C. L. REV. 535, 602, 604 n.465 (2004) (observing that "[t]he presumption of slavery from blackness and freedom from whiteness was adopted in virtually every jurisdiction," with Delaware being "[o]ne notable exception").

43. 33 Ky. (3 Dana) 382, 385 (1835); *see also* Hudgins v. Wrights, 11 Va. (1 Hen. & M.) 134 (1806). In *Hudgins*, Judge Tucker stated that "[a]ll [W]hite persons are and ever have been free in this country. If one evidently [W]hite, be notwithstanding claimed as a slave, the proof lies on the party claiming to make the other his slave." *Id.* at 139. Judge Roane elaborated on this proposition as follows:

> In the case of a person visibly appearing to be a negro, the presumption is, in this country, that he is a slave, and it is incumbent on him to make out his right to freedom: but in the case of a person visibly appearing to be a [W]hite man, or an Indian, the presumption is that he is free, and it is necessary for his adversary to shew [sic] that he is a slave.

Id. at 141. *See also* Gillmer, *supra* note 42, at 601 (noting that there was "a legal presumption that [B]lack people were slaves and [W]hite people and Native Americans were free").

harsher penalties than Whites for various crimes.[44] For example, many offenses were designated capital offenses if the accused was Black.[45] In the context of rape prosecutions after the Civil War, where the accused was Black and the alleged victim was White, evidence that the accused was Black could be evidence of his intent.[46]

In these examples, the bridge that connects race to the evidentiary concept of relevance is that race was thought to predict character. And it is in that sense that the law used race as character evidence. Race had a tendency to make it much more probable that persons who happened to be Black would be characterized as bad actors for whom slavery and tougher penalties for crimes were necessary. Indeed, to justify their enslavement of Blacks and the harsher treatment of Blacks in the criminal justice system, White slave owners and legislators constructed a mischaracterization of Blacks using multiple negative stereotypes. Among other things, Blacks were characterized as being lazy, unclean, dishonest, ignorant, and violent. The common denominator with all of the stereotypes was that they reinforced the idea of the Black person as inferior to the White person. To maintain social control over Blacks, Whites again used their mischaracterization of Blacks to justify harsher punishments for slaves and free Blacks in the criminal justice system.

Of course, the law no longer tolerates formal racism and its mischaracterization of Blacks. Overt racism is not fashionable or politically correct. A person who openly holds negative views about a person on the basis of race will most likely be ostracized. Race, nevertheless, still plays a significant—though more subtle—evidentiary role in American society today.

3. The "Black Tax"

Blacks and other minority community members, as well as civil rights activists, scholars, commentators, and other observers, have long noted the problem of the "Black tax."[47] Professor Jody Armour, in particular, wrote extensively about the Black tax in his seminal work *Negrophobia and Reasonable Racism: The Hidden Costs of Being Black in America*.[48] As Professor Armour defines it, "[t]he Black tax is the price

---

44. *See* Robert J. Cottrol, *Finality with Ambivalence: The American Death Penalty's Uneasy History*, 56 STAN. L. REV. 1641, 1653 (2004) (book review).

45. *See* Dorothy E. Roberts, *Crime, Race and Reproduction*, 67 TUL. L. REV. 1945, 1955 (1993).

46. *See* Karin S. Portlock, Note, *Status on Trial: The Racial Ramifications of Admitting Prostitution Evidence Under State Rape Shield Legislation*, 107 COLUM. L. REV. 1404, 1413 (2007).

47. *See* R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 591 (2003); Carolyn C. Jones, *Mapping Tax Narratives*, 73 TUL. L. REV. 653, 658–59 (1998); Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1143–44 (2000); Cheryl L. Wade, *Racial Discrimination and the Relationship Between the Directorial Duty of Care and Corporate Disclosure*, 63 U. PITT. L. REV. 389, 430 (2002).

48. *See, e.g.*, JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 13 (1997). Numerous commentators discuss Armour's important text. *See, e.g.*, William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 60 n.230 (2004); Jones, *supra* note 47, at 680 n.186; Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded as" Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*,

Black people pay in their encounters with Whites (and some Blacks) because of Black stereotypes."[49] Blacks are forced to accept and literally pay the Black tax on a daily basis. The "payment" can be in actual dollars or in less tangible, but nevertheless very real, social disadvantages.[50]

The term "Black tax" was used as early as the 1950s to describe the higher housing prices that West Indians had to pay to get housing in Britain.[51] More recently, the *New York Times* published an article on the "Ghetto Tax," a variation of the Black tax.[52] In that article, the Times discussed a study demonstrating that "poor urban residents frequently pay hundreds if not thousands of dollars a year in extra costs for everyday necessities."[53] For example, the article noted that "[d]rivers from low-income neighborhoods of New York, Hartford and Baltimore, insuring identical cars and with the same driving records as those from middle-class neighborhoods, paid $400 more on average for a year's insurance."[54] The article also noted that "rent to own" stores, notorious for inflating prices on appliances and furniture, primarily prey upon poor people, their "main customers."[55] The poor pay more for car loans and to cash checks.[56] And of course, Blacks make up a large proportion of "the poor" in this country. So the ghetto tax is in many ways simply a sub-category of the Black tax.[57]

In his book, *Negrophobia and Reasonable Racism*, Professor Armour discusses the Black tax with respect to the criminal justice system. "Like a tax, racial discrimination is persistent [and] pervasive . . . . And just as the state stands behind the collection of

---

2005 WIS. L. REV. 1283, 1337 n.231.

49. ARMOUR, *supra* note 48, at 13.

50. In the employment setting, Blacks often observe that they must work "twice as hard" to earn same respect and employment benefits that their White counterparts more easily achieve. *See* Amani Roberts, Something New: *An Interview with Director Sanaa Hamri and Actress Sanaa Lathan*, STORYBOARD (Wash., D.C. Film Society, Wash., D.C.), Feb. 2006, http://www.dcfilmsociety.org/storyboard0602.htm (noting that the use of the phrase "Black tax" "refers to being [Black] and having to work twice as hard to keep pace with White counterparts . . . especially in corporate America"); Urban Dictionary: Black Tax, http://www.urbandictionary.com/define.php?term=black+tax (defining Black Tax as "[t]he notion that Black people have to work and perform regular task [sic] twice as well as White people"). Some have even observed that Black politicians pay a Black tax in elections. They usually post poll numbers that are between five and ten points higher than their actual elections results because some "White people are ashamed of saying I won't vote for that guy because he's Black." *Chris Matthews Show* (MSNBC television broadcast Oct. 22, 2006). The election of Barack Obama may suggest that the Black tax no longer exists with respect to elections, or at least that it can be overcome by issues that voters consider much more important, such as the economy. I would suggest that only time will tell, particularly with respect to local elections, whether the Black tax has really been repealed for elections.

51. Jones, *supra* note 47, at 681.

52. Erik Eckholm, *Study Documents 'Ghetto Tax' Being Paid by the Urban Poor*, N.Y. TIMES, July 19, 2006, at A14.

53. *Id*.

54. *Id*.

55. *Id*.

56. *Id*. The Black tax does not just describe the penalties imposed by Whites. For example, some accomplished Blacks note that they have an "obligation" to return and give back to their communities in a way that Whites simply do not. *See* Jones, *supra* note 47, at 680.

57. *See* Eckholm, *supra* note 52 (noting that the "ghetto tax" is likely to increase prices for poor people and minorities).

the general taxes, *Blacks often have good cause to view state representatives such as police and judicial officers as IRS agents for the Black tax*."[58] Examples of the Black tax, according to Professor Armour, include "profile stops of Blacks by drug enforcement officers," and "Blacks being stopped and interrogated by police for walking or jogging through 'White' neighborhoods."[59] The tax metaphor is an apt one, as "[t]axation [is often viewed] as a regular and unpleasant interaction between state and citizen . . . ."[60]

In dealing with police, Blacks—regardless of socioeconomic status—are often subjected to racial profiling, unwarranted suspicions, and other indignities.[61] In discussing "Negrophobia," Professor Armour noted that the fear of Black violence was "the most disturbing source of dread in modern America."[62] He pointed to "[p]olls and studies [that] repeatedly show[ed] that most Americans believe that Blacks are 'prone to violence.'"[63] In describing blackness as a proxy for character, one scholar stated:

> When the public thinks about criminals they see a dark face. Consider the way doorbells are used in some city stores to keep criminals out. Race is often used as a predictor of bad character. The buzzers are meant to keep the criminals out. Race is used as a predictor of criminality. Consider "driving while Black" cases; stops and searches where police use race as a predictor of criminality.[64]

Professor Adeno Addis has observed that the media puts out a "daily narrative about crime" that "paints a picture of the [B]lack criminal threatening the innocence of [W]hite America."[65] Professor Addis continues, concluding "'[C]rime' has virtually become a metaphor to describe young [B]lack men."[66]

In Obama's speech on race, he candidly noted that his own White grandmother, who helped to rear and care for him, "confessed her fear of [B]lack men who passed by her on the street," and "on more than one occasion has uttered racial or ethnic stereotypes that made [Obama] cringe."[67] Among other Blacks, there is ample anecdotal evidence that supports the notion that there is a pervasive perception of Black criminality in this country.[68] Indeed, even as some other negative stereotypes about Blacks have decreased, the idea that Blacks are more "criminally inclined" remains "one of the most pervasive, well-known, and persistent stereotypes in American culture."[69]

---

58. ARMOUR, *supra* note 48, at 13–14 (emphasis added).
59. *Id.* at 14.
60. Jones *supra* note 47, at 658.
61. *See infra* Part III.C.
62. ARMOUR, *supra* note 48, at 2.
63. *Id*.
64. Josephine Ross, *"He Looks Guilty": Reforming Good Character Evidence to Undercut the Presumption of Guilt*, 65 U. PITT. L. REV. 227, 262–63 (2004); *see also* Roberts, *supra* note 45, at 1946–61 (arguing that the criminal justice system has constructed blackness as criminality as a means of social subordination).
65. Adeno Addis, *Recycling in Hell*, 67 TUL. L. REV. 2253, 2263 (1993).
66. *Id.*
67. Obama speech, *supra* note 3.
68. ARMOUR, *supra* note 48, at 2–4.
69. Mona Lynch, *Stereotypes, Prejudice, and Life-and-Death Decision Making*, *in* FROM LYNCH MOBS TO THE KILLING STONE 182, 188 (Charles J. Ogletree, Jr. & Austin Sarat eds.,

Professor Armour notes that the criminal penalties that Blacks pay as a result of the Black tax are not so much due to the "Mark Furhman" or "Ku Klux Klan"-type of racism.[70] He posits that the Black tax in the criminal context results from either "unconscious mental reflexes" or the perception that Blacks commit more crimes and are more dangerous than persons who are not Black.[71] Noting that conscious racism may prompt police to engage in racial profiling—as when police stop Blacks simply because they are walking in a "White" neighborhood—he also reasons that the police may view their actions as "responding reasonably" and rightly being suspicious of persons who seem "out of place."[72] Hence, Professor Armour uses the term "reasonable racism." Reasonable racism leads a White person to perpetuate the construction of Black criminality based on stereotypes or crime statistics,[73] as well as perceptions about the way others view Blacks or even an isolated personal experience with a particular Black person. While I have no doubt that there are still some "Mark-Furhman-type" racists who are decision makers in the criminal justice system, Professor Armour's observations regarding misperceptions about Black criminality are consistent with studies, like those that I discuss in Part III, exposing racial bias in the criminal process.

The Black tax reflects the use of race as predictive character evidence. It stems from the notion that somehow Blacks have a fundamentally "bad" character and are less deserving than Whites. Thus, with respect to housing or other purchases, Blacks must compensate for their perceived unworthiness through higher interest rates. In the employment setting, they must compensate for their perceived unworthiness by working harder than their White counterparts for the same benefits. And in the criminal context, they must pay for their perceived unworthiness by dealing with a hostile system that has made them the very face of criminality.

4. The "White Credit"

A part of the Black tax that is often overlooked is its corollary, which I will refer to as the "White credit." The assessment of the Black tax, be it through Blacks being charged higher interest rates or having to work "twice as hard," provides Whites with undeserved benefits. When Blacks pay higher interest rates than Whites do, not only do the people, usually White, receiving the payments enjoy an undeserved benefit, but those White consumers who enjoy the best rates also enjoy a benefit because of their skin color.

In the context of the criminal justice system, the White credit is particularly beneficial. White drivers, who do not have to concern themselves with the burdens of racial profiling and baseless traffic stops, enjoy an undeserved benefit. White criminal defendants enjoy an undeserved benefit from being White because the face of crime in America is decidedly Black. As I demonstrate in Part III, the system often punishes Blacks more harshly than Whites who have committed the same acts.

The White credit is consistent with the theory of whiteness as property. Professor Cheryl Harris has written extensively about whiteness as property, noting in particular

---

2006).

70. ARMOUR, *supra* note 48, at 13–14.

71. *Id.* at 14.

72. *Id.*

73. *Cf. id.*

that historically, "White identity conferred tangible and economically valuable benefits and was jealously guarded as a valued possession."[74] Moreover, she noted that in modern society, "[w]hen the law recognizes, either implicitly or explicitly, the settled expectations of [W]hites built on the privileges and benefits produced by [W]hite supremacy, it acknowledges and reinforces a property interest in whiteness that reproduces Black subordination."[75] The privileged treatment that Whites receive in the criminal justice system is an example of the law's reinforcement of whiteness as property.

C. The Racially Biased Operation of Apparently Race Neutral Rules of Evidence

It is my position that, as a general matter, the rules of evidence should be structured in a way that openly acknowledges the evidentiary value of race while simultaneously working to diminish that value to the extent that it is unfairly prejudicial. The rules currently operate in the opposite manner. They do not acknowledge the evidentiary value of race but at the same time often operate in a manner that perpetuates and increases the probative value and prejudicial effect of race. Not only does the Black tax manifest itself in the way that jurors and prosecutors independently view Black defendants, but the Black tax is camouflaged in the rules of evidence that filter what the jury hears about the case. This is true particularly in criminal cases.

The evidence rules, which appear to be race neutral, can instead operate in a racially biased manner, giving race evidentiary value. In many ways, the racially biased operation of the rules of evidence is more troubling than prosecutors', jurors', and judges' misuse of race as evidence. The rules are an official statement about what constitutes reliable evidence in a courtroom. When the rules of evidence give unfair prejudicial evidentiary value to race, they sanction the practice in a very official manner and empower prosecutors to appeal to racial bias and jurors and even judges to make decisions based on racial bias.

The remainder of this Article deals in particular with the use of race as evidence in the operation of Rule 609. Rule 609, which characterizes persons with prior convictions as untrustworthy, relies solely on the criminal justice system in identifying those witnesses who are not credible. The rule, however, does not account for the treatment of Blacks in the criminal justice system though numerous studies have demonstrated that racial bias exists at every stage in the criminal justice process.

Moreover, as most Americans associate Blacks with crime, revealing a Black defendant's prior convictions under Rule 609 reinforces widely held stereotypes about Blacks and encourages jurors to engage in reasonable racism. Throughout the criminal process, police, prosecutors, witnesses, judges, and jurors have been shown to engage in reasonable racism in one form or another. The current practice of prior conviction impeachment then makes use of prior convictions rooted in reasonable racism as evidence to obtain more convictions, resulting in the creation of Black recidivism.

In the next Part, I will discuss Rule 609 generally, in theory and in practice. The Rule, which in theory uses prior convictions as evidence of untruthful character, in practice is the product of legislative compromises made as lawmakers grappled with

---

74. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1726 (1993).
75. *Id.* at 1731.

related evidentiary issues that have existed for hundreds of years. Those issues include how to deal with testimony of persons with a criminal record, persons considered to be likely liars, and how to deal with testimony of criminal defendants, who were historically considered "the most likely liars of all."[76]

II. RULE 609 IN THEORY AND IN PRACTICE

This part considers the operation of Rule 609 in theory and in practice. I first discuss the historical roots of Rule 609, which developed after the demise of competency rules that kept several classes of witnesses off the stand, including convicted felons. Next, I look at the operation of Rule 609 today, as an exception to the general ban against character evidence. I then look at the controversial legislative history behind Rule 609, which was adopted in the 1970s and strongly supported by those who saw it as a crime fighting tool more so than just a rule about witness credibility. Against that backdrop, I reconsider the history of Rule 609 in its social and racial context. Finally, I demonstrate that as a practical matter Rule 609 is quite problematic for criminal defendants, especially Black criminal defendants.

A. Historical Roots of Prior Conviction Impeachment

Professor George Fisher provides a fascinating account of the historical evolution of juries to their current and relatively new "formal and complete role as the [judicial] system's lie detector."[77] Professor Fisher recounts the demise of the old competency rules, which effectively kept juries from having to determine the credibility of witnesses.[78] Under the old rules, if a person took the oath, it was conclusive evidence that he was telling the truth.[79] Because of the strength of the oath, the competency rules kept certain individuals whom the system considered"likely liars" from taking the oath and testifying.[80] Those individuals included persons who had an interest in the outcome of the trial, such as parties' spouses, "irreligious persons," civil parties, and persons having "financial interests" in the outcome of the case.[81] The underlying purpose for these competency rules was to exclude as witnesses "anyone whose temptation or inclination to lie was greater than average."[82]

The judicial system considered criminal defendants in particular to be the "most likely liars of all."[83] The system also considered persons previously convicted of crimes to be likely liars and hence prohibited them from testifying.[84] As with convicted felons and criminal defendants, the competency rules in the United States prohibited

---

76. George Fisher, *The Rise of the Jury as Lie Detector*, 107 YALE L.J. 575, 624–25, 661–62 (1997).

77. *Id.* at 581.

78. *Id.*

79. *Id.* at 580.

80. *Id.* at 624–25.

81. *Id.* at 624.

82. *Id.* at 625.

83. *Id.* at 662.

84. *Id.* at 624–25.

Blacks from testifying as well, at least in certain circumstances.[85] Eventually, common law jurisdictions abandoned the old competency rules, even the rules excluding testimony from convicted felons, criminal defendants, and from Blacks.[86] There was a catch, however, in the abandonment of the competency rules. Anyone who testified, even criminal defendants, would be subject to impeachment with his or her prior convictions.[87] Rule 609 codified the practice of impeaching witnesses, including criminal defendants, with their prior convictions.

B. Rule 609: An Exception to the General Ban on Character-Propensity Evidence

Generally, the Rules of Evidence forbid the use of character evidence to show that a person acted in conformity therewith on a particular occasion.[88] This general ban on character-propensity evidence is embodied in Rule 404 of the Federal Rules of Evidence.[89] The underlying rationale for the ban is not that such evidence is irrelevant. Instead, the concern is that the jury will give the evidence too much weight, and in the case of a criminal defendant, convict the defendant on the basis of prior bad conduct instead of focusing on his guilt or innocence with respect to the current charges. Rule 609, among others, is an express exception to this general ban on character-propensity evidence.[90] The rule permits the use of certain prior convictions to show that a witness has a propensity to lie. Juries are not, however, supposed to use the prior convictions as evidence of the defendant's bad character generally.

Under the federal version of the prior conviction impeachment rule, the prosecution or defense can impeach any witness, including a defendant who chooses to testify, with evidence of her prior convictions.[91] Congress passed Rule 609 in 1975, and most states have adopted Rule 609 or some version of it.

In fact, only one state, Montana, prohibits completely the use of prior convictions of any type to impeach.[92] Twenty-five states have adopted Rule 609, almost to the

---

85. *See id*. at 671–97 (discussing the rules excluding testimony from all Black witnesses and the ultimate abandonment of those rules); *see also* Katherine Hunt Federle, *Children, Curfews, and the Constitution*, 73 WASH. U. L.Q. 1315, 1341–42 (1995) (noting that under the slave codes, Blacks could not testify against Whites); James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 911 (2004) (discussing the congressional debate after the Civil War over whether Blacks should be permitted to testify); A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The Law Only as an Enemy, The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 993 (1992) ("[P]erhaps one of the most basic procedural deprivations that [B]lacks, enslaved and free, suffered was their preclusion from testifying against [W]hites and, during certain periods, from testifying against other [B]lacks, mulattoes, and Indians.").

86. *See* Fisher, *supra* note 76, at 659–71.

87. *See, e.g.*, Commonwealth v. Bonner, 97 Mass. 587, 589 (1867) (finding that criminal defendants were not "exempt" from "impeachment as a witness" and that there was "no reason why [they] should be").

88. FED. R. EVID. 404.

89. *Id.*

90. FED. R. EVID. 404(a)(3) (recognizing Rule 609 as an exception to the general ban on character-propensity evidence).

91. FED. R. EVID. 609.

92. *See* MONT. CODE ANN. § 26-1-609 (2008). Montana's Rule 609 states simply: "For the

letter,[93] while twelve states have adopted a less restrictive version of Rule 609.[94] Four states only allow impeachment with convictions involving dishonesty or false statements.[95] Five other states permit impeachment with felonies only.[96] This Article will refer mainly to the federal rule, as it represents the "model rule" for dealing with prior conviction impeachment.

The theory underlying Rule 609 is that a person who has in the past committed a crime is less credible than a person with a "spotless record."[97] The evidence is necessary, the theory goes, because without it jurors would likely presume that the witness is an upstanding citizen who has led a life beyond reproach and is, therefore, worthy of being believed.[98]

Under the federal scheme, generally, only convictions punishable by death or imprisonment for more than a year can be used for impeachment.[99] But the length of punishment is irrelevant if the prior conviction was for a crime that required an act of dishonesty or a false statement to satisfy the crime's elements.[100] For convictions other than those involving dishonesty or false statement, there are distinctions in Rule 609 in the standards for impeaching ordinary witnesses and defendants who testify. The prior convictions of ordinary witnesses are subject to the ordinary Rule 403 catchall balancing test.[101] Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."[102] This rule applies to nearly all otherwise admissible evidence.[103]

The prior convictions of criminal defendants, however, are subject to a different standard, which is found in the text of Rule 609(a)(1): the probative value of the conviction has to outweigh the prejudicial effect to the accused.[104] In theory, the standard for admitting the prior conviction of a defendant is higher than the standard

---

purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible." *Id.*

93. *See* ALA. R. EVID. 609; ARIZ. R. EVID. 609; ARK. R. EVID. 609; DEL. R. EVID. 609; FLA. R. EVID. 609; IND. R. EVID. 609; IOWA R. EVID. 609; ME. R. EVID. 609; MINN. R. EVID. 609; MISS. R. EVID. 609; NEB. R. EVID. 609; N.H. R. EVID. 609; N.M. R. EVID. 609; N.D. R. EVID. 609; OHIO R. EVID. 609; 12 OKLA. STAT. tit. 12, § 2609 (1992); S.C. R. EVID. 609; S.D. R. EVID. 609; TENN. R. EVID. 609; TEX. R. EVID. 609; UTAH R. EVID. 609; VT. R. EVID. 609; WASH. R. EVID. 609; W. VA. R. EVID. 609; WYO. R. EVID. 609.

94. *See* COLO. REV. STAT. ANN. § 13-90-101 (West 2005); GA. CODE ANN. § 24-9-20(b) (2002); 725 ILL. COMP. STAT. ANN. 5/115-16 (LexisNexis 2002); LA. CODE EVID. ANN. art. 609-1 (2006); MASS. GEN. LAWS ANN. ch. 233, § 21 (West 2000); MO. REV. STAT. § 491.050 (1996); N.Y. C.P.L.R. 4513 (McKinney 2007); VA. CODE ANN. § 19.2-269 (2004); WIS. STAT. ANN. § 906.09 (West 2000); N.C. R. EVID. 609; N.J. R. EVID. 609; R.I. R. EVID. 609; TEX. R. EVID. 609;.

95. *See* ALASKA R. EVID. 609; HAW. R. EVID. 609; KAN. CIV. PROC. CODE ANN. § 60-421(West 2005); PA. R. EVID. 609.

96. *See* CAL. EVID. CODE § 788 (West 2008); CONN. R. EVID. § 6–7; IDAHO R. EVID. 609; KY. R. EVID. 609; NEV. REV. STAT. ANN. § 50.095 (LexisNexis 2006).

97. Gold, *supra* note 12, at 2298.

98. *Id.*

99. FED. R. EVID. 609.

100. *Id.*

101. FED. R. EVID. 403, 609.

102. FED. R. EVID. 403.

103. *See id.*

104. FED. R. EVID. 609.

for admitting the prior conviction of an ordinary witness.[105] With respect to criminal defendants, the prosecutor carries the burden of showing that the probative value of the conviction outweighs the prejudicial effect to the accused.[106] With respect to other witnesses, the burden of proof is on the party seeking to exclude the conviction to show that, under Rule 403, the probative value is substantially outweighed by the danger of unfair prejudice.[107] The rule, therefore, on its face recognizes the inherent prejudice to a criminal defendant when the jury is informed of his or her prior convictions. In practice, however, judges routinely admit evidence of testifying defendants' prior convictions for impeachment purposes,[108] and appellate courts routinely affirm trial judges' admission of such evidence.[109]

Rule 609 also distinguishes between the types of crimes with which a witness or defendant who chooses to testify may be impeached. Unlike general felonies, crimes requiring in the establishment of their elements dishonesty or false statement are per se admissible.[110] In other words, there is no applicable balancing test, and there is no discretion for the trial judge to exclude them. Convictions older than ten years are presumptively inadmissible, and the inherent prejudice with respect to such convictions can be overcome only upon finding that "the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect."[111] The rule is most protective of juvenile adjudications, which are simply inadmissible against criminal defendants.[112] And for ordinary witnesses, juvenile adjudications are only admissible if the court finds that they are "necessary for a fair determination of the issue of guilt or innocence."[113]

As applied to the criminal defendant, the obvious problem with Rule 609 is the grave likelihood, indeed the near guarantee, of prejudice to the accused.[114] As

---

105. Roger C. Park, Daubert *on a Tilted Playing Field*, 33 SETON HALL L. REV. 1113, 1119 (2003) ("In effect, [Rule 609] tells judges to give more protection to criminal defendants than to other witnesses in balancing prejudice against probative value."); Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1282–83 n.134 (2001) ("At least as written, this test [under Rule 609] leans more toward inadmissibility when the current action is a criminal prosecution and the witness is the accused."); Donald H. Zeigler, *The Confusing Relationship Between Rules 608(b) and Rule 609 of the Federal Rules of Evidence*, 46 N.Y.L. SCH. L. REV. 527, 530 (2003) ("Rule 609 . . . makes it more difficult to impeach an accused than to impeach other witnesses with a conviction.").

106. Zeigler, *supra* note 105, at 531.

107. *Id.*

108. *See, e.g.*, R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 45 (1981) (noting that there are various aspects of our criminal justice system that "threaten convictions of the innocent," including the "routine introduction of prior convictions to impeach defendants").

109. Uviller, *supra* note 11, at 807 n.69.

110. FED. R. EVID. 609; *see also* MCCORMICK ON EVIDENCE § 42, at 63 (John W. Strong ed., 5th ed. 1999) (noting that "[c]rimes involving 'dishonesty or false statement,' regardless of the punishment or against whom used, do not require balancing of probative value against prejudice; under 609(a)(2), they are automatically admissible").

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

112. FED. R. EVID. 609(d).

113. *Id.*

114. Gold, *supra* note 12, at 2325.

recognized by the *Luck/Gordon* doctrine, which supplied the test for the admission of prior convictions before the enactment of Rule 609, this potential for prejudice is certainly not a new concern.[115] To the contrary, it has always been largely known and expected that juries will misuse this evidence despite courts' limiting instructions informing them of the purpose of the evidence.[116] And a recent empirical study has confirmed what courts, commentators, and lawmakers have suspected for years, revealing findings that "uniformly suggest that knowledge of a defendant's prior record promotes conviction in close cases, those where one should be most concerned about erroneous conviction" and noting that "[t]he criminal record effect could be even stronger than [the researchers] have found in these analyses."[117] In some ways the law actually recognizes the potential prejudice inherent in revealing prior convictions of criminal defendants. In fact, the erroneous admission of prior conviction evidence "even in the face of other evidence amply supporting the verdict, constitutes plain error impinging upon the fundamental fairness of the trial itself."[118] As the Tenth Circuit has put it:

> [A]n obvious truth is that once prior convictions are introduced the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality. This is true regardless of the care and caution employed by the court in instructing the jury. Thus, it is clear that the problem is not a simple evidentiary one, but rather goes to the fundamental fairness and justice of the trial itself.[119]

If jurors hear that the accused was previously convicted of a crime, even if the crime was completely unrelated to the current charges against the defendant, there is a substantial likelihood, indeed a substantial probability, that the jury will convict the

---

115. *See* Dodson, *supra* note 14, at 4–5.

116. *Id.* at 3.

117. 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. (forthcoming Sept. 2009) (manuscript at 32), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=998529. For commentary discussing the widespread suspicion regarding juror misuse of prior convictions admitted for impeachment, see Cordray, *supra* note 16, at 506–07, which states:

> The danger, and therefore the risk of prejudice, lies in the difficulty of making th[e] distinction [between using evidence of prior convictions for assessing the credibility of the criminal defendant and using this evidence to prove act propensity]. It is widely agreed that a jury is unlikely to maintain the distinction, even with the help of a limiting instruction . . . . [D]espite any limiting instruction the judge might give, there is a significant risk that the jury will use the evidence of prior crimes in its determination of guilt.

Id.

118. United States v. Biswell, 700 F.2d 1310, 1319 (10th Cir. 1983) (internal quotations omitted).

119. United States v. Gilliland, 586 F.2d 1384, 1389–90 (1978) (quoting United States v. Burkhart, 458 F.2d 201, 204–05 (10th Cir. 1972)); *see also* MCCORMICK ON EVIDENCE, *supra* note 110, § 42, at 65 (noting the "obvious danger" that a jury will misuse a prior conviction as evidence of the defendant's guilt).

defendant for being a "bad" person generally.[120] Moreover, in determining whether the accused is guilty, the jury is likely to give excessive or improper weight to the prior conviction.

The typical charge instructing the jury on prior convictions used for impeachment purposes instructs them to not consider the convictions as evidence of guilt but to help "judge the credibility and weight of the testimony given by the defendant as a witness in this trial."[121] Even though trial courts routinely render such instructions that are nearly intellectually impossible to follow, appellate courts refuse to find error, resting upon the settled fiction that presumes juries understand and follow trial judges' instructions.[122] But there is ample research showing that the many jurors simply do not understand jury instructions.[123] Moreover, studies show that it is almost impossible for jurors to put aside forceful and prejudicial evidence even when the court specifically instructs them to do so.[124] And there is no doubt that evidence of a defendant's prior conviction is both powerful and prejudicial.[125]

The other problem with Rule 609 is that it provides for the admissibility of evidence with relatively low probative value. Professor Uviller specifically criticized Rule 609 on this point, stating that "[t]he theoretical discontinuity perpetuated by Rule 609 is a major wrench to reason."[126] He questioned the probative value of prior conviction impeachment, calling it an "ancient precept" that "is the reverse of common experience."[127] Prior convictions are simply not predictive of who will likely lie under oath. The people who are likely to lie under oath do so based on two factors: "the importance to them of having a falsehood believed and their confidence that their false testimony will achieve that end with minimal risk."[128] In light of the low probative value of prior convictions in assessing truthfulness and the grave potential that jurors will use them to determine guilt, it has been argued that prior conviction impeachment can burden the constitutional right to testify.[129]

---

120. Ed E. Gainor, *Character Evidence by Any Other Name . . . : A Proposal to Limit Impeachment by Prior Conviction Under Rule 609*, 58 GEO. WASH. L. REV. 762, 762–63 (1990) ("There is nothing new about the observation that allowing impeachment by prior conviction places a defendant who has previously been convicted of a crime at a serious disadvantage in a criminal trial. Courts and commentators were in general agreement on this point before the adoption of the Federal Rules of Evidence.").

121. PENNSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS, § 3.09 (2005) (brackets in original omitted).

122. *See, e.g.*, People v. Hinton, 126 P.3d 981, 1006 (Cal. 2006) ("We presume the jury followed the court's instructions.").

123. *E.g.*, Darryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 MICH. L. REV. 1199, 1231 (1998); Nancy S. Marder, *Bringing Jury Instructions Into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 454–58 (2006); Paul H. Robinson, *Are Criminal Codes Irrelevant?*, 68 S. CAL. L. REV. 159, 170 (1994); Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 790–91 (2006).

124. Uphoff, *supra* note 123, at 790.

125. *See* Cordray, *supra* note 16, at 507.

126. Uviller, *supra* note 11, at 813.

127. *Id.*

128. *Id.*

129. *See* Hornstein, *supra* note 12, at 46–61.

These concerns with prior conviction impeachment were not lost on Congress. As one scholar has said, "the extraordinary amount of congressional interest generated by Rule 609(a) derived from the fact that the Rule significantly affects the outcome of criminal trials."[130] Indeed, though the congressional debate frequently appeared to focus on the particulars of Rule 609, it actually was a "broad and ideological" exchange about the proper balance between protecting criminal defendants' rights to a fair trial and protecting the public from criminals.[131]

C. Controversy Surrounding the Adoption of Rule 609

1. Legislative History—The "Great Compromise"

Rule 609 narrowly passed Congress and was supposedly a "compromise" between the House and Senate versions of the rule.[132] The rule was "hotly contested,"[133] and prior to its passage, Rule 609 was the subject of extensive debate in Congress, *receiving more attention than any other proposed rule of evidence*.[134] Indeed, there were various versions of the rule before the enactment of the final version. Initially, Rule 609 would have provided for the admission of all felony convictions and all convictions involving "dishonesty" or a "false statement," regardless of whether they were felonies or not.[135] Notably, the first draft of the rule treated felonies and *crimen falsi* (the crime of falsifying) the same, and likewise, the rule did not differentiate between criminal defendants and ordinary witnesses.[136] Perhaps most importantly, the initial rule provided no discretion for the trial judge to keep out convictions when the potential for prejudice outweighed the probative value of the prior conviction.[137] This omission drew criticism, so the next version of the rule gave judges discretion to exclude both *crimen falsi* crimes and general felonies.[138] But disapproval of this version led Congress to change the rule back to its initial draft, thus giving judges no discretion.[139] Various other solutions were offered, and ultimately, the Conference

---

130. Gold, *supra* note 12, at 2297.

131. *Id.* at 2298.

132. United States v. Smith, 551 F.2d 348, 360–61 (D.C. Cir. 1976) (noting that Rule 609 was "unquestionably the product of careful deliberation and compromise"); MCCORMICK ON EVIDENCE, *supra* note 110, § 42, at 63; Gainor, *supra* note 120, at 763 (calling the adoption of Rule 609 "the product of hard-fought political compromise"); Donald H. Ziegler, *Harmonizing Rules 609 and 608(b) of the Federal Rules of Evidence*, 2003 UTAH L. REV. 635, 650–51 (noting that "[c]ommentators almost universally characterize the final versions of Rules 608(b) and 609 as compromises" but also calling such characterizations "very charitable" and asserting that Congress "copped out" with its version of these rules).

133. *Smith*, 551 F.2d at 360.

134. Hornstein, *supra* note 12, at 6 ("The fierce debate surrounding adoption of [Rule 609] as well as its subsequent history evidences some of that controversy."); *see also* Gold, *supra* note 12, at 2302 (noting that "[t]he extent of the floor debate in the House over Rule 609(a) far exceeded that relating to any other provision in all the proposed Federal Rules of Evidence").

135. Hornstein, *supra* note 12, at 6–7.

136. *Id.* at 6–7.

137. *Id.* at 7.

138. *Id.*

139. *Id.* at 7–8.

Committee came to a "compromise," which is embodied in the current version of Rule 609.[140] *Crimen falsi* crimes are per se admissible, and general felonies may be admissible, subject to applicable balancing tests that weigh the probative value of the conviction against the prejudice to the defendant.[141] In 2006, Congress amended Rule 609 to make it clear that *crimen falsi* crimes require, in the establishment of their elements, proof of dishonesty or of a false statement to be per se admissible for impeachment purposes.[142] Since its enactment, Rule 609 has been widely criticized by scholars.[143]

2. Was Rule 609 Really a Compromise?

The debate over Rule 609 turned into a debate about the need for crime prevention and the need to protect criminal defendants' constitutional rights. Senator McClellan, who was "a powerful member of the Judiciary Committee and an outspoken advocate for prosecutorial interests," proposed a version of Rule 609 that would have rendered all felony convictions admissible against a criminal defendant—with no exceptions and with no judicial discretion to exclude prior convictions on the basis that the unfair prejudice outweighed the probative value.[144] Senator McClellan urged this proposed rule, which would require absolute admission of prior convictions with no exceptions, on behalf of himself and Senators Hruska, Roth, Talmadge, and Thurmond. Senator McClellan argued forcefully against an alternate proposal that would have limited the evidentiary use of prior convictions to only those crimes involving dishonesty and false statements by a criminal defendant.[145] Senator McClellan stated the following on the Senate floor:

> We have gone pretty far already in trying to protect criminals and granting every advantage to *them against society*. No one can deny that we provide every legal and legitimate right to make certain that a defendant charged with crime has a fair trial. And that aspect of the law should be defended and maintained. But why should one who has already been convicted of rape or murder and is later being tried for armed robbery, not be able to be questioned about his previous crimes, so that a jury might properly evaluate the credibility of the testimony he is giving—properly determine if he should be believed?[146]

---

140. *Id.* at 8; *see also* FED. R. EVID. 609.

141. *See* FED. R. EVID. 609.

142. *See* FED. R. EVID. 609(a)(2).

143. *See, e.g.*, Dodson, *supra* note 14, at 4 ("Current rules generally allowing prior conviction evidence place a premium on efficiently convicting people."); Friedman, *supra* note 13, at 678 ("Character impeachment evidence of an accused has virtually no probative value with respect to credibility, but its availability has tremendous prejudicial impact."); Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135, 137 (1989) ("Extrinsic crime evidence does weigh too heavily with the jury. It causes the jury to prejudge the case and to deny the defendant a fair trial on the specific charge in the indictment.").

144. Gold, *supra* note 12, at 2300, 2305.

145. 120 CONG. REC. 37,075–76 (1974).

146. *Id*. at 37,076 (emphasis added).

Senator McClellan's argument at first blush might have seemed focused on prior convictions as merely probative of credibility. However, as he continued with his remarks advocating the absolute admission of all prior convictions, he seemed to be concerned with more than just credibility determinations. He saw the use of prior felonies—as against criminal defendants—as a means of protecting society:

> Can it really be argued that the fact that a person has committed a serious crime—a felony—has no bearing on whether he would be willing to lie to a jury?
>
> Should a jury be denied that right? *Should society be denied the opportunity, in trying to protect itself*, in its effort to discover the truth, to show that the witness before it is a man who has committed such a crime and, therefore, might be willing to now lie to a jury? I think not.[147]

Senator McClellan saw his proposed rule as "fair" because all witnesses were treated the same under the rule. Moreover, he considered any further concessions to "the criminal" to be unfair to society and a threat to "the general welfare."

> Those witnesses who testified against him are also subject to the same test of credibility. . . . But to give a blanket exclusion to a defendant charged with a heinous crime from being challenged as to his credibility by being required to answer whether he has been convicted of a felony is placing a burden on society that it should not have to bear. It is an unwarranted and unjust shield for the criminal to the disadvantage of society.
>
> . . . .
>
> Mr. President, there is no justification in my judgment that could possibly warrant our making the precipitous change proposed in this bill—a change that can only weaken our efforts at law enforcement. It cannot result in perfecting society. *It cannot result in promoting the general welfare. It will serve only, Mr. President, to give further advantage to and to enhance the opportunity for convicted criminals to escape justice, by not permitting a jury to know of their criminal conduct and convictions in the past*. I hope this amendment will be adopted.[148]
>
> . . . .
>
> Surely a person who has committed a serious crime—a felony—will just as readily lie under oath as someone who has committed a misdemeanor involving lying. Would a convicted rapist, cold-blooded murderer or armed robber really hesitate to lie under oath any more than a person who has previously lied? Would a convicted murderer or robber be more truthful than such a person?
>
> Of course not!

---

147. *Id.* (emphasis added).
148. *Id.* (emphasis added).

> The fact that a person has committed such a serious offense in the past *clearly* bears on whether he would lie under oath where his life or liberty was in jeopardy.[149]

Interestingly, the final draft of Rule 609 is often touted as a "compromise" between those who proposed the admission of crimes involving false statement or dishonesty only and those who advocated for the per se admission of all felonies with no judicial discretion. In reality, however, those who adopted Senator McClellan's way of thinking gained the most in the so-called compromise. Despite the discretion that judges have to exclude prior convictions of criminal defendants, they routinely admit these convictions to impeach defendants. It has been determined that over seventy percent of criminal defendants who testify at their trials are impeached with evidence of their prior conviction.[150] While this number does not tell us the percentage of testifying defendants who actually have prior convictions, over seventy percent is a relatively high figure in and of itself. One can reasonably assume that there are testifying criminal defendants who do not have criminal records and for whom Rule 609 is not an issue. As a result, the percentage of defendants who receive the benefit of judicial discretion to exclude their prior convictions is likely quite low.

The reality is that defendants are routinely impeached with their prior convictions at trial.[151] Some courts have even admitted prior convictions against the criminal defendant without bothering to balance the probative value against the prejudicial impact or after improperly placing the burden of establishing prejudice on the defendant.[152] Given the broad discretion that trial courts enjoy under Rule 609 to admit or exclude evidence, some appellate courts have deemed trial courts' balancing determinations "virtually unreviewable."[153]

3. Reconsidering the Historical Development of the Prior Conviction Impeachment Rule in Its Social Context

The various studies highlighted later in this Article will demonstrate that the criminal justice system frequently uses race as evidence of bad character.[154] In some ways, what is most unfortunate about this use of race—particularly as it relates to Rule 609—is that there is nothing new about it. As discussed in Part II.A, during the same time period when Rule 609 was being developed, competency rules that prohibited testimony by convicted felons, criminal defendants, and Blacks were abandoned. It is

---

149. *Id.* at 37,076–77 (emphasis added).

150. Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1461 (2005) (citing H. KALVEN & H. ZEISEL, THE AMERICAN JURY 147 tbl.44 (1966)).

151. *See, e.g.*, Mirjan R. Damaska, *Propensity Evidence in Continental Legal Systems*, 70 CHI.-KENT L. REV. 55, 59 (1994) (noting that prior convictions are "routinely" used in common law jurisdictions); Greenawalt, *supra* note 108, at 45 (noting that there are various aspects of our criminal justice system that "threaten convictions of the innocent," including the "routine introduction of prior convictions to impeach defendants").

152. Gold, *supra* note 12, at 2322–23.

153. *Id.* at 2324.

154. *See infra* Part III.C.

important to note that there was substantial overlap between convicted felons, criminal defendants, and Blacks.[155] The abandonment of rules excluding convicted felons' and criminal defendants' testimony came with a cost to those persons who could then be impeached with their prior convictions.[156] It cannot be ignored that Blacks at that time made up a disproportionate share of the convicted felon and criminal defendant populations.

Professor Fisher draws an interesting racial link to the "explosion" of northern jurisdictions that abandoned the old competency rules with respect to criminal defendants after the Civil War.[157] Professor Fisher argues that northern states started the trend of allowing criminal defendants to testify in the 1860s to avoid arguments from southern states that they were hypocrites in demanding that southern states abandon their exclusion of Blacks from testifying in trials while still holding on to their own competency rules barring criminal defendants from testifying.[158] The justice system historically placed Blacks in essentially the same category as criminal defendants—"the most likely liars of all"[159]—and convicted felons; and the ability of criminal defendants to testify came about, in significant part, because of the rules that allowed Blacks to testify. The racial link in at least one southern state, for example, reflected notions of White supremacy, even the supremacy of a White criminal above a Black person. By liberalizing state competency rules against everyone, including criminal defendants, South Carolina legislators "protected even accused [White] criminals from [the] perceived ignominy" of ever being forced to sit silently while a Black person testified against him.[160] Eventually, of course, no White person in the United States, even a criminal defendant, would have to deal with this "ignominy."

To many, during both the antebellum and post-Civil War periods, Blacks and crime were synonymous. Historically, race was used in constructing criminality, both in terms of defining crimes and enforcing criminal law.[161] This construction of criminality was part of "[W]hite efforts to effectively criminalize and punish the very condition of being [B]lack."[162]

Indeed, during the post-Civil War period, there was a disproportionate number of Blacks in the criminal justice system, particularly in the South. The rapid criminalization of Blacks was fueled in large part by the "convict leasing" system, whereby "the Southern court system operated as an employment agency for [W]hite plantation owners, making the state-enforced bonded labor of [B]lacks and the prison

---

155. *See supra* Part II.A.

156. GEORGE FISHER, EVIDENCE 252 (2002).

157. Fisher, *supra* note 76, at 696–97.

158. *Id.*

159. *Id.* at 662.

160. *Id*. at 696.

161. *See* Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9, 16 (1999) (observing that "[t]he development of criminal justice policy suggests that racial considerations are of major consequence when it comes to formulating responses to illegal behavior" and noting, for example, that "[t]he history of national policy in regard to marijuana is clear in this regard").

162. R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 861 (2004).

system enormously profitable."[163] In the South, "[a]fter emancipation, the jailhouse became a [B]lack preserve," and "[o]ver ninety percent of the convicts were [B]lack."[164] The formal institution of slavery was systematically replaced by the penal system. Observers "had long lamented that the operations of the criminal justice system affected [Blacks] disproportionately" and believed that "[t]he end of the Civil War could only exacerbate matters."[165]

In Massachusetts, for example, the state prison warden publicly expressed his concern that there would be "a northward immigration of poor, unskilled freed slaves who would overburden the state's penal institutions."[166] Permitting criminal defendants and convicted felons to testify after the Civil War also meant permitting a substantial number of Blacks to testify. Perhaps this is another reason why southern states might have seen hypocrisy in northern states' taking pride in abandoning rules excluding Blacks from testifying while maintaining their rules that kept criminal defendants and convicted felons off of the witness stand.

The liberation of the competency rules for criminal defendants, a disproportionate number of whom were Black, would prove to be illusory at any rate because they could be impeached with their prior convictions. For example, in *Taylor v. State*[167]—a case decided not long after the abandonment of the competency rules—a Black defendant was impeached with his prior record and ultimately sentenced to death. Though the trial judge instructed the jury that they could not consider the defendant's prior record for any purpose other than assessing his credibility, he allowed the county attorney to argue the following:

> "I am well enough acquainted with this class of niggers to know that they have got it in for the race in their heart, and in their hearts call them all [W]hite sons of bitches."
>
> . . . "The only punishment you can give this negro bully is to end his earthly career. If you send him to the penitentiary, it will not reform him. He has been in the penitentiary for assault to murder, and it has had no effect on him. And he goes out the first thing and gets a big six-shooter, and goes to killing. He has been tried in the penitentiary, and that does no good, and you must not give him another chance in the penitentiary, for, if you do, he will watch his opportunity to kill the guards and escape."[168]

The Texas Court of Criminal Appeals reversed the defendant's conviction and sentence, finding that the trial court "should not only have reprimanded the counsel, but should have charged the jury to totally disregard such argument."[169] Even though

---

163. Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981, 1026–27 (2002).

164. Melvin Gutterman, "*Failure to Communicate": The Reel Prison Experience*, 55 SMU L. REV. 1515, 1528 (2002) (citing Matthew J. Mancini, *Race, Economics, and the Abandonment of Convict Leasing*, 63 J. NEGRO HIST. 339, 339, 343 (1978)).

165. Fisher, *supra* note 76, at 691 (citation omitted).

166. *Id.*

167. 100 S.W. 393 (Tex. Crim. App. 1907).

168. *Id.* at 393.

169. *Id.*

the appellate court ultimately reversed and ordered a new trial, the case is disturbing in that the trial judge allowed the prosecutor to appeal to fears of Black violence, to paint the defendant as a "negro bully" who was a career criminal with no chance of rehabilitation, and to claim that the defendant could only be stopped by imposing the death penalty. Also disturbing is the appellate court's suggestion that a mere limiting instruction would have cured the error.[170] This case demonstrates that in the intensely hostile climate for Blacks during the post-Civil War period, the rule that permitted Black criminal defendants to testify, subject to impeachment by their prior records, could only help reinforce the social control of Blacks through the criminal justice system.

Though the racial climate was not as openly hostile as in the days of *Taylor v. State*, the stereotype of the Black criminal—so deeply ingrained in the American psyche—was very much alive in 1975 when Rule 609 was adopted. So when Senator McClellan made his impassioned plea to adopt Rule 609 in its most restrictive form, with no judicial discretion and in order to protect society from the criminal elements, *i.e.*, "them,"[171] one must keep in mind that most people at that time—as is true today—saw a Black face when they thought about the criminal element in society. Indeed, such pleas by politicians have often been seen as appeals to racial bias, "rhetorical winks," as sociologist Jerry Himelstein has called them, referring to politicians' use of such rhetoric with race and class undertones.[172] In political and social dialogue, "conversations about welfare or crime are freighted with racial innuendo and resentment."[173]

> Sentencing and related criminal justice policies that are ostensibly "race neutral" have in fact been seen over many years to have clear racial effects that could have been anticipated by legislators prior to enactment. In some instances, the purported race neutrality has merely been a thin cover for racial intent.[174]

Rule 609 was passed during an era that saw the rapid proliferation of "get tough" on crime laws, which resulted in the mass incarceration of hundreds of thousands of persons, mostly minorities.[175]

As discussed above, scholars have roundly criticized Rule 609 for the dilemma that it poses for criminal defendants. Despite the richness of the scholarship in this area, there is a striking void in that there is no in-depth consideration of the current race implications of the prior conviction impeachment of criminal defendants. Because of this void, the current collective critique of Rule 609 is largely incomplete. Where a rule

---

170. *Id.* at 394.

171. *See supra* text accompanying notes 142–47.

172. Lani Guinier, *Clinton Spoke the Truth on Race*, N.Y. TIMES, Oct. 19, 1993, at A29.

173. *Id.*

174. Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 OHIO ST. J. CRIM. L. 19, 28 (2007).

175. *See* LEADERSHIP CONFERENCE. ON CIVIL RIGHTS LEADERSHIP CONFERENCE EDUC. FUND, JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 21–23, http://www.civilrights.org/publications/reports/cj/justice.pdf (discussing the "'tough on crime' movement of the past several decades" and noting that it has "led to incarceration rates for minorities far out of proportion to their percentage of the U.S. population").

has a disproportionate impact on a certain group, there must be a consideration of how the rule operates from the perspective of that group.

Based on the disproportionate impact alone, Rule 609 has harsh consequences for the Black community. Notably, in an essay on the judicial process, racism, and actual innocence, Judge Stephen Fortunato of the Rhode Island Superior Court pointed out the disproportionate impact of Rule 609 on Black defendants: "While the admission of a prior record hurts a defendant, whatever his color, Blacks wishing to testify in their own defense in a criminal trial are more disadvantaged as a group than [W]hites."[176]

Judge Fortunato's observation is an excellent starting place, as the studies are clear that Black defendants are more likely than Whites to have a criminal record. But there is more to the race problem of Rule 609 than just its disproportionate impact. To understand how Rule 609 both reflects and shapes the evidentiary meaning of character, we must look at why Blacks are more likely to have a criminal record than Whites. The racial disparity studies that I discuss in Part III have an underlying thread that connects them. That thread is character.

Misperceptions about the inherent character of Blacks lead to disparities in the way they are treated in the criminal justice system. Rule 609 then becomes a part of the cycle of the mischaracterization of Blacks. Rule 609 accepts, without question, the criminalization of a substantially disproportionate segment of the population based on perceptions of their character and serves to sustain this systemic mischaracterization.

What is not *overtly* stated in the legislative history of Rule 609 or in the scholarly commentary about Rule 609 is that when most people think of the stereotypical "criminal," regardless of their race, a Black face comes to mind.[177] Rule 609 perpetuates the belief that blackness equates bad character. As discussed above, the theory underlying the rule is that persons with certain prior convictions—those serious enough to be considered felonies in most jurisdictions or those involving dishonesty or false statement—are dishonest. This underlying theory is consistent with the historical stereotype of Blacks as dishonest.[178]

Rule 609 effectively permits juries to find that because the defendant previously committed a crime, he is a "bad" person generally. Thus, the more realistic evidentiary use of prior convictions under Rule 609 is as general character evidence. This use of the rule is also consistent with the idea that Blacks tend to have overall bad character.

D. Is Rule 609 Really a Problem for Criminal Defendants?

Judge Fortunato's comments regarding the disproportionate effect of Rule 609 on Blacks is significant as a practical matter, given his perspective from the bench.[179] His observations provide powerful evidence about the day-to-day practical impact of Rule 609 on criminal defendants, particularly Blacks. But putting race issues aside for a moment, one might wonder about the role that Rule 609 actually plays in practice on a day-to-day basis in the criminal justice system as a general matter. Does the existence

---

176. Stephen J. Fortunato, *Judges, Racism, and the Problem of Actual Innocence*, 57 ME. L. REV. 481, 505 (2005).

177. *See supra* Part I.B.

178. *See supra* Part I.B.

179. *See supra* text accompanying note 176.

of Rule 609, though often criticized by scholars, have much of an impact as a practical matter? The answer is an unqualified "yes."

1. Effect on Plea Bargaining

Of course, it is widely known that the vast majority of criminal cases do not go to trial. In fact, around ninety-five percent of criminal defendants enter guilty pleas.[180] Because Rule 609 is a rule that governs in the event of a trial, one may wonder about its impact as a practical matter. Though criminal trials are relatively few and far between, Rule 609 is nevertheless an important rule—even outside of the courtroom.

As any good litigator knows, the rules of evidence are important not only at trial but also, and perhaps more so, during the pretrial stage of a case. Knowing beforehand the likelihood that certain information will or will not be admissible aids significantly in evaluating the strength of a case. Indeed, available data and common experience demonstrate that Rule 609 is a very real threat to criminal defendants with prior records, one that they consider—and which is often at the forefront of their minds—in deciding whether or not to go to trial. The real fear of being impeached dissuades defendants from taking the stand if they go to trial and, in a number of cases, from even going to trial at all.

In recounting the history of plea bargaining, Professor George Fisher notes that "[t]he upshot [of] a law that purported to grant defendants a new right to testify at trial instead deprived those defendants who had criminal records of the right to any meaningful trial, and left them with little alternative but to seek the best plea bargain they could get."[181] Fisher observes that "[t]he dramatic conversion to a plea bargaining regime" began a relatively short period after defendants gained the right to testify and, in turn, gained the risk of impeachment with their prior convictions.[182] Indeed, the criminal defendant impeachment rules serve as "strong allies" that aid in promoting the plea bargaining system.[183] Empirical evidence also demonstrates that whether a defendant has a prior conviction is among the crucial considerations that a criminal defendant and her lawyer take into account when deciding whether to forgo a trial and to accept a plea agreement.[184]

2. Effect on Decision to Testify

Should they decide to take their chances and go to trial, defendants with prior criminal records face the dilemma of whether to testify and tell their story or to sit silently while other trial participants develop the story without them. And silent

---

180. Natapoff, *supra* note 150, at 1462 (citing U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 416 tbl.5.17, 448 tbl.5.46 (2002), *available at* http://www.albany.edu/sourcebook/archive.html).

181. GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 107 (2003).

182. *Id.* at 109.

183. *Id.*

184. DEBORAH S. EMMELMAN, JUSTICE FOR THE POOR: A STUDY OF CRIMINAL DEFENSE WORK 41 (2003).

criminal defendants must face the fact that jurors want to hear a narrative.[185] In fact, studies have shown that the narrative aspect of trials is of paramount importance.[186]

> [T]rials are essentially "story-battle[s].". . . The jurors then compare their own stories with those offered by the parties. The side who can offer a story which the juror accepts as the "best" explanation of the evidence presented, and the closest match to his or her own narrative, will win the juror's vote in the end.[187]

Thus, jurors construct their own stories and compare them to those that the prosecution and defense presented. They base their comparisons in part on what they believe makes a "complete story."[188] In the end, "[t]he defendant's ability to tell the right story—and to tell it completely—is a powerful influence on the outcome of a trial and thus central to the protection of his constitutional right to present a complete defense."[189] Rule 609 greatly diminishes the criminal defendant's ability to present a narrative, or at least a believable narrative, to the jury.[190] A criminal defendant who is unable to make his own "contribution" to the jury's constructed narrative is at a significant disadvantage.

The United States Constitution, as interpreted by the Supreme Court, guarantees criminal defendants the right to testify in their own defense. Specifically, the Supreme Court has stated that "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment, . . . or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, . . . the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"[191] Facing the very real likelihood that the prosecution will use their prior convictions to impeach them, many defendants simply remain silent.[192] This fact severely undermines criminal defendants' constitutional right to testify in their own defense. Indeed, it has even been argued that this forced silence is antithetical to the high value that our democracy places on speech and freedom of expression.[193]

A recent article by Professor John Blume provides empirical data that impeachment through prior convictions is of great concern to criminal defendants, even deterring defendants who are later proven to be *factually innocent* from testifying on their own

---

185. John H. Blume, Sheri L. Johnson & Emily C. Paavola, *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense*, 44 AM. CRIM. L. REV. 1069, 1087–91 (2007).

186. *See id.* ("It is now widely accepted, and empirical research demonstrates, that narrative plays an important role throughout the entire trial process. . . . [J]urors organize and interpret trial evidence as they receive it by placing it into a story format . . . .").

187. *Id.* at 1089.

188. *See id*.

189. *Id.* at 1091.

190. *See* Natapoff, *supra* note 150, at 1461 (noting that Rules 609 and 404(b) of the Federal Rules of Evidence "threaten the defendant's ability to be heard by the jury. Past crimes and bad acts impair credibility, and make the defendant a less believable storyteller").

191. Crane v. Kentucky, 476 U.S. 683, 690 (1986) (quoting California v. Trombetta, 467 U.S. 479, 485 (1984) (citations omitted)).

192. *See* Natapoff, *supra* note 150, at 1462 (explaining that prior criminal histories work to silence defendants who choose to "keep quiet" rather than subject themselves to the prejudice associated with their prior convictions).

193. *See id.* at 1449–57.

behalf.[194] Professor Blume studied cases in which individuals were convicted and later exonerated because of DNA evidence. He found that "demonstrably innocent defendants do not testify in their own defense at substantially different rates than criminal defendants in general" and that "[v]irtually all of the defendants who did not testify had a prior record which would have been disclosed to the jury had they taken the stand."[195] Either the defendants or their lawyers (or both) justifiably believed that once the jurors heard about their prior convictions, they were more likely to convict them on the basis that "the defendant is the type of person who would have done it."[196] Blume's data has led him to "conclude that the *current rules of evidence contribute to wrongful convictions*."[197]

Thus, Rule 609, which is a powerful tool in a prosecutor's arsenal, has a tremendous impact in the criminal justice system. The power of Rule 609 generally, coupled with its impact from a race standpoint, makes it all the more important to explore its reliability.

III. THE UNRELIABILITY OF PRIOR CONVICTIONS

Because Rule 609 gives evidentiary value to race through its reliance on a racially biased criminal justice system, it is helpful to look to evidentiary principles to evaluate the soundness of the prior conviction impeachment practice. The racial bias that is inherent in the practice sets up an interesting evidentiary problem that scholars have not considered up to this point. The Black tax in the entire criminal process operates unjustifiably to criminalize Blacks, whereas the White credit operates unjustifiably to redeem White criminals. The fact that these racially based taxes influence the convictions used for impeachment suggests that the convictions, and more importantly, the system through which they were obtained, are an unreliable source from which to determine character.

The unreliability of prior convictions as means to assess character significantly reduces their probative value for impeachment purposes. The fact that Blacks are likely to face even more prejudice than Whites when impeached with their prior convictions compounds the unreliability problem with prior conviction impeachment. These problems raise serious due process issues with respect to the use of prior convictions to impeach Black defendants. I will explore these due process concerns in Part IV.

In this Part, I establish that prior convictions are a form of hearsay and that the exceptions that allow for their admissibility to impeach unjustifiably presume the reliability of the convictions. I then show that the justice system under which Blacks are convicted in this country is not a reliable "hearsay declarant," particularly with respect to assessing character. I demonstrate how misperceptions of character based on race influence the pretrial process and the presentation and adjudication of cases that actually do go to trial. I also take a closer look at two issues that are particularly troubling from a race and perception standpoint: drug offenses and the juvenile justice

---

194. John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted* 1, 3–4, 15–20 (Cornell Law Sch. Legal Studies Research Paper Series, Paper No. 07-017, 2007), *available at* http://lsr.nellco.org/cornell/lsrp/papers/83/.

195. *Id.* at 3.

196. *Id.* at 3–4.

197. *Id.* at 4 (emphasis added).

system. These two aspects of the criminal justice system play a large and largely unfair role in the construction of Black criminality.

A. Recognizing Prior Convictions as Hearsay

Prior convictions are hearsay.[198] The definition of hearsay in the Federal Rules of Evidence is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[199] Stated another way, hearsay is an out of court statement offered to prove the truth of the matter asserted. A prior judgment used in the impeachment context fits the classic definition of hearsay.[200] It is a statement, or assertion, that was made by another court, that is, the declarant, outside of the current proceedings.[201] Additionally, when used to impeach in the Rule 609 context, a prior judgment is offered to prove that the witness, often the defendant-witness, was convicted and in fact committed the underlying crime for which he is being impeached.

One might argue that prior convictions admitted under Rule 609 are admitted for impeachment purposes and not for the truth of the matter asserted. Stated another way, the argument might go that it is the very fact of conviction that impeaches, and the "statement" that the criminal system makes regarding the underlying conduct is irrelevant. Even though Rule 609 ultimately allows for impeachment, "it is the underlying conduct that impeaches."[202] Rule 609, therefore, is an exception to the hearsay rule.[203] Rule 609 does not expressly state that it is an exception to the hearsay

---

198. *E.g.*, Hiroshi Motomura, *Using Judgments as Evidence*, 70 MINN. L. REV. 979, 980–91 (1986) (noting that prior judgments, including prior criminal convictions, are hearsay).

199. FED. R. EVID. 801(c).

200. *See, e.g.*, Ronald N. Boyce & Edward L. Kimball, *Utah Rules of Evidence 1983—Part III*, 1995 UTAH L. REV. 717, 799–800 ("While Rule 609 allows proof of convictions to impeach, it is the underlying conduct that impeaches. In that sense Rule 609 is de facto an additional exception to the hearsay rule.").

201. *See id.*

202. *Id.* at 799.

203. *See* Miguel A. Mendez, *Comparing the Federal Rules of Evidence with the California Evidence Code—Proposition 8 and the Wisdom of Using Initiatives as a Rulemaking Device*, 36 SW. U. L. REV. 571, 583 (2008) ("Impeachment by convictions implicates the hearsay rule because of their value as evidence of a witness's character for lack of veracity."); Miguel A. Mendez, Crawford v. Washington: *A Critique*, 57 STAN. L. REV. 569, 594 (2004) (explaining that "when the records are offered to prove the misconduct underlying the conviction, the hearsay rule is seriously implicated because multiple layers of hearsay are involved"); Motomura, *supra* note 198, at 980–91 (noting the prior judgments, including prior convictions, are hearsay); Roger C. Park, *The Definition of Hearsay: To Each Its Own*, 16 MISS. C. L. REV. 125, 133 (1995) (discussing a statute prohibiting persons convicted of a felony from carrying a gun and noting that "evidence of the conviction is hearsay when offered to show that the convicted person actually committed the crime that led to conviction"). Outside the impeachment context, the Federal Rules of Evidence expressly recognize prior convictions as hearsay. Under a specific hearsay exception in the Federal Rules, Rule 803(22), prior convictions are admissible in criminal and civil trials. This rule specifically permits the admission of evidence of prior convictions, with the exception of those resulting from *nolo contendere* pleas, in civil and criminal cases to prove "any fact essential to sustain the

rule, but such an express statement is wholly unnecessary. In the Federal Rules of Evidence, certain rules operate as exceptions to more general ones and do not expressly state that they are exceptions in other instances.[204]

At any rate, to understand why Rule 609 is an exception to the general rule against hearsay, also consider that Rule 609 is an express exception to Rule 404, which bans the use of character evidence to show that someone acted in conformity with his or her character on a particular occasion. Rule 404 specifically states that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except . . . [e]vidence of the character of a witness, as provided in Rules 607, 608, and 609."[205] As a result, the probative value of a prior conviction under Rule 609 is not in the conviction itself but in what that conviction says about the convicted person's character. Thus, it is indeed "the underlying conduct that impeaches," not the person's mere status as a convicted felon.[206]

In *People v. Wheeler*, the California Supreme Court observed that California's version of the prior felony conviction impeachment rule, which parallels Rule 609, is in fact an exception to the rule against hearsay.[207] And because the California prior conviction impeachment rule provided for the admissibility of felonies only, the court held that there was no exception to the hearsay rule for prior misdemeanor convictions and that such convictions are inadmissible.[208] The court rejected the government's argument that the fact of conviction itself, and not the underlying conduct, was the relevant aspect for impeachment purposes.[209] The court observed that "[a]nalytically, a judgment that is offered to prove the matters determined by the judgment is hearsay evidence. It is in substance a statement of the court that determined the previous action [i.e., other than by a testifying witness] . . . that is offered to prove the truth of the matter stated."[210]

B. Race and the Unreliability of Prior Convictions

1. Back to Basics: The Testimonial Infirmities of the Hearsay Declarant

The general rule against the admission of hearsay in criminal and civil trials is well established. The theory underlying the hearsay rule is that it is far more reliable to have live testimony that is subject to cross-examination than to have hearsay testimony. The hearsay rule is, therefore, concerned with reliability.

---

judgment." FED. R. EVID. 803(22).

204. *See, e.g.*, FED. R. EVID. 413–15 (allowing inquiry into specific instances of certain sexual misconduct without noting that doing so is an exception to Rule 405's directive that, in cases where character evidence is admissible against an accused, inquiry is limited to reputation and opinion evidence on direct examination).

205. FED. R. EVID. 404(a).

206. Boyce & Kimball, *supra* note 200, at 799.

207. 841 P.2d 938, 947 (Cal. 1993).

208. *Id.* ("There can be no doubt that the hearsay objection to use of misdemeanor convictions remains valid.").

209. *Id.*

210. *Id.* at 946 (citation omitted in original).

As Professor Laurence Tribe stated in his well-known piece, *Triangulating Hearsay*, "[t]he basic hearsay problem is that of forging a reliable chain of inferences, from an act or utterance of a person not subject to contemporaneous in-court cross-examination about that act or utterance, to an event that the act or utterance is supposed to reflect."[211] Professor Tribe conceptualized these inferences in his famous "testimonial triangle."[212]

In the first "link" of inferences that are made with respect to hearsay, we are concerned with what was actually on the declarant's mind when she made the utterance or acted.[213] We are concerned in the second link with the accuracy of the declarant's beliefs in relation to the reality of the external event about which she spoke.[214] We are able to test these inferences for possible inaccuracies when a witness testifies in court.[215] However, if the declarant's utterance or act is brought out in a manner other than through her testimony at trial under oath, then a process is being undertaken that "has long been regarded as particularly suspect."[216] The trier of fact is unable to observe the declarant under oath and cannot consider her demeanor and her verbal and nonverbal reactions to the conditions of cross-examination.

The hearsay rule is concerned with the inability to test evidence through cross-examination. Indeed, cross-examination has been deemed the most effective tool available for truth-seeking. Wigmore remarked that cross-examination is "the greatest legal engine ever invented for the discovery of truth."[217] Courts have also recognized the power and importance of cross-examination. For example, one state supreme court noted that cross-examination "is a safeguard essential to a fair trial and a cornerstone in the quest for truth."[218]

As a matter of constitutional law, the Sixth Amendment embodies the rights of confrontation and cross-examination in criminal cases. But the United States Supreme Court has said that "[i]n almost *every* setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."[219] The Court has further observed that the rights of confrontation and cross-examination "have ancient roots" and that the Court is "zealous to protect these rights from erosion" not just in criminal cases, but in "all types of cases where administrative actions [are] under scrutiny."[220]

Cross-examination is so crucial because it tests for inaccuracies in testimony that can arise from four important "testimonial infirmities": ambiguity, insincerity, faulty perception, and erroneous memory.[221] Evidence from an out of court hearsay declarant simply cannot be tested for these infirmities.

---

211. Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958 (1974).
212. *Id.* at 958–59.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (James H. Chadbourn rev. 1974).
218. Davidson v. Great Nat'l Life Ins. Co., 737 S.W.2d 312, 314 (Tex. 1987).
219. Goldberg v. Kelly, 397 U.S. 254, 269 (1970) (emphasis added).
220. *Id.* at 270 (quoting Greene v. McElroy, 360 U.S. 474, 496–97 (1959)).
221. Tribe, *supra* note 211, at 958.

As any law student who has studied evidence knows, there are a plethora of exceptions to the general rule against hearsay. For the most part, these exceptions exist because they pertain to the types of statements made under circumstances that are thought to provide some assurances of reliability and trustworthiness.[222] For example, there is a well-known exception for "excited utterances."[223] Under this exception, statements that the declarant made while he was still under the stress or excitement of an event will be admissible.[224] Similarly, there is an exception for so-called "dying declarations."[225] Under this exception, statements that a declarant makes while believing that his death is imminent are admissible.[226] The theory underlying these sorts of exceptions is that they were made under circumstances that assure their reliability. The theory assumes that people who are under the stress or excitement of an event or what they think is their impending death are less likely to be insincere in their statements.[227] An additional exception exists for "present sense impressions," which covers statements made while the declarant perceives an event or occurrence.[228] The contemporaneous nature of such statements is thought to ensure accuracy in perception.[229]

As Professor Tribe notes, some exceptions exist because there are assurances of reliability with respect to "one leg" in the testimonial triangle, which is "thought to reduce the triangle's weaknesses so substantially that the balance of untrustworthiness and likelihood of probative value favors admissibility of the evidence."[230] In these instances, "one good leg is enough."[231] Thus, the assurances of reliability with respect to perception may be strong enough to overcome the other testimonial infirmities.

The underlying justification for the hearsay exception for prior convictions[232] is that criminal convictions are deemed "reliable and trustworthy," given the various checks in the criminal process.[233] The assumption is that, in the prior proceedings, the accused had every incentive to defend the case vigorously.[234] After all, his freedom was at stake, as was his reputation due to the stigma attached to a criminal conviction. Additionally, because criminal trials are subject to the taxing *beyond a reasonable doubt* standard, prior convictions are presumed to be accurate.[235] Even the process and procedures for obtaining guilty pleas are assumed to have adequate protections in place to ensure the integrity of the conviction. As a result, convictions resulting from guilty

---

222. *See id.* at 965–69.
223. FED. R. EVID. 803(2); *see also* Tribe, *supra* note 211, at 969.
224. FED. R. EVID. 803(2).
225. FED. R. EVID. 804(b)(2).
226. *Id.*; *see also* Tribe, *supra* note 211, at 966–69.
227. Tribe, *supra* note 211, at 966–67.
228. FED. R. EVID. 803(1).
229. Tribe, *supra* note 211, at 965.
230. *Id.* at 964.
231. *Id.* at 966 (emphasis omitted).
232. FED. R. EVID. 803(22).
233. Motomura, *supra* note 198, at 988–89.
234. *Id.* at 989.
235. *Id.*; *see also* People v. Wheeler, 841 P.2d 938, 946 (Cal. 1992) (stating that a prior felony conviction is "peculiarly reliable" because of the "seriousness of the charge," and the reasonable doubt standard will ensure "full litigation" such that "the question of guilt will be thoroughly considered").

pleas are also deemed reliable enough to overcome the hearsay rule and can be used to impeach.[236]

No one has ever really challenged the reliability of prior convictions; it has simply been assumed, for the reasons discussed above, that such prior judgments by previous courts are inherently reliable. The mounting evidence of substantial racial bias in the criminal justice system, however, necessitates that these assumptions be challenged. When study after study demonstrates that Blacks are targeted far more often than Whites, are charged with more serious crimes than Whites, and are more likely than Whites to be introduced to the adult criminal system as juveniles, we must consider whether continued blind faith in the criminal justice system is really warranted. The badly fractured system has left the hearsay exception for prior conviction impeachment without a leg to stand on.

2. Multiple Layers of Hearsay

A prior conviction is a judgment from a previous court, and it represents that court's pronouncement about the guilt of the convicted person.[237] But the conviction itself relies on multiple pronouncements from various officials and other participants in the criminal process. In crimes involving victims, the system relies on assertions from victims about their perpetrators. The system also relies on the statements of witnesses other than the victims in determining what has occurred and in reconstructing the story of the crime.

The system, of course, relies heavily on police. Police make pronouncements on a daily basis that set series of events in motion, ultimately leading to convictions. With regard to traffic stops, they decide whose behavior is suspicious and who needs to be stopped. They then decide who to pursue further and who to let go with just a warning. Their actions are all assertions about what constitutes criminality and criminal behavior.

Prosecutors make pronouncements in deciding what cases to prosecute and the severity of the charges in a particular case. Judges make pronouncements in their dealings with criminal defendants before them—including whether there is sufficient evidence for a criminal case to proceed, whether to accept a plea agreement, and the final sentence. In cases that actually go to trial, jurors are most often the ultimate determiners of whether a defendant is guilty or not guilty. Moreover, legislatures are in a sense hearsay declarants in their construction of criminal statutes, particularly those that have a disparate impact on specific groups of people.

Thus, the criminal process is a complex one in which many declarants' statements or nonverbal assertions may ultimately lead to conviction. And all along the way, there is a very real likelihood that a particular declarant's misperceptions based on race biases caused her to make certain statements or assertions. As discussed above, the hearsay rule is based on concerns with the testimonial infirmities of ambiguity, faulty memory, insincerity, and perception.[238] Based on the studies that I discussed above and on other race critiques of the criminal justice system, perception, or misperception,

---

236. Motomura, *supra* note 198, at 989.

237. *See* FED. R. EVID. 803(22).

238. *See supra* text accompanying note 221.

tends to be the infirmity that invades the criminal process most often. I do not mean to say that the other infirmities are inapplicable; indeed, perception problems based on race can lead to problems of ambiguity, faulty memory, and insincerity. Unfortunately, intentional racism still exists and can lead to the untrustworthiness of convictions, but it seems that perception is at the root of the race bias problem in the criminal process.

C. Perception, Race, and Prior Convictions

As Professor Tribe notes, the inability to test the hearsay declarant's perception of the event he is speaking about presents one of the problems with hearsay.[239] A hearsay declarant may speak about an event that he misperceives. Without in-court cross-examination, we cannot effectively expose this infirmity to the jury. When a defendant is impeached with his prior conviction, the jury will simply find out that the defendant has a prior felony conviction and the name of the crime for which the defendant was convicted.

Juries ordinarily do not hear about the various biases in the criminal process. This is particularly problematic for a Black defendant with a prior record. A jury may not realize that the legislature has constructed Black criminality through the creation of laws, such as those discussed below dealing with drug offenses.[240] Moreover, jurors may not realize that the enforcement of criminal statutes often operates in a way that constructs Black criminality.

Also, there may have been witness and juror perception problems that led to the Black defendant's prior conviction. Both White witnesses and White jurors expect criminals to be Black.[241] Thus, in the case of a violent crime involving a White victim and a Black defendant, a White witness might remember the Black person to be the aggressor in an episode in which the White person was actually the aggressor.[242] Professor Dorothy Roberts has noted that "[t]he unconscious association between [B]lacks and crime is so powerful that it supersedes reality: it predisposes [W]hites to literally *see* [B]lack people as criminals."[243] Prior conviction impeachment, with its blind reliance on the hearsay declarants, will never expose this phenomenon of race-based misperception to a jury.

Additionally, the presumed reliability of prior convictions does not take into account the reality of the plea-bargaining machine, which mass produces convictions in an assembly line fashion. One judge candidly admitted that racial bias can seep into the day-to-day grind of keeping the massive plea bargaining machine going:

---

239. Tribe, *supra* note 211, at 958.

240. *See infra* Part IV.C.3.

241. Sheri Lynn Johnson, *Cross-Racial Identification Error in Criminal Cases*, 69 CORNELL L. REV. 934, 950–51 (1984); *see also* R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1103–04 (2001) (noting that "stereotypes and expectancies might systematically bias patterns of misperception such that victims are more likely to erroneously implicate a racial minority as a criminal perpetrator than to erroneously implicate a [W]hite"); Roberts, *supra* note 45, at 1953–54 (discussing cross-racial identification and noting that Blacks are disproportionately misidentified, in part, because of "[W]hite witnesses' presumption of [B]lack criminality").

242. Johnson, *supra* note 241, at 950.

243. Roberts, *supra* note 45, at 1954 (emphasis in original).

> There's great pressure to say: "Look, we have time for X cases today, and the calendar has X plus 200. We're going to have to hurry. Go out and deal". . . . In that process, it is certainly possible that preconceived notions and misconceptions and stereotypes can creep in.[244]

It is important to note that the misperception problem with prior convictions also operates in a way that can mislead jurors about White defendants and White witnesses. If a White defendant or a White witness does not have a prior record, the jury will assume that the person has led an honorable life and is worthy of belief. This is at least consistent with the theory underlying the practice of prior conviction impeachment, which states that a jury might be misled into thinking that the witness is trustworthy without this impeachment method. White credit in the criminal justice system, then, misleads juries who evaluate the testimony of White defendants and other White witnesses. A White defendant who has managed, because of the White credit, to keep his record clean—at least to this point—will likely be viewed quite differently from a Black defendant who has had numerous run-ins with the law because of the Black tax. In short, race has become evidence through Rule 609, and it is unreliable evidence.

Below, I explore specific areas that highlight and expose the race perception problem in the criminal justice system. Specifically, I consider pretrial processing and the trial setting. I also give special consideration to the race issues surrounding drug laws as well as the juvenile justice system.

1. Pretrial Processing

A felony conviction is the culmination of a number of events that occur during the pretrial process. Studies have demonstrated that a substantial amount of the system's racial bias manifests in the pretrial process. These studies have shown "consistent and substantial evidence that Black and Latino defendants receive less beneficial pretrial decisions than do White defendants with similar legal characteristics."[245] In fact, "[t]he available evidence suggests that disparities at this stage of criminal processing may be larger and more consistent than disparities in sentencing."[246]

In 2007, the Justice Department released a national study analyzing traffic stops, finding that police are more likely to search Black and Hispanic drivers.[247] In 2005, police across the country stopped around eighteen million drivers, finding evidence of criminal activity in twelve percent of their searches.[248] The study found that while police stopped Whites, Blacks, and Hispanics at "similar rates," disparities in treatment

---

244. Christopher H. Schmitt, *Plea Bargaining Favors Whites as Blacks, Hispanics Pay Price*, SAN JOSE MERCURY NEWS, Dec. 8, 1991, at 1A (quoting Alameda County Superior Court Judge Ken Kawaichi).

245. Traci Schlesinger, *The Cumulative Effects of Racial Disparities in Criminal Processing*, 7 J. INST. JUST. & INT'L STUD. 261, 262 (2007) (discussing Demuth's 2003 study and Schlesinger's 2005 study).

246. *Id.*

247. Donna Leinwand, *Black Drivers Searched More Often, Feds Say; Disparities Appear After Initial Stop*, USA TODAY, Apr. 30, 2007, at 3A (discussing U.S. Department of Justice study in detail).

248. *Id.*

occurred after the initial stops.[249] Police searched Black drivers around three times the rate they searched White drivers and arrested Black drivers twice as often as White drivers.[250] Moreover, Blacks reported that police used force against them at over three times the rate that Whites reported the use of force.[251] Unfortunately, racial disparities in treatment exist in other aspects of the criminal process. Recent studies have shown that even when the same alleged criminal conduct is involved, Blacks are more likely to actually be incarcerated upon conviction.[252]

> Across this country, there are two justice systems–one for [B]lacks and one for [W]hites. Black (and Latino) young men are not more likely to commit crimes than [W]hites. But they are more likely to be stopped by police, more likely to be arrested if stopped, more likely to be charged if arrested, more likely to be jailed if convicted, more likely to be charged with felonies, and more likely to be tried and imprisoned as adults.[253]

This two-tiered system of justice is pointedly reflected in a 2004 study by the *Miami Herald* finding that "White criminal offenders in Florida are nearly 50 percent more likely than [B]lacks to get a 'withhold of adjudication,' a plea deal that blocks their felony convictions even though they plead [guilty] to the crime."[254] The study also concluded that "White Hispanics are 31 percent more likely than [B]lacks to get a withhold."[255] Unconscious racism—according to a criminal defense lawyer interviewed for the study—accounts for the disparity in the manner that prosecutors and judges handle cases of Black defendants: "Most prosecutors and some judges see the potential for salvation in a [W]hite defendant. With a [B]lack defendant, they see the destruction of a civilized society."[256]

Prosecutors and other commentators, who deny that race is a factor in these disparities, point to "pure economics."[257] White defendants often can afford to hire attorneys "who get them the break," whereas most Black defendants cannot and must rely on public defenders.[258] But significant disparities remained even when Black and White defendants had the same kind of legal representation—private or public.[259]

The newspaper's analysis of over 800,000 felony cases from 1993 to 2002 revealed "a system that is more likely to punish [B]lacks than [W]hites in the same

---

249. *Id.*

250. *Id.*

251. MATTHEW R. DUROSE, ERICA L. SMITH & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2005 8 (2007), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cpp05.pdf.

252. *See, e.g.*, Schlesinger, *supra* note 245, at 262–63 (noting differential treatment between Black, Latino, and White defendants whose cases have "similar legal characteristics").

253. Jesse Jackson, *Racially Biased Justice Still Infects American Courtrooms*, CHI. SUN-TIMES, Sept. 18, 2007, at 29.

254. Manny Garcia & Jason Grotto, *Odds Favor Whites for Plea Deals*, MIAMI HERALD, Jan. 26, 2004, at 1A.

255. *Id.*

256. *Id.* (quoting H.T. Smith, a South Florida criminal defense lawyer).

257. *Id*.

258. *Id.*

259. *Id.*

predicament."[260] Interestingly, the disparity was at its highest in drug cases, where White defendants were "nearly twice as likely to get the break [a plea deal with no felony conviction] as Blacks charged with the same crime."[261] These disparities persist despite the sentencing guidelines, which Florida adopted to deal with inequalities in sentencing.[262] The study related an anecdote about two teenagers charged in separate stabbing cases. One young man, Edward Cobbs, was Black and the other, Jared Smith, was White. They each had "identical score sheets" for purposes of the sentencing guidelines. Nevertheless, Smith received a withheld adjudication and two years of house arrest. He was also permitted to work and go to school. A police sergeant remarked that Smith received "an amazing deal." The victim's father, disappointed with the outcome, said that "[t]his thug should be in prison."[263] Cobbs, on the other hand, did not fair so well. Like Smith, Cobbs was charged as an adult, but there was evidence that he had a mental disorder. He was on medication for the disorder, and even the victim's family thought that he should be placed in a mental health program. The judge in Cobbs' case, however, thought that Cobbs' crime was "too violent to withhold adjudication" and sentenced Cobbs to two years in prison and four years of probation.[264]

These types of biases do not exist solely in Miami. The *San Jose Mercury News* reviewed around 700,000 cases in California and found statistical evidence that compared to Blacks, Whites had better chances of: receiving "interest of justice" dismissals, having their felony charges reduced to misdemeanors, having the number of charges against them reduced, receiving alternative punishments, and avoiding state prison sentences.[265] Specifically, the newspaper stated:

> At virtually every stage of pretrial negotiation, [W]hites are more successful than non-[W]hites. They do better at getting charges dropped. They're better able to get charges reduced to lesser offenses. They draw more lenient sentences and go to prison less often. They get more chances to wipe their records clean.[266]

The bottom line was that "[W]hites as a group get significantly better deals than Hispanics or [B]lacks who are accused of similar crimes and who have similar criminal backgrounds."[267]

A related *San Jose Mercury News* article—citing a federal crime victimization survey—asserted that:

> Six of every 10 times a woman is raped in California, an assault is committed or someone gets robbed, it's a [W]hite person who's the offender . . . . Yet you'd never know [W]hites commit so many of these crimes from the march of suspects into police stations or the parade of defendants before judges. More than six of

---

260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*
265. Schmitt, *supra* note 244.
266. *Id*.
267. *Id*.

> every 10 people arrested for these violent crimes are non-[W]hite, a review of hundreds of thousands of cases shows.[268]

The newspaper noted that police made unfounded arrests of Blacks and Hispanics at rates "sharply higher" than that of Whites.[269] Some argued that this disparity "stems from police mounting crackdowns on crime in non-[W]hite neighborhoods and using looser standards for arresting members of minorities while they're doing it."[270]

But there is also some racial bias amongst judges in the pretrial process. One California judge, who was at the time "widely seen as one of Santa Cruz County's most liberal, most compassionate judges," openly used the race of a Hispanic defendant as evidence to determine whether or not the police had probable cause to arrest him.[271] The judge, who had been on the bench for fifteen years, found probable cause for an arrest in a drug case based in part on the fact that "the suspected seller was a Hispanic in a Hispanic part of town."[272] When questioned in an interview about this incident, the judge said that he was "absolutely perplexed" and noted that he has "nothing but compassion for people of all races."[273] He went on to defend his use of race in determining whether there was probable cause: "Am I to ignore the facts before me, the fact it was a Hispanic at that particular location? . . . *That's a consideration. I don't have any cases involving anybody but Hispanics at that location*."[274] No one seemed to dispute that this judge tries to be fair and sensitive, but that fact highlights a large part of the problem. Despite earnest efforts to treat criminal defendants fairly, influential decision makers in the criminal process often "lapse into ethnic insensitivity nonetheless," causing them to rely on race as evidence.[275]

It is important to note that disparities in the treatment of Blacks in the justice system occur at every stage of the process. As one commentator noted, "You see prosecutors unable to understand the person's life experiences, and say, 'I'm not willing to bargain,' unless they can identify with them."[276] Additionally, Jeffrey Butts, formerly of the Urban Institute in Washington, D.C., has noted that there is an empirical bias "at each stage of the process" and that "[b]y the time you reach the end, you have all minorities in the deep end of the system."[277]

Because the Miami and California studies took place in locations with large concentrations of minorities, the question arises as to whether the exposed bias is limited to such areas. But consider the case of Minnesota, where Blacks are a relatively

---

268. Christopher H. Schmitt, *Ethnic Disparities Start with Arrests: Many More Blacks, Hispanics Taken into Custody, Then Freed*, SAN JOSE MERCURY NEWS, Dec. 9, 1991, at 8A.

269. *Id.*

270. *Id.*

271. Christopher H. Schmitt, *Local Judge's Remarks Labeled as Insensitive*, SAN JOSE MERCURY NEWS, Dec. 9, 1991, at 1A.

272. *Id*.

273. *Id*. (internal quotations omitted).

274. *Id.* (emphasis added) (internal quotations omitted).

275. *Id*.

276. Christopher H. Schmitt, *Getting Minorities Fairer Plea Bargains*, SAN JOSE MERCURY NEWS, Dec. 10, 1991, at 1A.

277. Ctr. on Juvenile & Criminal Justice, CJCJ: Race and the Juvenile Justice System, http://www.cjcj.org/jjic/race_jj.php (last visited Sept. 16, 2008).

small segment of the population. A recent report by Minnesota's Council on Crime and Justice asserted that "[t]he racial disparity in Minnesota's justice system is one of the worst in the nation."[278] Thus, it seems that disparities in the arrests and convictions of Blacks and other minorities are not limited to areas with a large minority population.

As part of its "Racial Disparity Initiative," the Council on Crime and Justice has conducted several studies in Minnesota and produced various reports noting their findings and making recommendations.[279] The Council has observed that in Minnesota, where Blacks made up approximately 3.5% of the total population in 2000, they accounted for 37.2% of state prisoners.[280] In fact, with a "ratio of [Blacks] to [W]hites in state prison [of] 25.09 to 1" in 1997, Minnesota had the "greatest [B]lack-to-[W]hite disparity in imprisonment rates" of all fifty states.[281]

Professor Richard Frase of the University of Minnesota has called the racial disparities in the state "[p]erhaps the most disturbing aspect of Minnesota's prison populations under the [sentencing] guidelines" and has noted that various studies have revealed a "striking racial disproportionality."[282] He also noted that Black defendants tend to have "higher-severity conviction offenses or more extensive criminal history scores"; thus, Blacks are more likely than Whites to receive a prison sentence.[283] In 2001, nearly thirty percent of felony convictions were of Black defendants,[284] a striking number given Minnesota's relatively small Black population.[285]

Studies have revealed that in Minnesota much of the racial bias takes place before the defendants even go into the courtroom, usually beginning at the arrest stage.[286] In 2001, for example, Blacks accounted for around thirty-eight percent of arrests for "adult violent Index-Crime" and thirty percent of arrests for drug offenses.[287] As with its incarceration rate, Minnesota has the most disproportionate arrest rate for Blacks in the United States.[288] One source of the bias, according to the Council on Crime and

---

278. COUNCIL ON CRIME AND JUSTICE, REDUCING RACIAL DISPARITY WHILE ENHANCING PUBLIC SAFETY: KEY FINDINGS AND RECOMMENDATIONS 14, http://www.racialdisparity.org/files/Final%20Report-Reducing%20Disparity%20%20Enhancing%20Safety.pdf [hereinafter REDUCING RACIAL DISPARITY].

279. *Id.* at 1.

280. COUNCIL ON CRIME AND JUSTICE, AFRICAN AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM 1, http://www.racialdisparity.org/files/African%20American%20Males.pdf.

281. *Id.*

282. Richard S. Frase, *Sentencing Guidelines in Minnesota, 1978–2003*, 32 CRIME & JUST. 131, 199 (2005).

283. *Id.* at 200.

284. *Id.*

285. Minnesota's Black population was 4.4% in 2006. U.S. Census Bureau, Minnesota—Fact Sheet, http://factfinder.census.gov/home/saff/main.html (follow "Fact Sheet" hyperlink, then select Minnesota from the drop-down menu).

286. Frase, *supra* note 282, at 200–01; *see also* Akeem Soboyede, *Study Shows Racial Disparity in MN's Justice System Exceptionally High Compared to Other States*, ST. PAUL LEGAL LEDGER, July 13, 2006 ("[T]he trip to the 'Big House' for most minorities does not start with being caught embezzling money from an employer or stealing from a department store. It usually originates with a traffic stop by a police officer.").

287. Frase, *supra* note 282, at 200.

288. *Id.* at 200–01.

Justice, is that police disproportionately target people of color pursuant to a policy that encourages them to patrol "geographic hot spots."[289] Such "hot spots" tend to be where large concentrations of people of color can be found.[290] "The racial disparity (i.e. the ratio of arrest rates) for [Blacks] to White[s] was 10:1 . . . . Nationally, the disparity for Blacks and Whites was 4:1; which means that the arrest rate disparity in Minnesota [wa]s more than twice the national average."[291]

A 2006 report on reducing racial disparity by the Council on Crime and Justice noted that "[w]hile this [racial] disparity has many causes, racial bias is a significant contributor."[292] The report blamed this bias on "institutional policies and practices rather than individual racism."[293] Regardless, it found that the result was the same. More importantly, because the result has now been revealed, failing to ameliorate the bias "becomes an elevated and egregious form of bias."[294] The report recommends concentrating on the institutional policies and practices that contribute to racial bias, which are "discrete and identifiable within the justice system."[295]

In a study on racial profiling analyzing traffic stop data from sixty-five jurisdictions in Minnesota, the Council found that police stopped and searched Black, Latino, and American Indian drivers at a significantly higher rate than White drivers, but found contraband on those drivers of color at a lower rate than they found on White drivers.[296] Thus, there was not only a disparity in the stop rate, but in the "hit rate" as well.

> These disparities in discretionary search rates are particularly troubling given the rates at which contraband was found as a result of these searches, i.e. the hit rates. Overall, 24% of discretionary searches of Whites produced contraband compared to only 11% of searched [sic] of Blacks and 9% of searches of Latinos.[297]

The study revealed that the "disparities are particularly large for Blacks and Latinos," with Blacks experiencing the largest disparity.[298] This pattern persisted across the state of Minnesota.[299] The study concluded that "[t]hese patterns suggest a strong likelihood that racial/ethnic bias plays a role in traffic stop policies and practices in Minnesota. The same is true for the searches that result from these stops."[300]

The Council on Criminal Justice's Racial Disparity Initiative Project sparked much discussion regarding possible solutions to the problems that it exposed. While on a

---

289. REDUCING RACIAL DISPARITY, *supra* note 278, at 6 (internal quotations omitted).
290. *Id.* at 7.
291. *Id.* at 5.
292. *Id.* at 14.
293. *Id.*
294. *Id.* at 15.
295. *Id.*
296. COUNCIL ON CRIME AND JUSTICE, MINNESOTA STATEWIDE RACIAL PROFILING REPORT: ALL PARTICIPATING JURISDICTIONS 1, 5 (2003), *available at* http://www.racialdisparity.org/files/Racial%20Profiling%20Study.pdf; REDUCING RACIAL DISPARITY, *supra* note 278, at 5.
297. COUNCIL ON CRIME AND JUSTICE, *supra* note 296, at 1.
298. *Id.*
299. *See id.*
300. *Id.* at 2.

panel moderated by a Minnesota judge, University of Minnesota Law Professor Michael H. Tonry stated, "[R]acial disparity is also a problem in England. But more importantly, the criminal justice system there recently came out and acknowledged it is institutionally racist. We should do the same here too as a first step in fixing the problem."[301]

Each of the Project's seventeen studies demonstrate how the misperception of Black criminality can lead to convictions—particularly felonies—that can be used to impeach a defendant later should he find himself at odds with the criminal justice system, which is a very likely scenario. In such cases, if the defendant is like Edward Cobbs in Miami and if a trial is held, the jury will never know that under nearly identical circumstances, a judge gave "an amazing deal" of a withhold adjudication to another young man whose record is now clean and cannot be used for impeachment purposes.[302] If the defendant received his prior conviction from a judge with biases similar to the judge that sociologist James Austin discussed in his study, then the jury certainly will not hear that the judge saw the defendant "differently" from the way that he saw White defendants who were accused of committing the same crime for which the defendant was convicted.[303] Nor does the jury hear that discretionary decisions—like the vast racial profiling practice in Minnesota—that occur throughout the criminal process often lead to harsher results for Black defendants. And not only will a jury not hear this information under ordinary circumstances, a prosecutor usually will not consider these issues, important as they may be, when considering whether or not to charge the defendant in the first place. Indeed, prosecutors normally see prior records as strengthening their cases and as part of their leverage in potential plea discussions.[304] The simultaneous operation of the Black tax and the White credit in the system produces evidence that perpetuates the Black criminal stereotype.

Problems with the perception of Black criminality arise in other aspects of the criminal system besides pretrial processing. I consider those other aspects in the following Parts. As with pretrial processing, each of these areas demonstrates how racial biases can discredit the criminal system as a hearsay declarant.

2. The Black Tax and White Credit in the Courtroom

Of course, race is not just an issue in the pretrial process. Race in and of itself is evidence *in American courts*.[305] I contend that is true whether the person is a party in a

---

301. Soboyede, *supra* note 286.

302. *See supra* text accompanying notes 263–64; *see also* State v. McFadden, 772 So. 2d 1209, 1216–17 (Fla. 2000) (finding that a withheld adjudication is not a "conviction" for impeachment purposes).

303. *See infra* text accompanying notes 404–05.

304. *See* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1126 & n.37 (2008) (noting that "[e]ven in the weakest cases, prosecutors can go forward with charges and anticipate pleas because they know that recidivists cannot easily fight charges at trial under existing evidence rules," such as the prior conviction impeachment rule).

305. *See, e.g.*, Chet K.W. Pager, *Blind Justice, Colored Truths, and the Veil of Ignorance*, 41 WILLAMETTE L. REV. 373, 375 (2005) (conceptualizing race as evidence); Aaron Goldstein, Note, *Race, Reasonableness, and the Rule of Law*, 76 S. CAL. L. REV. 1189, 1214–19 (2003) (conceptualizing race, in the context of claims of self-defense, as irrelevant and prejudicial

civil case or a defendant in a criminal case. I want to focus, however, on the criminal context in this Article, as the prior conviction impeachment scheme is most prejudicial to criminal defendants. Indeed, Rule 609's use of race as evidence is problematic in at least two ways. First, as I have been discussing, many convictions are the direct result of racial bias and lack reliability. This problem can be compounded in a court where a prior conviction is admitted before a jury that may already have preexisting racial biases.

A Black criminal defendant's race is likely to be an issue, whether the parties choose to discuss the issue openly or not. The very act of a Black defendant coming into court has some probative value; that is, race has a tendency to prove or disprove something in the American justice system just as it does in society at large.[306] Race is indeed evidence and is automatically admissible, as we do not shield a person's race from the jury. And, generally, the rules of evidence do nothing to ameliorate the potential prejudice that might result from the evidence of a person's race. To the contrary, Rule 609 can make the race problem much worse for a Black defendant.

One commentator has argued that we should indeed shield the race of witnesses from jurors.[307] While this is an intriguing proposal and could be useful in some instances, it does not sufficiently take into account the conceptualization of race as evidence inside *and* outside of the courtroom. Pieces of evidence, such as witness testimony, are often "racialized" before ever entering the courtroom, as can be demonstrated by evidence admissible under Rule 609.[308]

The face of crime in America, particularly violent crime, is a Black face.[309] American jurors—White and Black—come from a society that has criminalized blackness. More often than not, when people think of the "typical" criminal defendant, they think of a Black person.[310] Given this reality, the presumption of Black criminality would be quite prejudicial to a White defendant whose race was disguised. Without any information to the contrary, he will very likely be presumed Black and suffer the prejudicial effects of that presumption. In conceptualizing race as evidence, we must be mindful of potential prejudice to all defendants, including White defendants.

Moreover, skin color in and of itself is not the only evidentiary means by which race is identified. As Professor Sheri Lynn Johnson has noted, "[r]acial imagery can be conveyed in pictures, stories, examples, and generalizations."[311] Thus, based on the imagery that the prosecution presents, a jury may simply presume that the crime was

---

evidence and proposing a rule to bar "evidence suggesting that the alleged victim's race is relevant to determining whether the defendant's apprehension of imminent or severe bodily harm was reasonable" and "evidence suggesting that any racial group poses an increased danger to other citizens").

306. Black's Law Dictionary defines probative as "[t]ending to prove or disprove." BLACK'S LAW DICTIONARY 1240 (8th ed. 2004).

307. Pager, *supra* note 305, at 429.

308. *See* FED. R. EVID. 609 (allowing evidence of a witness's prior criminal conviction in several instances in order to attack the witness's character).

309. *See supra*, Part II.C.

310. *See* R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, 94 CAL. L. REV. 1169, 1173 (2006).

311. Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1743 (1993).

committed by a Black person. Indeed, many crimes have been mischaracterized as "Black crimes," as I demonstrate below in discussing drug offenses.

i. Jurors' (Un)Authorized Use of Race as Evidence

Rule 609 can become a part of the racial imagery that a prosecutor uses. If jurors are already predisposed to believe stereotypes about Black criminality, the introduction of Rule 609 evidence against a Black defendant will likely confirm those stereotypes—even though the prior conviction itself might have been the result of Black mischaracterization. Studies have shown that jurors consider race in a manner that is prejudicial to Black criminal defendants.[312] As an initial matter, there is already significant evidence against a criminal defendant embodied in the accusation of criminal behavior itself.[313] In every aspect of the trial, the prosecutor is labeling the defendant as a criminal.[314] The weight of the accusation of criminality can frustrate the presumption of innocence that we hold so dear in our criminal justice system.[315] When the defendant is Black, race adds even more weight to the force of the accusation.[316]

These observations about how race shapes society's views of criminality are quite significant in criminal cases because they hold true in the courtroom as well. "Jurors come from the same society that produces the shop owners, police, the readers of *Time* [which darkened the image of O.J. Simpson], and the constituents mentioned above [in Part I]. The opening statement of the prosecutor is even more likely to stick when the face they see at counsel table is a dark one."[317]

Empirical evidence based on mock jury trials has demonstrated that in cases where evidence is not overwhelmingly in favor of one party or the other, race was especially significant in jurors' decision-making processes.[318] Moreover, studies have shown that in a criminal case where there is not much evidence against a defendant, the jury is more likely to convict the defendant if the victim is the same race as the jurors.[319] This is particularly significant because juries tend to be mostly White.[320] "[W]hen the evidence is sparse, jurors are more likely to attribute guilt to defendants of a different race. . . . [I]n marginal evidence conditions [B]lack defendants will tend to be acquitted less often than [W]hite defendants and [B]lack defendants with [W]hite victims will tend to be acquitted least often."[321] Also, when the mock jurors were given incomprehensible sentencing guidelines, they tended to rely on race in their decision-

---

312. *See* Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries: A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1016 (2003) (discussing "two studies [that] provide support for the hypothesis that White juror bias is actually more likely to occur in trials without salient racial issues, where norms regarding race are weak—a conclusion that is consistent with theories of modern racism").

313. *See* Ross, *supra* note 64, at 262.

314. *Id.* at 229.

315. *See id.*

316. *See id.* at 261.

317. *Id.* at 263.

318. Lynch, *supra* note 69, at 189.

319. Johnson, *supra* note 241, at 951.

320. *Id.*

321. *Id.*

making processes.[322] This empirical evidence suggests, then, that White jurors would rely on racial stereotypes in weighing Rule 609 evidence, especially given the incomprehensible instructions that tend to accompany such evidence.

Professor Cynthia Lee discusses the "Black-as-criminal stereotype" and how it relates to a claim of self-defense.[323] She notes that "[t]he Black-as-criminal stereotype is so deeply entrenched in American culture that false claims of Black criminality are made and, in many cases, *readily* believed."[324] She acknowledges that "[o]ne of the stereotypes most often applied to [Black] males is that they are more dangerous, more prone to violence, and more likely to be criminals or gang members than other members of society."[325] She observes that Black women are also stereotyped as "untrustworthy, criminal, or dangerous."[326] Drawing on social science studies, she concluded that such stereotyping can lead people to view ambiguous actions as violent when the actor was a Black person, but nonviolent when the actor was a White person.[327] Again Rule 609 evidence would reinforce these stereotypes and compound the already existing problem.

Studies have shown "that White Americans are willing to be particularly punitive when presented with stereotypical images of [Black] violent felons as the object of punishment policies," in comparison to their view of how a White felon in the same position should be treated.[328] This tendency to treat Black defendants more harshly has been discussed extensively in the capital-sentencing context, where the stakes are literally matters of life and death.[329] Interviews of jurors from capital cases, as part of the comprehensive Capital Jury Project, demonstrated that White jurors in capital cases involving a Black defendant and a White victim relied on racial stereotypes in deciding that death was the appropriate sentence.[330] Similarly, Fleury-Steiner's 2004 study "powerfully revealed how racialized cultural stereotypes, particularly about the propensity to do violence, shape White jurors' narratives about minority defendants, their culpability, and ultimately their death-worthiness."[331]

A recent study in the Psychological Science Journal found that: "People associate Black physical traits with criminality in particular. The more stereotypically Black a person's physical traits appear to be, the more criminal that person is perceived to be."[332] Using a database of over 600 "death-eligible" cases, the study demonstrated that in cases in which the death penalty was a possible sentence and where the victim was White, the Black defendants' physical features "function[ed] as a significant

---

322. Lynch, *supra* note 69, at 189.

323. Cynthia K.Y. Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 408–21 (1996).

324. *Id.* at 408 (emphasis added).

325. *Id.* at 403.

326. *Id.*

327. *Id.* at 404–05.

328. Lynch, *supra* note 69, at 188.

329. *See id.*

330. *Id.*

331. *Id.*

332. Jennifer L. Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns & Sheri Lynn Johnson, *Looking Deathworthy, Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 383 (2006).

determinant of deathworthiness."[333] The study concluded that "defendants whose appearance was perceived as more stereotypically Black were more likely to receive a death sentence than defendants whose appearance was perceived as less stereotypically Black."[334] Thus, in the most serious of cases—those with the ultimate penalty of death—researchers have confirmed that blackness equals such evil and depravity that it warrants the death sentence in the minds of jurors.

Courts typically inform jurors that they are not to let any type of bias or prejudice, which would include racial bias, weigh into their decisions. However, there is currently no way to be sure that jurors do not let race bias, particularly unconscious race bias, play into their decisions. The law presumes that jurors follow courts' instructions without ever questioning whether this is actually the case.

ii. Prosecutors' Misuse of Race as Evidence in Arguments to Jury

Prosecutors recognize the powerful effect that blackness can have on a jury's assessment of character. Unfortunately, prosecutors sometimes use "racial code words" to play on stereotypes and create "images of [B]lack-ill characters."[335] For example, in *Smith v. State*, the Supreme Court of Indiana upheld a conviction in a case despite the fact that the prosecutor argued in closing that a Black defense witness was "shucking and jiving on the stand," a phrase that the court found was "clearly of [B]lack origin" and reminded jurors of the "untrustworthy appearance of this witness."[336] That same prosecutor also argued that the defendant "had to play Superfly," referencing an idealized Black fictional character, who happens to be a Harlem pimp.[337] Prosecutors have also sent racial cues by referring to Black defendants as "they" or "them," as an indication that Blacks are generally outliers in the moral, civilized, and law-abiding society to which the jurors themselves belong.[338] In *State v. Henderson*,[339] the prosecution made the following argument to the jury regarding the defendant's witnesses, all of whom were Black:

> This is a case of gang violence. This isn't a case where two parties from the suburbs are having a dispute. One party from Edina and another party from North Oaks are having a minor dispute. This is a case about gang violence. Gangs.
>
> . . . .
>
> [T]he people that are involved in this world are not people from your world. Their experiences, their lifestyles are totally foreign to all of you. These are not your world. These are the Defendant's people. They are his friends.[340]

---

333. *Id.* at 383–84.

334. *Id.* at 384.

335. Andrew E. Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121, 133 (2006).

336. 516 N.E.2d 1055, 1064 (Ind. 1987).

337. *Id.*

338. *See* Ryan P. Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis*, 11 MICH. J. RACE & L. 325, 334–35 (2006).

339. 620 N.W.2d 688 (Minn. 2001).

340. *Id.* at 702 (alteration in original).

Rule 609 sanctions this type of racial code, given the deep-rooted Black-as-criminal stereotype. It allows a prosecutor to place the defendant in the "other" category—in much the same way that proponents of the prior conviction impeachment rule intended. "One of the best means for a prosecutor to establish her *ethos* and to appeal to the jurors' *pathos* in the context of the criminal trial is to define the defendant as a member of the 'other.'"[341] In doing so, the prosecutor essentially "draw[s] a line around the defendant, locating both herself and her audience on the same opposite of that line—thereby defining the attorney as a trustworthy member of the jurors' community."[342] Not surprisingly, prosecutors have employed this oratorical method "from the time of Cicero until the present."[343] Jurors will naturally have a negative view of the defendant. Though some appellate courts have reversed trial court judgments resulting from attorneys' arguments appealing to racial bias, in other cases they have simply found such arguments permissible, as the court in *Smith* did,[344] or "harmless error," as the court in *Henderson* did.[345] Even more troubling is the very real likelihood that appeals to racial bias go completely unnoticed or are simply not subject to objection.

3. A Closer Look at Drug Offenses

It has been argued that "the real racial disparity in treatment exists with respect to nonviolent, victimless crimes, where the discretion of the actors within the criminal justice system is most influential."[346] It is in this area that the decision makers in the criminal justice system have almost unfettered discretion and can "choose which of the many drug users or distributors to arrest."[347] Even those who argue that the overrepresentation of Blacks in prison is due to the higher involvement of Blacks in serious crimes make an exception to their argument for drug offenses. Such an acknowledgment, however, should not be relegated to footnote status. "In the United States and many other nations, it is no longer possible to talk honestly and frankly

---

341. Alford, *supra* note 338, at 334–35 (emphasis in original).

342. *Id.* at 335.

343. *Id.*

344. Smith v. State, 516 N.E.2d 1055, 1063–65 (Ind. 1987).

345. 620 N.W.2d at 703 (expressing "concern" over the arguments, but finding that it was not so inexcusably serious and prejudicial that Henderson's right to a fair trial was denied); *see also* People v. Bahoda, 531 N.W.2d 659, 662–65 (Mich. 1995) (finding that the prosecution made "several references" to defendant's "Arabic ethnicity" at a trial that took place during the Persian Gulf War, but determining such references "to be innocuous, unintended and not of a degree that prejudiced defendant's right to a fair trial").

346. Daniel S. Goldman, Note, *The Modern Day Literacy Test? Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611, 629 (2004).

347. *Id.*; *see also* R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 578 (noting that "drug law enforcement is highly discretionary," that "rates of arrest and conviction reflect investigation and enforcement decisions as much as underlying rates of criminality," and that "[t]he self-fulfilling prophecy argument reminds us that the outcomes often offered as the justification for racial profiling may, in fact, be the consequence of racial profiling, which can create the appearance of racial differences in criminality even when there are none").

about racism without talking about the 'war on drugs.'"[348] And drug offenses have been found to have "a bearing on credibility" for Rule 609 purposes, necessitating the need for a discussion of race and the "war on drugs" as part of the Rule 609 problem.[349]

Over the last twenty years, the so-called "war on drugs" has become the "most significant factor contributing to the disproportionate incarceration of [Blacks] in prisons and jails. . . . The escalation of drug prosecutions has coincided with a large-scale law enforcement emphasis on drug policing in communities of color."[350] National statistics show that 33.9% of drug arrests in 2005 were of Blacks even though they represent only fourteen percent of drug users.[351] Fifty-three percent of persons sentenced to prison for drug offenses are Black.[352]

These disparities have been particularly harsh on Black men, but between 1986 and 2001 the rate of incarceration for Black women increased by a staggering 800%.[353] This sharp increase in the incarceration of Black women is due in large part to convictions for drug offenses.[354]

It is well documented that the history of drug illegalization in the United States is rooted in racism.[355] In the 1800s, "opiates and cocaine were freely available and used both medicinally and recreationally by people throughout the U.S."[356] The "typical" drug addict was "a middle aged, rural, middle- or upper-class White woman."[357] Drug addiction was common and considered a "health problem" that doctors and pharmacists were well suited to treat.[358] This sentiment changed, however, when the perception of the average drug user changed. San Francisco passed the first "anti-drug" law in 1875.[359] The city outlawed the smoking of opium because there was a fear that "Chinese men were using it to lure [W]hite women into their opium dens and to their ruin."[360] Shortly thereafter, the federal government passed a law that "made it illegal for anyone of Chinese origin to traffic in opium."[361]

Similarly, one article stated that most "attacks upon [W]hite women of the South are the direct result of the cocaine-crazed Negro brain."[362] Police in the South even started using .38 caliber revolvers because they were concerned that "cocaine made Blacks

---

348. DRUG POLICY ALLIANCE NETWORK, THE RACIAL HISTORY OF U.S. DRUG PROHIBITION (2001), http://www.drugpolicy.org/about/position/race_paper_history.cfm.

349. United States v. Barrow, 448 F.3d 37, 44 (1st Cir. 2006).

350. Mauer, *supra* note 174, at 25–26.

351. *Id.* at 26.

352. *Id.*

353. Charles J. Ogletree, Professor of Law, Harvard Law Sch., Discriminatory Impact of Mandatory Minimum Sentences in the United States, Testimony Before the Inter-American Commission on Human Rights (Mar. 3, 2006), *in* 18 FED. SENT'G REP. 273, 276 (2006).

354. *Id.*

355. *See, e.g.*, Mauer, *supra* note 161, at 16.

356. DRUG POLICY ALLIANCE NETWORK, *supra* note 348.

357. *Id.*

358. *Id.*

359. Robert N. Taylor, *Special Report: The Racist History of the War on Drugs*, WASH. INFORMER, Dec. 22, 2005, http://www.washingtoninformer.com/ARWaronDrugs2005Dec22.html.

360. *Id*. (internal quotations omitted).

361. *Id*. (internal quotations omitted).

362. DRUG POLICY ALLIANCE NETWORK, *supra* note 348.

impervious to .32 caliber bullets."[363] It has been said that the purpose of stories like this one was to convince southern congressional members to vote for the Harrison Narcotics Act, which would give the federal government tremendous power to regulate drugs.[364] "This lie was also necessary, since, even though drugs were widely used in America, very little crime was associated with the users."[365]

The earliest laws prohibiting the use of marijuana were local ordinances in El Paso, Texas. "At the time, the Texas government wanted legal avenues to control the immigrant . . . population."[366] During the 1920s, marijuana was seen as a "[B]lack drug."[367] "Not until the 1960s, when college educated [W]hite liberals started openly using marijuana and questioning marijuana policy, did the marijuana laws in the United States become more lenient."[368]

More recently, federal law with respect to crack cocaine and powder cocaine has been similarly racialized.[369] Legal scholars and other commentators have long criticized the disparities between crack and powder cocaine in drug sentencing.[370] As part of the Anti-Drug Abuse Act of 1986, Congress implemented a drug policy that created rather extreme disparities in the treatment of crack cocaine and powder cocaine offenses; thus, there are disparities for "two forms of the same drug."[371]

Under 21 U.S.C. § 844, a person who is convicted for the first time of possessing any amount of powder cocaine can be sentenced to no more than one year in prison.[372] On the other hand, that same statute provides that a person convicted for the first time "for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years."[373] 21 U.S.C. § 841 and the corresponding provision of the United States Sentencing Guidelines produce a 100:1 sentencing disparity for the distribution of crack cocaine and powder cocaine.[374] From a race standpoint, the problem with this distinction is that around eighty-five percent of those convicted and sentenced for crack offenses are Black.[375]

As the Supreme Court acknowledged in its recent decision *Kimbrough v. United States*, "a drug trafficker dealing in crack cocaine is subject to the same sentence as one dealing in 100 times more powder cocaine."[376] Thus, a "major supplier of powder cocaine may receive a shorter sentence than a low-level dealer who buys powder from

---

363. *Id.*

364. *Id.*

365. *Id.*

366. *See* Varun Soni, *Freedom from Subordination: Race, Religion, and the Struggle for Sacrament*, 15 TEMP. POL. & CIV. RTS. L. REV. 33, 60 (2005).

367. *Id.*

368. *Id.*

369. *See id.* at 61.

370. *See, e.g.*, Tracey L. Meares, Neal Katyal & Dan M. Kahan, *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1175 (2004) (noting that "[m]uch attention has been given to the racial implications of the disparity between powder cocaine and crack cocaine").

371. *See* Kimbrough v. United States, 128 S. Ct. 558, 565–66 (2007).

372. 21 U.S.C. § 844(a) (2006); *see also* Donald Braman, *Criminal Law and the Pursuit of Equality*, 84 TEX. L. REV. 2097, 2114 (2006) (discussing sentencing for federal drug offenses).

373. 21 U.S.C. § 844(a) (2006).

374. *See* 21 U.S.C. § 841 (2006); *Kimbrough*, 128 S. Ct. at 567.

375. *See Kimbrough*, 128 S. Ct. at 568.

376. *Id.* at 564.

the supplier but then converts it to crack."[377] In *Kimbrough*, the Court held that district courts are not required to enforce the "crack/powder" disparity in sentences for crack and cocaine offenses. Citing *United States v. Booker*, the Court found that the United States Sentencing Guidelines are "advisory only" and that a district court may consider the crack/powder disparity among other factors in determining the appropriateness of a sentence.[378]

The United States Sentencing Commission initially incorporated the crack/powder disparity in its Guidelines setting the base offense levels for drug trafficking, but it has since changed its view on whether the sentencing disparity is warranted.[379] The Commission found that the disparity does not further Congress's stated goals in the Anti-Drug Abuse Act and that recent data no longer supports the previous perceptions about the harmfulness of crack in relation to powder cocaine.[380] On several occasions, the Commission has unsuccessfully attempted to persuade Congress to reduce the crack/powder disparity.[381]

Most recently, in November 2007, the Commission issued a report asking Congress to amend the Anti-Drug Abuse Act.[382] Additionally, the Commission made a "modest" amendment to the Sentencing Guidelines, which would make sentences for crack offenses two to five times longer than they would be for the same amount of cocaine.[383] Noting that this amendment was only a "partial remedy," the Commission stated that Congress would have to implement more "comprehensive" solutions to the problem through legislative action.[384] Members of Congress have introduced various bills that would reduce some of the disparity. Congresswoman Sheila Jackson Lee in particular has recently introduced a bill that would eliminate altogether the crack/powder disparity, though she has acknowledged the legislation "faces a strong challenge."[385]

Kimbrough and the recent actions of the United States Sentencing Commission are positive steps to ameliorating the crack/powder disparity. However, these steps are far from concrete solutions. *Kimbrough* gives judges discretion; but judges remain free to continue this very harsh disparity, which the Commission admits is unwarranted. The problem with judicial discretion is that it can be used in a way that assesses the Black tax and grants the White credit (as I discussed above with the Miami cases, for example). Additionally, the Commission's recent amendment is quite modest. So, the crack/powder disparity may persist for some time to come.

Even more troubling are the other drug laws, such as drug free school zone laws, that many states and the federal government have adopted. New Jersey even has special drug free public housing zone laws.[386] Such laws, which increase punishment for drug

---

377. *Id.* at 566.
378. *Id.* at 564.
379. *See id.* at 568.
380. *Id.*
381. *Id.* at 569.
382. *Id.*
383. *Id.*
384. *Id.*
385. Michelle Mittelstadt, *Jackson Lee Says Strict Sentencing Costs Society: Lawmaker Wants to Eliminate Bias in Crack Cases and Boost Treatment*, HOUSTON CHRON., Feb. 3, 2008, at A10.
386. Mauer, *supra* note 174, at 29–30.

offenses in specified zones, lead to disparate treatment of Blacks in the criminal system.[387] Because Blacks and other minorities tend to live in urban areas that are much closer to schools or public housing, they are more likely to be the target of harsher treatment in the criminal system because of such laws. [388] In New Jersey, for example, ninety-six percent of the people serving time for "drug free zone offenses" are Black or Hispanic.[389]

The most disturbing aspect of the drug offense disparities is that they are only a symptom of the much larger problem I have presented in this Article—which is that the criminal law has, both historically and currently, been largely constructed on the foundation of race. The criminal justice system's reliance on race in defining what constitutes criminal behavior has been to the great disadvantage of minorities, particularly Blacks. Eliminating the crack/powder disparity will not cure the disease of mischaracterizing Blacks as criminals that has infected the criminal justice system. But it is a positive step, as is addressing the unfair impact of drug laws on the application and operation of Rule 609. The following Part, which deals specifically with the mischaracterization of Black children as criminals, demonstrates how deeply this mischaracterization has penetrated into the American psyche and how it threatens the viability of the next Black generation.

4. The Pipeline to Prison: A Closer Look at the Treatment of Black Children in Schools and the Juvenile Justice System

As mentioned earlier in this Article, juvenile adjudications are generally not admissible under Rule 609. Though there are very limited exceptions to this rule, juvenile convictions are never admissible against a criminal defendant. It is, however, of paramount importance to discuss racial bias in the juvenile system because juvenile justice problems with Black youth often turn into more serious issues (such as felony convictions and long prison sentences). Once in the system, Black youth are more likely to remain in the system. Moreover, they are more likely to be waived into adult court where their felony convictions can be used as Rule 609 evidence. On the other hand, White youth often get the benefit of staying in the juvenile system (or not having to deal with the system at all) and/or get the benefit of rehabilitation programs. Thus, their juvenile convictions will never be used against them under Rule 609 in any future interaction with the criminal system because juvenile offenses are not admissible for impeachment.

Unfortunately, the perception of Black criminality negatively shapes how society views Black children. A friend, a Black woman, recently forwarded a copy of an e-mail she sent to the headmaster of her son's exclusive private school in the heart of a major U.S. city. The e-mail was regarding the casting decisions made for the school's upcoming musical production of *The Bremen Town Musicians*. My friend was deeply disturbed upon learning that her son, a second-grader and one of very few Black children in the school, had been cast in the musical as the robber.[390] Sure, given the production that the school chose, someone had to play the robber. The question is why

---

387. *Id*.
388. *Id*.
389. *Id*.
390. A copy of the e-mail is on file with author.

the Black child? Moreover, as a school that purported to be committed to promoting diversity and cultural sensitivity, there was good reason to avoid casting the Black child as the robber, as doing so would most certainly reinforce well known negative stereotypes of Blacks as criminals.

My friend's story raises the question about how teachers, principals, and other adults in the school system, public and private, perceive Black children. As I noted in Part I of this Article—jurors, teachers, principals, and other adults in the school system come from the same society in which Black criminality has been deeply engrained in the American psyche. The *Chicago Tribune* recently reported that Black students are far more likely than White students to be suspended or expelled from school.

> Fifty years after federal troops escorted nine [B]lack students through the doors of an all-[W]hite high school in Little Rock, Ark., in a landmark school integration struggle, America's public schools remain as unequal as they have ever been when measured in terms of disciplinary sanctions such as suspensions and expulsions, according to little-noticed data collected by the U.S. Department of Education for the 2004-2005 school year.[391]

Though research has found that Black children are no more likely than children of any other race or ethnic group to have behavioral problems, Black children are disciplined at a much higher rate than any other group.[392] According to one expert in educational psychology, "[t]here simply isn't any support for the notion that, given the same set of circumstances, [Black] kids act out to a greater degree than other kids."[393] Moreover, he stated that "the data indicate that [Black] students are punished more severely for the same offense, so clearly something else is going on. We can call it structural inequity or we can call it institutional racism."[394]

This issue of disparate treatment in schools is not just about a student's negative school discipline record. Disparities in the discipline of school children based on race are significant because studies show that a record of school suspensions or expulsions "is a strong predictor of future trouble with the law."[395] Indeed, such a record is a part of what some civil rights leaders have called the "school-to-prison pipeline."[396]

Schools are increasingly calling law enforcement officials to deal with disciplinary issues. And the disproportionate treatment of Black youth continues once they are in the juvenile justice system. In California, for example, "[Black] youth with felony arrests are 4.4 times more likely than [W]hite youth with felony arrests to be sentenced to the California Youth Authority."[397] Data compiled in 2000 from the twelve most populated counties in California revealed that Black youth made up just nine percent of

---

391. Howard Witt, *School Discipline Harder on Blacks*: *Analysis of Federal Data Shows Racial Inequality in Suspensions and Expulsions Nationwide; Locally, the Gap Is Widest in Lake and DuPage*, CHI. TRIB., Sept. 25, 2007, at C1.

392. *Id.*

393. *Id.* (quoting Russell Skiba, a professor of educational psychology at Indiana University whose research focuses on race and discipline issues in public schools).

394. *Id.*

395. *Id.*

396. *Id.*

397. Ctr. on Juvenile & Criminal Justice, *supra* note 277.

the population but forty-three percent of arrests and thirty-five percent of ultimate commitments to detention.[398] On the other hand, White youth made up thirty-five percent of the youth population but only twenty-five percent of the total youth arrests and fifteen percent of commitments to detention.[399]

Nationwide studies also show that while "[Blacks] represent 15% of the population, [they represent] 26% of juvenile arrests, 44% of youth who are detained, 46% of the youth who are judicially waived to [adult] criminal court, and 58% of the youth admitted to state prisons."[400] Indeed, "[Black] children [are] transferred to adult courts in greatly higher numbers than [W]hite children."[401] One study of eighteen jurisdictions found that eighty-two percent of transfers to the adult system were of minority youth and seventy percent of the transferred youth in particular were Black.[402] "In one extreme example of a county in Alabama, [Black] youth accounted for [three] out of [ten] felony arrests while representing [eighty] percent of felony cases transferred to adult court . . . ."[403]

In one study, sociologist James Austin reported that a judge openly acknowledged that he sees Black and White youth differently *even when they are charged with similar crimes*.[404] According to Austin, Black youth, particularly males, "are seen as less controllable, with limited family support, if returned to the community."[405] On a macro level, the juvenile system as a whole seems to view Black youth differently. Given the raw data, it is reasonable to think that this judge's sentiment, though it may not be openly expressed often, is shared by a number of judges and other influential actors in the criminal process. Consider, for example, the juvenile specialty courts that are focused on rehabilitation for drug offenders. "[I]n early reporting of juvenile drug court numbers, [W]hite children constituted the largest racial group receiving this sort of rehabilitative treatment."[406] Thus, in the juvenile justice system, rehabilitation—that is, "the judgment that a child can be saved"—is not "available on a truly race neutral basis."[407]

---

398. *Id.*

399. *Id.*

400. *Id.*

401. *See* Daniel M. Filler & Austin E. Smith, *The New Rehabilitation*, 91 IOWA L. REV. 951, 989 (2006); *see also* Position Statement, Am. Psychiatric Assoc., Adjudication of Youths as Adults in the Criminal Justice System (Dec. 2005), *available at* http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200507.aspx (noting that Black youth are far more likely to receive "waivers" and "transfers" to the adult criminal system).

402. Position Statement, *supra* note 401.

403. *Id.*

404. John Cheves, *Detention of Black Teens Up for Scrutiny*, LEXINGTON HERALD-LEADER, Sept. 7, 1999, at A1.

405. *Id.* (internal quotations omitted).

406. Filler & Smith, *supra* note 401, at 989.

407. *Id*. at 989–90.

D. Misperceptions Based on "Reasonable Racism"?

Some may argue that any perceptions, or misperceptions, of criminality based on race in the criminal justice system (and in society in general for that matter), are reasonable. Professor Armour uses the term "Negrophobia" to describe the "posttraumatic stress disorder about Blacks that courts have actually permitted to play a role in formal legal proceedings."[408] Relying on empirical data, he posits that "unconscious racial discrimination influences the social judgments of all Americans and lies at the heart of 'Negrophobia.'"[409] He also introduces the terms the "Reasonable Racist," the "Intelligent Bayesian," and the "Involuntary Negrophobe," all of which describe persons who use the concept of reasonableness, albeit in different ways, to conclude that Blacks are more likely to commit crimes.[410]

The Reasonable Racist is someone who believes that it is reasonable to believe that Blacks are more likely to commit crimes because "most similarly situated Americans would have done so as well" even though this belief is rooted in racism.[411] The Intelligent Bayesian also relies on reasonableness, but her reliance is based on statistics demonstrating that Blacks disproportionately commit crimes.[412] Thus, her argument is that it is "logical" to treat Blacks "differently."[413] Professor Armour demonstrates how the law, with its fondness for the standard of reasonableness, embodies the very concepts of reasonableness that both the Reasonable Racist and the Intelligent Bayesian employ.[414]

Professor Armour's third category of reasonable racism describes what he calls the "Involuntary Negrophobe."[415] The Involuntary Negrophobe is someone who has had a negative and traumatic encounter with a Black person and has "develop[ed] a pathological phobia towards *all* Blacks."[416] This person engages in a different type of reasonableness—one based on a subjective test.[417] If a "typical" individual who had the same experience would develop the same phobia, then the Involuntary Negrophobe's reaction to all Blacks is considered reasonable.[418] While noting that this variation of reasonableness in the context of race is "open-ended and dangerous," Professor Armour also informs us that "the legal system has already accepted its underlying

---

408. ARMOUR, *supra* note 48, at 17.

409. *Id.*

410. *Id.* at 71–80.

411. *Id.* at 19; *see also* Loren Page Ambinder, *Dispelling the Myth of Rationality: Racial Discrimination in Taxicab Service and the Efficacy of Litigation Under 42 U.S.C. § 1983*, 64 GEO. WASH. L. REV. 342, 368 (1996) (discussing discrimination against Blacks by taxicab drivers and noting that "[b]oth cabdrivers and their many apologists advance the argument that taxicab service discrimination is the rational result of a realistic assessment of the risks involved in picking up Black passengers—an assessment that is 'accurately' informed by evidence such as crime statistics and generalized experience with Black individuals").

412. ARMOUR, *supra* note 48, at 37.

413. *Id.*

414. *Id.* at 21.

415. *Id.* at 61.

416. *Id.* at 63 (emphasis in original).

417. *Id.* at 62.

418. *Id.* at 63.

doctrinal and psychological propositions."[419] He gives the example of a Florida workers' compensation case in which the judge accepted a "Negrophobic" plaintiff's claim that she could not work around Black people, especially "big, Black males," after a Black male mugged her while she was working for her employer.[420] The judge awarded workers' compensation benefits to the plaintiff based on her "work-related phobia."[421]

If a hearsay declarant who helped secure a Rule 609 conviction in the criminal justice process is a Reasonable Racist, an Intelligent Bayesian, or an Involuntary Negrophobe, then that person is biased regardless of how reasonable the declarant, or the courts for that matter, may consider the bias to be. Negrophobia has shaped the declarant's perception of Blacks. Indeed, the studies discussed in Part III of this Article indicate that Negrophobia has played a large part in the biases against Blacks in the criminal process and the resulting construction of Black criminality. Those biases substantially diminish the reliability of criminal convictions. Of course, reasonableness has its place in the law; but reliability, not reasonableness, is the overarching concern in the Federal Rules of Evidence. While Negrophobia may produce reasonable racism, it does not produce *reliable* racism. As has been shown time after time, institutionalized racism is inherently unreliable.

Rule 609 requires reliability. And, in general, evidence law requires reliability. In the context of expert witness testimony, for example, the Supreme Court has rejected the standard of admissibility that focused merely on "general acceptance" in the scientific community in favor of a standard that makes reliability the primary guideline.[422] With respect to scientific testimony, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* the Court noted that "the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability."[423] The focus on reliability is, according to the Court, consistent with the "common law insistence upon 'the most reliable sources of information.'"[424] The Court explained that by referencing evidentiary reliability, it was really talking about "trustworthiness."[425]

E. Considering Community Views on Reliability

It is important to note that reliability can very well be in the eyes of the beholder. One's view on the reliability of the criminal justice system may differ based on one's experiences with the system. Interestingly, though, according to a survey completed in 1999 by the National Center for State Courts, there is "an overwhelming belief that equal justice under the law is more equal to some than to others. And this is important—it's not just specific groups who see inequality. It's the public at large."[426]

---

419. *Id.* at 62.

420. *Id.* at 63.

421. *Id.* at 63–64; *see generally* William Booth, *Phobia About Blacks Brings Worker's Compensation Award; Florida Woman Filed Claim After Parking-Lot Mugging*, WASH. POST, Aug. 13, 1992, at A3.

422. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 588 (1993).

423. *Id.* at 590.

424. *Id.* at 592.

425. *Id.* at 591 n.9.

426. NAT'L CTR. FOR STATE COURTS., HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999

The study showed that "White and Hispanic-Americans tend to agree that [Blacks] are treated worse than other groups by the legal system."[427] The pervasiveness of this view is striking given that, as discussed in Part I of this Article, statistics also show that the public associates blackness with criminality. Thus, even though society has constructed Black criminality, it also sees that Blacks are treated unfairly in the justice system.

Moreover, while "only [twenty-three] percent of [Blacks] believe the court system treats them the same as it does other people. . . . Almost [seventy percent] of [Blacks] respondents think that [Blacks], as a group, get 'Somewhat Worse' or 'Far Worse' treatment from the courts" than other people.[428] These numbers are not surprising, particularly in the criminal context. Among the Black community, there is a deep mistrust of the criminal justice system and a serious doubt as to its likelihood of delivering reliable convictions. The mistrust is even prevalent amongst Blacks with no criminal record. The "mistrust is deeply, historically entrenched . . . . The utter lack of faith [of Blacks] in the criminal justice system is corrosive . . . ."[429]

The mistrust in the Black community cuts across generations. For example, a 2003 study of 911 young people from New York City found that that Black youth are highly likely to harbor feelings of mistrust in the criminal system.[430] These youth, "had relatively little criminal justice experience" in terms of arrests and convictions, though the police had stopped over half of them.[431] Indeed, both Black and Hispanic youth felt the least safe of any other group in the city and "were significantly more likely than other groups to worry about being arrested and harassed by police."[432] "Stories of police harassment came largely from Black and Hispanic youth."[433] A White female even reported being harassed by police when she was with a Black youth because the police assumed they were drug dealers.[434] One Black female said, "[y]ou get used to this, the pat downs, spread eagles."[435]

The public perception that the law does not treat Blacks equally is troubling, particularly given the studies that demonstrate that this perception is reality. At a national state judiciary conference, an overwhelming majority of participants "believed the greatest challenge facing the state courts is strengthening the relationship with the public."[436] This point recognizes that the public's view of the justice system is quite

---

NATIONAL SURVEY 3 (1999), *available at* http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf.

427. *Id.*

428. *Id.* at 3, 8.

429. Editorial, *When Race Is at Issue . . . Get Special Prosecutor in Cop Shooting*, NEWSDAY (Long Island, N.Y.), Jan. 3, 2007, at A30.

430. *See* Michelle Fine, Nick Freudenberg, Yasser Payne, Tiffany Perkins, Kersha Smith & Katya Wanzer, *"Anything Can Happen with Police Around": Urban Youth Evaluate Strategies of Surveillance in Public Places*, 59 J. SOC. ISSUES 141 (2003).

431. Deanna L. Wilkinson, *Local Social Ties and Willingness to Intervene: Textured Views Among Violent Urban Youth of Neighborhood Social Control Dynamics and Situations*, 24 JUST. Q. 185, 189 (2007) (analyzing study highlighted in article, *"Anything Can Happen with Police Around"*).

432. *Id.*

433. Fine et al., *supra* note 430, at 153.

434. *Id.*

435. *Id.*

436. NAT'L CTR. FOR STATE COURTS, *supra* note 426, at 6.

relevant. Indeed, it is an "integral" aspect of the system itself.[437] When laws and decision makers in the criminal process are biased against Blacks, they have infused racial bias, and hence unreliability, into the criminal justice system.[438]

Moreover, within the criminal justice system, "racial profiling is ineffective as a law-enforcement tool."[439] Blacks and other minorities' distrust of the system "hinders law enforcement because minorities are less likely to report crime or to participate in prosecutions."[440] Many minorities simply refuse to serve jury duty, as has been observed when "potential jurors often refuse to serve in crack cases, knowing that the penalties hurt [Blacks] more."[441] Professor Paul Butler has urged those Blacks who will participate as jurors to consider engaging in jury nullification and acquitting Black defendants even though they may be guilty because of the racial bias in the system.[442] In short, it is simply impossible for the criminal system to be effective without cooperation from minority communities.[443]

> The rebuilding of the trust level is important to the *integrity* of the justice system. Most importantly, it is important to the [Black] community whose own peace and safety is best served by a generally accepted respect for the rule-of-law, not by a disproportionate presence of the police and the criminal justice system.[444]

To many people, of all races, the system currently lacks integrity, and hence reliability. This fact cannot be ignored when analyzing the propriety and fairness of prior conviction impeachment.

F. Lessons from the Innocence Movement

The innocence movement, with the advent of DNA testing, has exposed the very real truth that many innocent persons, mostly minorities, have been wrongly convicted.[445] Professor Brandon Garrett recently published findings of an empirical study in which he analyzed the evidence from the original trials of inmates who were exonerated through DNA testing. As of May 2007, 200 persons had been exonerated through such testing.[446] Professor Garrett's study analyzed evidence from each of those

---

437. *See id*. at 7.

438. *See* Angela J. Davis, *Prosecution and Race, The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 38 (1998).

439. Johnson, *supra* note 21, at 310.

440. *Id.*

441. Richard B. Schmitt, *Panel May Cut Thousands of Prison Terms*, L.A. TIMES, Nov. 12, 2007, at A1.

442. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679 (1995) (arguing that the current treatment of Blacks in the criminal system makes it the "moral responsibility of [B]lack jurors to emancipate some guilty [B]lack outlaws").

443. Johnson, *supra* note 21, at 310.

444. COUNCIL ON CRIME AND JUSTICE, *supra* note 280, at 10 (emphasis added).

445. *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 79 (2008) (observing that there is a "disproportionate" number of minorities "among those exonerated by postconviction [sic] DNA testing").

446. *Id.* at 64.

cases.[447] The demographics of the "innocence group" were "troubling."[448] Sixty-two percent of those exonerated were Black.[449] In all, seventy-one percent were minorities, which is much more "than is typical even among average populations of rape and murder convicts."[450] Professor Garrett's analysis revealed that unreliable evidence, particularly cross-racial identifications, played a large role in convicting these innocent persons.[451]

The innocence movement raises some disturbing issues regarding the overall reliability of the entire system. Because the availability of and access to DNA testing is limited, there must be deep concerns that there are many more innocent persons serving time in prison, even on death row, who may never be able to prove their innocence. Moreover, DNA evidence is only relevant in certain cases, typically rape and murder. Thus, exoneration via DNA testing offers only a mere glimpse into the failings of our criminal justice system, particularly as it pertains to Blacks. We must begin to address the innocence movement seriously and its implication regarding the reliability of Rule 609 evidence and the desirability of continuing this practice.

IV. PROPOSALS FOR REFORM: REMEDYING THE DUE PROCESS PROBLEM

In this Part, I analyze the due process problems that the use of unreliable prior convictions create. I then propose that Congress and state legislatures confront the reality of racial bias in the criminal process and eliminate the use of prior convictions to impeach criminal defendants, in light of the current unreliability of the criminal justice system across the country. Until the use of prior convictions to impeach criminal defendants is abolished, however, courts should intervene and allow defendants to challenge the reliability of their prior convictions, as they have the right to "impeach" the credibility of hearsay declarants.

A. What's Due Process Got to Do with It?

The reliability problems with prior convictions discussed above raise serious due process concerns for criminal defendants with prior records. Ordinarily, a judgment of conviction from another U.S. court is admissible, provided that the other limitations of Rule 609, discussed above, are met. When a prosecutor seeks to use a defendant's prior conviction against him or her at trial for impeachment purposes, the defendant has essentially little or no opportunity to challenge the validity of the prior conviction. The Supreme Court in *Loper v. Beto* held, however, that convictions that were rendered in violation of the right to counsel under *Gideon v. Wainright*[452] are not reliable and cannot be used as a basis for impeachment under Rule 609.[453] The use of such

447. *Id*.
448. *See id.* at 66.
449. *Id.*
450. *Id.*
451. *See id.* at 79–80.
452. 372 U.S. 335 (1963).
453. Loper v. Beto, 405 U.S. 473, 483 (1972) ("The absence of counsel impairs the reliability of such convictions just as much when used to impeach as when used as direct proof of guilt." (quoting Gilday v. Scafati, 428 F.2d 1027, 1029 (1st Cir. 1970))).

convictions would violate due process, according to the Court.[454] *Loper*'s reach seems to be quite limited. It applies to convictions obtained in cases where the right to counsel was denied altogether and later determined to be void.[455] There have only been "modest" extensions of the doctrine beyond this bright line application, for example, if the defendant was denied access to counsel before his cross-examination.[456]

But the Court's concern in *Loper* with reliability should extend to all prior convictions sought to be used against defendants under Rule 609.[457] Though many judges are likely hesitant to extend *Loper* beyond its narrow scope, "the rationale of *Loper* [sic] could be extended beyond cases in which the right to counsel was denied."[458] The Court's reliance on due process as the basis for holding that convictions obtained absent the right to counsel were unconstitutional "permits the argument that procedures violating other rights essential to reliability could also produce unreliable tainted convictions."[459]

Prior convictions under Rule 609 are what the Supreme Court would call "non-testimonial" hearsay, and one might argue that there is a due process requirement that such evidence be reliable. The Confrontation Clause in the U.S. Constitution, as recently interpreted by the Supreme Court, places constitutional limitations on the admissibility of hearsay statements that are "testimonial." The Supreme Court's recent decision in *Crawford v. Washington* held that, for Confrontation Clause purposes, if a hearsay statement is "testimonial," it is inadmissible against a criminal defendant unless the hearsay declarant is unavailable to testify at trial, and the defendant had a prior opportunity to cross-examine the declarant.[460] Later, in *Whorton v. Bockting*, the

---

454. *Id.*

455. *See, e.g.*, Smith v. Collins, 964 F.2d 483, 486 (5th Cir. 1992). The *Smith* court noted:

> [Defendant's] reliance on *Loper* [was] misplaced. *Loper* involved convictions used for impeachment which [sic] were constitutionally invalid because the accused was denied the right to counsel—a defect which [sic] impairs the very integrity and reliability of a conviction. . . . [Defendant's] prior convictions were invalidated because the indictments *contained technical defects*. The factual reliability of his convictions was not questioned.

Id. (emphasis added); *see also* State v. Dahlin, 1998 MT 299, ¶ 20, 292 Mont. 49, ¶ 20, 971 P.2d 763, ¶ 20 ("Here, no prior conviction later determined invalid was introduced into evidence. . . . In contrast to the prior convictions at issue in . . . *Loper*, Dahlin's testimony has not been ruled invalid or void . . . .").

456. *See* CHARLES A. WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 6140 (2008) (noting *Loper*'s limitations but suggesting that it would be "much more difficult for the trial judge where the accused had counsel but complains of constitutional error because of insufficient access to counsel or because counsel was incompetent").

457. Wright and Gold contend that despite limitations currently placed on *Loper*, it would not be inappropriate to extend the reliability concern in *Loper* to other cases where prosecutors wish to have prior convictions admitted against defendants under Federal Rule of Evidence 609. *Id.*

458. *Id.*

459. *Id.*

460. 541 U.S. 36, 68 (2004) ("Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

Court observed that the Confrontation Clause does not protect against unreliable non-testimonial hearsay statements.[461]

Thus, some scholars and commentators have raised the question of what constitutional protections are available for a criminal defendant against whom the State attempts to introduce unreliable, non-testimonial hearsay. The "straightforward" and most logical answer is that freestanding due process requires there be sufficient indicia of reliability for non-testimonial hearsay statements offered against the criminal defendant.[462] As one court noted, "[t]here may be some statements so lacking in reliability that their admission would raise due process concerns."[463] And in the context of witness identification evidence, the Supreme Court has indicated that due process requires that such evidence be reliable.[464]

Professor Andrew Taslitz has argued for a "reinvigorated due process analysis [for hearsay statements], drawing on recent lessons from the innocence movement."[465] That movement focuses on obtaining correct results, which the due process clause is well-suited to encourage. Indeed, "[d]ue process is meant more than any other constitutional doctrine to bear the load of encouraging correct results . . . ."[466]

A substantial amount of hearsay, including prior judgments of convictions, will be beyond *Crawford*'s reach, although some of the multiple layers of hearsay that led to the prior conviction might be deemed testimonial. The ultimate conviction, however, will be deemed non-testimonial,[467] and thus should be subject to a due process analysis. And due process, with its promotion of fundamental fairness, is concerned with reliability.[468] "[T]he primary . . . function of freestanding due process is to promote reliable fact-finding," that is, that which leads to "measurably accurate outcomes, such as convicting the killer who wielded the knife and not the innocent bystander falsely caught in a web of flawed circumstantial evidence."[469] With respect to evidence, particularly hearsay evidence, "[r]eliability . . . can thus be served in at least two ways: (1) by promoting procedures enhancing the likelihood that admissible evidence correctly reflects reality; and (2) by improving the fact finder's ability to assess the accuracy of, and weight to be accorded to, admitted evidence."[470]

---

461. 127 S.Ct. 1173, 1183 (2007).

462. *See* Carol A. Chase, *Is* Crawford *a "Get Out of Jail Free" Card for Batterers and Abusers? An Argument for a Narrow Definition of "Testimonial"*, 84 OR. L. REV. 1093, 1108–09 (2005).

463. Commonwealth v. Edwards, 830 N.E.2d 158, 170 n.21 (Mass. 2005); *see also* United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992) (assuming "that the admission of facially unreliable hearsay would raise a due process issue").

464. Chase, *supra* note 462, at 1108–09 (discussing Manson v. Braithwaite, 432 U.S. 98 (1977)).

465. Andrew E. Taslitz, *What Remains of Reliability: Hearsay and Freestanding Due Process After* Crawford v. Washington, 20 CRIM. JUST. 39, 40 (2005).

466. *Id.*

467. *See, e.g.*, People v. Shreck, 107 P.3d 1048, 1060 (Colo. Ct. App. 2005) (analogizing prior convictions to business records, which *Crawford* specifically excluded from the definition of "testimonial" hearsay).

468. *See* Taslitz, *supra* note 465, at 47.

469. *Id.*

470. *Id.*

In addressing a constitutional challenge to Rule 413, which provides for the admissibility of evidence of a criminal defendant's prior sexual offenses whether charged or uncharged, the court in *United States v. Enjady* indicated that without the "safeguards embodied in Rule 403," Rule 413 would be unconstitutional.[471] The court "agree[d] that Rule 413 raises a serious constitutional due process issue."[472] However, those concerns were adequately safeguarded by the discretion granted to a trial judge under Rule 403 to exclude evidence where the probative value of the evidence is substantially outweighed by its prejudicial effect.[473] The Rule 403 balancing test that the court outlined, however, was largely concerned with reliability.[474]

Rule 609 evidence obtained in a system plagued with racial bias raises serious due process concerns. And, as I discuss below, a court faced with due process objections from a defendant to the admission of such evidence should address the reliability issues surrounding that evidence.

B. Confronting the Inconvenient Truth: A Call for Legislative Action

Many might be resistant to the idea of declaring that prior convictions are unreliable means of impeachment. Doing so necessarily acknowledges that there are serious flaws in our criminal system and that those flaws might have caused injustice to a particular individual. But we cannot ignore the substantial evidence of bias in the system and that there is injustice that leads to unreliable convictions. Moreover, the idea that a flawed criminal justice system would compound its failings by making use of unreliable convictions to produce more unreliable convictions is repugnant.

The criminal justice system—which includes legislators, prosecutors, police, judges, and even jurors and witnesses—must always seek to improve its accuracy. Doing so requires that the system be its own toughest critic. Eradicating racial bias in the criminal process will require careful attention to the ways that race is used as evidence. Reliance on prior convictions will result in the continuation of the invidious cycle. This is why impeaching criminal defendants with prior convictions obtained through a racially biased system perpetuates institutionalized racism.

The evidentiary rules reflect our society's ideals of how best to construct the legal facsimile of truth. Thus, the rules are a powerful symbol. They model for society the best way to seek and understand truth. Our rules must change from time to time to reflect our growth and understanding as a society. The Rape Shield statute is such an example. Congress and state legislatures should consider the evidence of racial bias in the criminal justice system, acknowledge the failings in the system, and eliminate the use of prior convictions to impeach criminal defendants.

Though it is my argument that prior convictions are the product of an unreliable system, I am most concerned about the elimination of their use against criminal defendants because of the grave potential for prejudice coupled with their low probative value. I would continue to give courts discretion to allow criminal defendants to impeach witnesses for the prosecution with their prior convictions in light of defendants' constitutional right to mount a defense and effectively cross-examine the

---

471. 134 F.3d 1427, 1433 (10th Cir. 1998).
472. *Id.* at 1430.
473. *Id.* at 1433; *see also* Taslitz, *supra* note 465, at 48.
474. *See* Taslitz, *supra* note 465, at 48.

witnesses against them. Moreover, in that context, the criminal justice system suffers the prejudice that might result from the defendants' use of the system's own unreliable convictions.

C. Challenging "Ancient" Assumptions: A Possible Need for Judicial Intervention

Judges are not in the best position to declare the criminal justice system, in particular jurisdictions or as a whole, unreliable, because this is more of a political determination. Still, unless or until Congress addresses the due process concerns with prior conviction impeachment, judges must intervene in individual cases. In light of due process concerns, there should be a strong presumption against the admissibility of prior convictions and a heavy burden against the government to overcome that presumption. Prior convictions should no longer be "routinely" admitted as a right to prosecutors.

The burden of establishing admissibility is already on the government—the party seeking to use the prior conviction. In meeting that burden, courts should require the prosecution to demonstrate the reliability of the convictions that they offer for impeachment. The court should consider the race of the defendant and the incarceration rates based on race and any available studies regarding racial bias in the particular jurisdiction from which the conviction was obtained. The court should also consider whether the prior conviction resulted from a plea bargain or was the result of a full-blown trial. If the conviction was the result of a plea bargain, the court should be particularly concerned about reliability. Additionally, the court should consider how the defendant's conviction and his race might work to prejudice him in light of the facts of the case at hand.

Under the *Luck/Gordon* doctrine, which preceded Rule 609, but is still relied upon by courts exercising their discretion under the rule, courts already consider various nonexclusive factors in balancing the probative value of prior convictions against their prejudicial effect.[475] These factors include the impeachment value of the conviction, the point in time of the conviction and the defendant's subsequent history, the similarity between the prior crime and the current charge, and the centrality of the credibility issue in the case.[476] In *Gordon*, with respect to plea bargaining, then-Justice Burger even noted that "[t]he relevance of prior convictions to credibility may well be different as between a case where the conviction of the accused was by admission of guilt by a plea and on the other hand a case where the accused affirmatively contested the charge and testified . . . ."[477] Thus, Burger considered plea-bargaining to be a factor in determining the probative value of prior convictions.[478]

My proposal would add factors dealing with racial bias in the criminal process to the *Luck/Gordon* analysis. Before admitting the prior conviction against the defendant, the court should be satisfied by a preponderance of the evidence under Rule 104(a), the

---

475. *See* Hornstein, *supra* note 12, at 25 (referring to *Gordon v. United States*, 383 F.2d 936 (D.C. Cir. 1967) and *Luck v. United States*, 348 F.2d 763 (D.C. Cir. 1965) and noting that courts continue to rely on those cases in determining whether to admit prior convictions).

476. *See* United States v. Alexander, 48 F.3d 1477, 1488 (9th Cir. 1995) (en banc) (citing United States v. Cook, 608 F.2d 1175, 1185 n.8 (9th Cir. 1979) (en banc)).

477. *Gordon*, 383 F.2d at 940 n.8.

478. *See id.*

rule governing preliminary determinations by the court, that the conviction is reliable.[479]

Rule 806 allows parties to attack the credibility of a hearsay declarant,[480] and in the case of a prior conviction, the criminal justice system is the declarant that has stated that the defendant is a criminal. Criminal defendants should be able to argue that their convictions are unreliable. In demonstrating this unreliability, they should be able to point to any available studies, which may be similar to those discussed in Part III, showing disproportionate targeting of minorities in their jurisdiction. They should also be able to inform the jury of any exoneration in the jurisdiction from which the conviction was obtained. If the defendant has evidence of racial bias in his case, he should be able to inform the jury. Similarly, if the defendant has evidence of his actual innocence, he should be permitted to present it to the jury. Openly discussing race in this manner will likely help jurors to confront and be mindful of their own racial biases.

The obvious criticism of this proposed approach will be the argument often relied on in other contexts—that this evidentiary issue will spawn a "mini-trial" and that judicial economy will suffer.[481] Wright and Gold, in arguing that the *Loper* doctrine should not be extended much beyond its narrow scope, state that "[e]ngaging in this [type of] side-trial can be distracting and of little value since the inquiry is pertinent only to witness credibility."[482] As discussed above, however, it is widely known that, practically speaking, the admission of a defendant's prior conviction is quite likely to have a highly prejudicial impact on the defendant and is of much more importance than mere "witness credibility." So when considering the dangers of the "side-trial," we must also consider how powerful this type of evidence is.

And admittedly, there is that potential for a mini-trial. But we permit preliminary hearings regarding other evidentiary issues, such as *Daubert* hearings on the reliability of expert testimony. The requisite initial showing of reliability by the prosecution would operate in a similar manner. With respect to the defendant's impeachment of the criminal justice system, I view the possibility of a mini-trial and the sacrifice of judicial economy as necessary to protect the defendant's constitutional rights. If the prosecution is concerned about judicial economy, there is a simple solution: do not offer the prior conviction into evidence. They certainly have no constitutional right to offer this type of evidence. Additionally, the court has tremendous discretion under the Federal Rules of Evidence to avoid the introduction of irrelevant, cumulative, or unduly confusing evidence.[483]

---

479. FED. R. EVID. 104(a).

480. FED. R. EVID. 806.

481. WRIGHT & GOLD, *supra* note 456, (arguing that extending *Loper* beyond its narrow scope would be "difficult" because "the trial court must conduct an inquiry into the facts of the underlying case to determine the extent to which there were problems" and that the court must "conduct what might be [a] complex consideration of the law to determine if the facts raise constitutional problems").

482. *Id.*

483. *See* FED. R. EVID. 403.

CONCLUSION

While we cannot ignore the progress symbolized by the election of Barack Obama, we also cannot deny that race remains a significant issue in America, particularly in the way that justice is served in the criminal process. Race is indeed predictive character evidence, and it has proven time and time again to be unreliable evidence. As Obama said of America in his pivotal speech that I referenced in the Introduction of this Article, the Union "may never be perfect, but . . . it can always be perfected."[484] This ambitious idea holds true for the criminal justice system as well. In the process of perfecting the system, we must eliminate racially biased rules such as Rule 609 and demand evidence of the highest reliability. We must do so even if that means facing the uncomfortable truth that the American justice system's racial bias has rendered it an unreliable source of evidence for future cases. Evidence law is about seeking truth through reliable means. We must not let our past imperfections impede our present goal of perfecting our truth-seeking process.

484. Obama speech, *supra* note 3.