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Assessment of Federal Rule of Evidence 609 and the Necessity of a Deeper Collaboration with the Social Sciences for Racial Equality

*Carta H. Robison**

INTRODUCTION

Author and journalist Hunter S. Thompson once wrote, "I'm a relatively respectable citizen a multiple, felon, perhaps, but certainly not dangerous."[1] Anglo-American jurisprudence presents a very unique set of procedural rules, many codified through common law, which have guided our American legal system for several decades.[2] The Federal Rules of Evidence were enacted in 1975.[3] They apply to actions, cases, and proceedings brought after the Rules took effect.[4] The purpose of these Rules is to "administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[5] Consistent with this provision, the Federal Rules of Evidence mandate that all relevant evidence is admissible unless the Constitution, a federal statute, the Federal Rules of Evidence themselves, or any other rule prescribed by the Supreme Court provide otherwise.[6]

Challengingly, however, the Federal Rules of Evidence reflect two principalistic issues that do not always live in accord in the criminal context.[7] Through

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[1] HUNTER S. THOMPSON, FEAR AND LOATHING IN LAS VEGAS: A SAVAGE JOURNEY TO THE HEART OF THE AMERICAN DREAM, 74 (Vintage Books 2d ed. 1998).

[2] *See generally* Margaret A. Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 HOFSTRA L. REV. 255 (1984) (discussing codification of the law of evidence).

[3] Federal Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926 (1975).

[4] FED. R. EVID. 101.

[5] FED. R. EVID. 102.

[6] FED. R. EVID. 402.

[7] *See generally* Donald H. Zeigler, *Harmonizing Rules 609 and 608(b) of the Federal Rules of Evidence*, 2003 UTAH L. REV. 635 (2003) (discussing the

the most foundational of principles in our jurisprudence system, the Accused is innocent until proven guilty in criminal prosecutions. This is known as the "presumption of innocence" and exists today under our common-law legal system.[8] The text of the Sixth Amendment to the Constitution of the United States provides several guarantees to the Accused, including the right to a speedy and public trial in front of an impartial jury, to be informed of the accusation against him, to confront the witnesses against him, and to call witnesses in his favor.[9] Because the Accused possesses this inherent presumption of innocence, the prosecution must prove beyond a reasonable doubt each essential element of the crime charged. The notion, in theory, is that we base our criminal-justice system on the precept that a person will be convicted only for what he does, not for who he is or for what he has done prior to the event in question.[10]

One hallmark rule of the Federal Rules of Evidence has codified this notion with particularity: that evidence of a person's character or character trait is not admissible to prove that at a given time the person acted in accordance with that character.[11] Character, in this sense, is roughly the equivalent of what people think the kind of person someone is; it is "a fixed trait or the sum of traits."[12] This is known as character propensity, and Federal Rule of Evidence 404 prohibits use of such evidence. Therefore, on one hand, the rules are designed to provide relevant information to the trier of fact (judge or jury), but through rules such as Rule 404 and its propensity ban, certain information may be limited when it is likely to be given too much weight by the trier of fact.[13]

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inconsistencies between Rules 609 and 608(b) and their respective impeachment methods and the disparities that result in their application).

[8] *See generally* François Quintard-Morénas, *The Presumption of Innocence in the French and Anglo-American Legal Traditions,* 58 AM. J. COMP. L. 107(2010) (discussing the development of the presumption of innocence doctrine in both the French and Anglo-American traditions).

[9] U.S. CONST. amend. VI.

[10] H. Richard Uvillers, *Evidence of Character to Prove Conduct*: *Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 868 (1982).

[11] FED. R. EVID. 404(a)(1).

[12] IA JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 55, ILL. L. REV. (Tillers Rev. 1983).

[13] Robert D. Okun, *Character and Credibility: A Proposal to Realign Federal Rules of Evidence 608 and 609*, 37 VILL. L. REV. 533, 534 (1992).

Federal Rule of Evidence 609 is known to be the most controversial of all the rules.[14] Many scholars in opposition of the rule have suggested that there be more restrictions on use of a defendant's criminal convictions to impeach a defendant's credibility.[15] Social-science research has enhanced support for the fact that admissibility of prior bad acts can significantly prejudice the defendant. Furthermore, there is more room for social science and critical race theory to play a role in legal policy assessment and in the development of policy to reflect the status of racism in the American jurisprudence system than has been accepted.

Triers of fact apply Federal Rule of Evidence Rule 609 under the assumption that the rule is neutral. This Note will explain that the rule is not neutral and should be reviewed to account for the racial inequality in the criminal justice system: Black men face more criminal convictions than any other demographic.[16] More specifically, this note links critical race theory, social science methods, and the law, to intervene and address how the use of Rule 609 disproportionately affects people of color. Rule 609 permits exposure of a witness's prior conviction when those convictions are the result of being swept into a system that is biased towards them. A stricter scrutiny of the reliability of the prior conviction as a result of systemic racism must be acknowledged.[17] A collaboration with social science is the best intervention.

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[14] *See, e.g.*, Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 295 (2008); Teree E. Foster, *609(a) in the Civil Context: A Recommendation for Reform*, 57 FORDHAM L. REV. 1, 8 (1988) (noting the commentary around 609 as challenging and profuse); Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2295 (1994) (noting that no Federal Rule of Evidence has sparked more controversy than Rule 609).

[15] Okun, *supra* note 13, at 536.

[16] Despite the recommendation of *The Chicago Manual of Style*, I have intentionally capitalized the "b" in Black. Historically, "Black" constitutes a group which includes African-Americans and those who are of African descent but not from the United States. Capitalizing "Black" is also the accepted standard used by Black media outlets and shows respect for the necessary distinction between color and race. For additional commentary, *see* Lori L. Tharps, Opinion, *The Case for Black with a Capital B*, N.Y. TIMES, Nov. 18, 2014, https://www.nytimes.com/2014/11/19/opinion/the-case-for-black-with-a-capital-b.html?_r=0.

[17] Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563, 565 (2014).

This Note proposes that a stricter focus on behavioral realism in the law will take into account the scientific findings of bias and systemic racism and use them to understand how people's (including judges') subconscious biases affect their behavior in the operation of Rule 609. With this information, lawmakers can craft policies to address current discrimination and reform the rules beginning with Rule 609. Ultimately, this Note will show that Rule 609, as it stands today, re-manifests discrimination in the justice system whereby the prior conviction helps convict the defendant again, and that social science should be applied more forcefully to show that bias plays a major role in perpetuating racism in the law. As the most controversial of the Federal Rules of Evidence, Rule 609 is best suited to lead the charge for criminal-justice reform. Application of Rule 609 severely prejudices the defendant-witness. The legal system should be accountable for approaches in the law that have been invalidated by the social sciences. This article calls for implementation of a federal interdisciplinary task force to follow the model proposed by Jerry Kang: deconstruct Rule 609, apply behavior realism, and reform the law to reflect scientific findings.[18]

I. THE HISTORICAL AND RACIAL SIGNIFICANCE OF RULE 609

There have been several iterations and reconstructions of what is now Rule 609 since 1970.[19] In 1965, the courts initiated complete judicial discretion and balancing tests where the judge could use her discretion to weigh the probative value of the conviction against the issue of the witness's credibility.[20] This was short lived, however, because by 1970 Congress rejected the balancing test when it amended the District of Columbia Code to mandate the admissibility of a felony conviction for any

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[18] *See* Jerry Kang, *Rethinking Intent and Impact: Some Behavioral Realism about Equal Protection*, 66 ALA. L. REV. 627, 635–36 (2015) (arguing that the commitment to behavioral realism is a three-step process: step one, identify new science; step 2, excavate old law; and step 3, account for the gap).

[19] *See Rule of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 271 (1973).

[20] *See* Luck v. United States, 348 F.2d. 763 (D.C. Cir. 1965) (holding that trial courts should employ a balancing test to determine whether to admit prior convictions in order to impeach a witness).

crime involving dishonesty or a false statement.[21] Congress's desire to use prior convictions against a witness was taking a strong hold, and judges were quickly becoming restricted in the discretion they could use.[22] The Rule 609 of today is a product of this amendment to the D.C. Code. It was a bargain between two conflicting draft versions of the rule produced by both the House and Senate Judiciary Committees in 1975.[23] Each version varied drastically.[24] The Conference Committee was tasked with reconciling the two versions.[25] While Rule 609 was an attempt to strike a balance between the necessity of prior-conviction evidence and the defendant's right to a fair trial, it became clear that those who favored greater admission of prior-conviction evidence got the better end of the compromise.[26]

The crux of Rule 609 is as follows: once the defendant-witness takes the stand, he opens himself up to impeachment for credibility by the prosecutor, who may (and often will) introduce evidence of the defendant's prior convictions.[27] Rule 609 is only triggered when there is a conviction and the defendant-witness takes the stand.[28] The rule's design encompasses two parts. The first, and most straightforward part, is Federal Rule of Evidence 609(a)(2), which seeks to admit conviction evidence for crimes involving dishonesty or a false statement (e.g. perjury, tax evasion, forgery, embezzlement).[29] If such a conviction exists, and the conviction was in the last ten

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[21] Okun, *supra* note 13, at 541 (quoting D.C. CODE ANN. § 14–305(b)(1) (1980)) ("For the purpose of attacking credibility of a witness, evidence that the witness has been convicted of a criminal offense shall be admitted . . . if the criminal offense (A) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or (B) involved dishonesty or a false statement regardless of punishment.").

[22] *See* Alan D. Hornstein, *Between a Rock and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 VILL. L. REV. 1, 8 (1997); *see also* Gold, *supra* note 14, at 2299 (discussing the history of Rule 609 and criticism around the Preliminary Draft's absence of any discretion to exclude the threat of prejudice in a criminal case).

[23] 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, 10 (1999).

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *See* Edward Roslak, *Game Over: A Proposal to Reform Federal Rule of Evidence 609,* 39 SETON HALL L. REV., 695, 716 (2009).

[28] *Id.* at 695.

[29] *See* FED. R. EVID. 609(a)(2).

years, then it must automatically be admitted.[30] This also means that the judge exercises no discretion on whether such evidence should be admitted, and its admission is not subject to the Rule 403 balancing.[31] The thought is that because these convictions involve "dishonestly or false statements" they are highly probative of untruthful character.[32] The rule does not distinguish between felonies or misdemeanors.[33]

The second part, Federal Rule of Evidence 609(a)(1), is slightly more complex and involves evidence for crimes punishable for more than one year that *do not* involve a false statement or dishonesty. In other words, Rule 609(a)(1) admits other serious crimes through one of two balancing tests. Rule 609(a)(1)(A) indicates that evidence must be admitted, subject to Rule 403, in a civil or criminal case where the witness was *not* the defendant.[34] Rule 609(a)(1)(B) states that evidence must be admitted where the witness was also the defendant if the probative value outweighs prejudicial effect.[35] Finally, Rule 609(b) caps the look-back period of a conviction at ten years.[36] After ten years, the law favors exclusion of the evidence. If more than ten years have passed from a witness's conviction or release (whichever is later) and the impeachment would be otherwise admissible under Rule

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[30] *See id.*; Gold, *supra* note 14, at 2319.

[31] *See* FED. R. EVID. 403. Rule 403 is a balancing test for judges to determine whether the evidence introduced has probative value. If the evidence passes Rule 401's relevancy standard then the judge determines whether the evidence's probative value is substantially outweighed by the danger of one of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. When that probative value is outweighed, the judge may exclude the evidence; *see also* Gold, *supra* note 14, at 2319 (describing that evidence admitted under (a)(2) is not subject to exclusion, even where prejudicial effect outweighs probative value).

[32] Gold, *supra* note 14, at 2319-2320.

[33] *See* FED. R. EVID. 609(a)(2) (noting that the rule applies to any crime regardless of the punishment).

[34] FED. R. EVID. 609(a)(1)(A).

[35] FED. R. EVID. 609(a)(1)(B). This is a modified (reverse) version of Rule 403 where the law favors exclusion: the probative value of the evidence must outweigh the prejudicial effect to the defendant. This balancing test is designed to account for the prejudice the criminal defendant faces when the jury learns of such conviction. For all other witnesses, the original Rule 403 balance applies and favors inclusion of evidence.

[36] *See* FED. R. EVID. 609(b). This subdivision applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is greater.

609(a), then an extremely strong showing of probative value is required to admit conviction evidence.[37]

Admitting evidence to the trier of fact that could be attributed too much weight is dangerous for several reasons. To start, it is important to first note why the Federal Rules of Evidence exist in the first place. Some scholars have posited that juries are the reason why such extensive rules exist.[38] The problem with juries is illustrated through the concept of "mental contamination" and it comes up frequently in evidence law.[39] Juries are lay people, not legal scholars, and they bear the heavy burden of sifting through a lot of information and deciding, based on the facts presented in the case, whether the defendant is guilty or not guilty of the crimes charged. But mental contamination represents a category of research findings about how juries use prior knowledge (and bias) in an unwanted manner.[40] From the start, the judge must be the gatekeeper of the flow of evidence and information presented to the jury to reduce the bias and prejudice that the jury may exert against the defendant. Federal Rule of Evidence 403, discussed previously, is one such rule that requires the judge to make swift determinations on how the jury will be affected by admission of the information.[41] Human behavior indicates that people rely on character and the assumption is that people behave according to their personality or character.[42]

Character or a character trait is normally proven by one of three available means: reputation, specific manifestation, and sometimes opinion.[43] Culturally, most Americans assume that one's personality (or "character") has a strong bearing on one's propensity to behave in a certain way towards others.[44] In other words, Americans like to believe that if they understand a person's

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[37] *See* FED. R. EVID. 609(b)(1); *see also Rule of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 271 (1973) (stating that "practical considerations of fairness and relevancy demand that some boundary be recognized").
[38] *See* MICHAEL J. SAKS & BARBARA A. SPELLMAN, THE PSYCHOLOGICAL FOUNDATIONS OF EVIDENCE LAW 2 (2016).
[39] *Id.* at 19.
[40] *Id.*
[41] *Id.* at 57.
[42] *Id.* at 142.
[43] Uvillers, *supra* note 10, at 849.
[44] SAKS & SPELLMAN, *supra* note 38, at 142.

personality traits, then it may be easier to predict that person's behavior on a given occasion. The question then becomes: under this assumption, is it proper for the law to exclude evidence of a person's character to determine whether a criminal defendant is more or less likely to have committed the crime charged? The response of the common law is "yes and no."[45] The American criminal-justice system has developed to exclude evidence of a person's character to prove that a defendant has a propensity to commit crime.[46] By contrast, there is no prohibition on use of prior-conviction evidence to impeach a defendant's credibility as a witness.[47]

Second, character evidence is generally excluded because it is of slight probative value.[48] Character evidence is thought to be time consuming and distracting.[49] At worst, as the Advisory Committee Notes to Rule 404 note, character evidence is very prejudicial: it "distracts the trier of fact from the main question of what actually happened on the particular occasion" and "punish[es] the bad man . . . despite what the evidence in the case shows actually happened."[50] On a psychological level, jurors misuse negative character evidence.[51] Further, when character is introduced, and the prosecution is able to probe into specific instances of the witness's character, the jury is more likely to find the defendant guilty "when positive character evidence is rebutted than when character evidence is not introduced at all."[52] Thus, the Federal Rules of Evidence were established to restrain lawyers from presenting unreliable evidence that would confuse, mislead, deceive the jury, or

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[45] Uvillers, *supra* note 10, at 849.
[46] FED. R. EVID. 404.
[47] *See generally*, FED. R. EVID. 609.
[48] *Rule of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 219 (1973).
[49] *See id; see also* Uvillers, *supra* note 10, at 850.
[50] *Rule of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 219 (1973).
[51] *See* Evelyn M. Mader & Jennifer S. Hunt, *Talking About a Black Man: The Influence of Defendant and Character Witness Race on Jurors' Use of Character Evidence*, 29 BEHAV. SCI. L. 608, 609 (2011) (analyzing studies that found that jurors are more influenced by specific negative information from the prosecution's cross examination than the general positive character evidence introduced by the defense).
[52] *Id.* at 610.

be too prejudicial to a criminal defendant.[53] The law assumes that people do not dependably behave in accordance with their personalities, so as a general rule character evidence is excluded.[54]

The lines of character evidence begin to blur as the litigious evidence battle continues with the complexity of rules such as Rule 609. Rule 609 is an *exception* to Rule 404's ban against character evidence.[55] Courts allow character evidence under certain circumstances and for certain purposes.[56] But, as is the case for Rule 609, once prior-conviction evidence is admitted, the jury cannot unhear it. Prior-conviction evidence is still used even though there is an overwhelming body of data that concludes that jurors outright misuse prior-conviction evidence.[57] The jurors draw impermissible inferences—so much so that Rule 609 creates an entirely opposite effect![58] It has been proven that jurors cannot manage evidence of a person's prior convictions: they use prior-conviction evidence to infer criminal propensity and frequently ignore or fail to understand limiting instructions.[59] The drafters made two very large assumptions: 1) that jurors are able to understand a judge's limiting instruction when prior-conviction evidence is introduced; and 2) that jurors will obey the instruction.[60] Thus, in theory, the rules were designed to help jurors by limiting the amount of prejudicial evidence that is presented, but instead the rules allow introduction of evidence that the jury cannot objectively handle. Coupled with other psychological processes, such as implicit bias and stereotyping, "[w]hite jurors are more likely to experience anger and less likely to report empathy toward the defendant," seeing them as vicious

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[53] T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499, 501 (1999).
[54] SAKS & SPELLMAN, *supra* note 38, at 143; *see generally* FED. R. EVID. 404.
[55] FED. R. EVID. 404(a)(3). Evidence of a witness's character may be admissible under Rules 607, 608, and 609. Emphasis added.
[56] *Id.*
[57] Dodson, *supra* note 23, at 42.
[58] *See id.* at 32 (discussing one of the first relevant studies regarding jurors and limiting instructions).
[59] *Id.* at 39 ("[T]he defendant's criminal record does not affect the defendant's credibility, but does increase the likelihood of conviction, and the judge's limiting instructions do not appear to correct that error.").
[60] *Id.* at 31.

and dangerous.[61] Under Rule 609, this level of prejudice leads to re-conviction and increases racial disparities in the criminal justice system.[62]

Psychology and evidence law enjoy a unique intersection because psychological rationales have been presented in support of many of the rules seen today. Naturally, the story of the Federal Rules of Evidence begins with rulemakers, those who design and continue to shape the rules. At one point, rulemakers were common-law judges, but today they are legislatures, committees, and often judges in their role as interpreters of the rules.[63] Within the universe of the Federal Rules of Evidence, there are judges who apply the rules, parties to cases, lawyers who argue how the rules should be applied, witnesses, and jurors. Undergirding the application of the rules of evidence is, unavoidably, psychology.[64] Arguably, the rulemakers must act as psychologists.[65] The rules require factfinders to comprehend the meaning of evidence, assess its soundness, ascertain whether certain kinds of inquiries by counsel are likely to help illuminate the strengths and weaknesses of evidence, and to determine whether judicial instructions can provide guidance when confronting problematic evidence.[66] In the end, "rulemakers must predict how a given kind of evidence . . . is likely to influence factfinders, steering them away from misleading factual conclusions and moving them towards correct ones."[67] Similarly, when a judge rules on whether to admit or exclude a piece of evidence, she is doing so by predicting how a jury will be influenced by it.[68] Unfortunately, the rulemakers have simply gotten this wrong when it comes to Rule 609.

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[61] Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 ANN. REV. L. SOC. SCI. 269, 280 (2015).
[62] *See* Montré D. Carodine, *The Mis-Characterization of the Negro: A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 550 (2009).
[63] *Cf. Rule of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 185 (1973) (Douglas, J., dissenting) (expressing that the Supreme Court is a "merely a conduit" to those who wrote the Rules and is not qualified enough to "apprise their merits when applied in actual practice.")
[64] *See* Eilis S. Magner, *Wigmore Confronts Munsterberg: Present Relevance of a Classic Debate*, 13 SYDNEY L. REV. 121, 122 (1991).
[65] SAKS & SPELLMAN, *supra* note 38, at 1.
[66] *Id.*
[67] *Id.* at 2.
[68] *See* Reagan Wm. Simpson & Warren S. Huang, *Procedural Rules Governing the Admissibility of Evidence*, 54 OKLA. L. REV. 513, 521 (2001).

The premises on which many of the Federal Rules of Evidence are constructed are largely a product of the rulemakers' perceptions and beliefs about human psychology: how people receive, store, and retrieve information, as well as how they draw inferences.[69] Consider, for example, the evidence law concept of "hearsay." Hearsay is broadly defined as an out-of-court statement offered for the truth of the matter asserted.[70] Hearsay statements are generally inadmissible because it is like offering secondhand testimony without the statement's declarant in court to attest to its truth.[71] Remarkably, a savvy lawyer may be able to admit such a statement under the nearly thirty exceptions to the hearsay rule.[72] For example, under Rule 803(2), an out-of-court statement offered for the truth of the matter asserted may be admissible when the statement is made under the influence of a stressful event.[73] Rule 803(2) is known as the "excited utterance" exception to the hearsay rule.[74] It is rooted in the belief that people have limited cognitive capacity and that the stress of an arousing event creates so much excitement that people lack sufficient capacity of reflection to create falsehoods.[75] This rule, grounded in cognitive theory, dates back to the early twentieth-century and was accepted as sound by American judges and later the drafters of the Federal Rules.[76] Therefore, if rulemakers and judges are using these social beliefs, we must then inquire whether these

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[69] SAKS & SPELLMAN, *supra* note 38, at 2.
[70] "'Hearsay' means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." FED. R. EVID. 801.
[71] Consider this simplified example: A witness says, "I heard Mr. Jones say that the defendant killed Mr. Smith." That is a hearsay statement. If Mr. Jones is not in the courtroom, he is not observable by the jury and unavailable by the defense for cross examination. Hearsay is generally excluded to support the defendant's right to confront the witnesses against him and to keep unreliable and unverified statements at bay. *See* Adam Freedman, *What is Hearsay?*, QUICK AND DIRTY TIPS (Nov. 25, 2011), http://www.quickanddirtytips.com/business-career/legal/what-hearsay.
[72] *See* FED. R. EVID. 803(1)-(24). These subdivisions are *not* excluded by the rule against hearsay, regardless of whether the declarant is available as a witness.
[73] FED. R. EVID. 803(2).
[74] *Id.*
[75] See *Rule of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 303 (1973).
[76] *See* Alan G. Williams, *Abolishing the Excited Utterance Exception to the Rule Against Hearsay*, 63 U. KAN. L. REV. 717, 724 n.29 (2015).

beliefs are correct, thereby rendering the rules fair and most effective to administering every proceeding fairly.[77]

Rule 609 is a rule for impeachment purposes and uses a witness's prior conviction as evidence that the witness is unreliable.[78] Impeachment evidence is "evidence that may be used to impeach a witness because it tends to harm the witness's credibility."[79] Anyone who takes the stand can be subject to impeachment.[80] By contrast to the cognitive theory of the "excited utterance" hearsay exception, Rule 609 theory is that a person who has been convicted of a crime can be inferred to have a character for untruthfulness, and the factfinder is welcome to infer that such a person might be lying on the witness stand when he testifies.[81] The law once considered criminal defendants to be the "most likely liars of all"[82] and excluded them entirely from testifying. Today, Rule 609 asserts that someone convicted has a blemished record and therefore is less credible than someone with no criminal record at all. In other words, Rule 609 asserts that if the defendant was so antisocial to have been convicted of a crime previously, it is probative of his willingness to give false testimony on the stand today.[83] Theoretically, the evidence of a person's prior conviction is necessary because the jury deserves to know whether the witness is an upstanding citizen and worthy of belief.[84] So, the evidence of a person's prior conviction is outside of Rule 404's propensity ban. Instead, when evidence of the witness's prior conviction is introduced, the jury is expected to psychologically exclude it for use as character propensity (to determine whether the defendant acted according to his character on a particular occassion)

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[77] *See generally* FED. R. EVID. 102 (discussing the rule's purpose).
[78] A witness could be called to testify on behalf of the Accused or be the Accused himself. When the Accused testifies on his behalf he is known as the witness-defendant. This paper focuses on the experiences of the witness-defendant.
[79] *Impeachment evidence*, MERRIAM-WEBSTER'S DICTIONARY OF LAW (Updated ed. 2011).
[80] FED. R. EVID. 607 ("Any party, including the party who called the witness, may attack the witness's credibility.").
[81] SAKS & SPELLMAN, *supra* note 38, at 169.
[82] George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 662 (2006).
[83] GLEN WEISSENBERGER & JAMES DUANE, FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY, AND AUTHORITY 378 (LexisNexis 7th ed. 2012).
[84] *See* Gold, *supra* note 14, at 2298.

and use that evidence for its proper purpose (to determine witness credibility).

The problem with this theory is that it ignores the twin problems of juror misuse of evidence and implicit bias. Rule 609's policy assumes that the law today coexists in a post-racial and beyond-race society.[85] History tells us this is simply not true. At common law, a felon was deemed incompetent to testify as a witness.[86] The idea was that the felon, in addition to being punished for the crime committed, was disqualified from testifying because felons were "unworthy of belief."[87] Today, felons may not be automatically disqualified from testifying, but if they so choose to testify, they may be impeached when the prosecutor introduces evidence of their prior conviction.[88] Indeed, it matters that the law has evolved beyond the original blanket disqualification under the common law.

In the United States, race has always been used as predictive character evidence. As one scholar has so strikingly noted: race is evidence.[89] American slavery and the segregation of Blacks from whites made clear that one's race was the sole determining factor for one's place in society. During the slavery era, when a person was evidently Black, it was reasonable to legally assume they were a slave—skin color had probative value.[90] Additionally, being Black bore the presumption of bad character when race determined the severity of penalties that Blacks received in the criminal justice system.[91] Certain crimes were designated as capital offenses if the defendant was Black,[92] and race could be used to determine intent if the defendant was Black in rape prosecutions after the Civil War.[93] Additionally, under the United States slave codes and competency requirements,

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[85] *See* Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. SOC. SCI. 149, 151 (2014).
[86] Green v. Bock Laundry Mach. Co., 490 U.S. 504, 511 (1989).
[87] *Id.* (internal citation omitted).
[88] Okun, *supra* note 13, at 538 (citing Rosen v. United States, 245 U.S. 467 (1917) (holding common law rule disqualifying convicted felons from testifying is inapplicable for determining witness competency)).
[89] Carodine, *supra* note 62, at 528.
[90] *Id.* at 531.
[91] *Id.*
[92] *See* Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1955 (1993).
[93] Carodine, *supra* note 62, at 532.

Blacks were not able to testify against whites.[94] The ability of Blacks to testify is also directly correlated to their ability to sit on juries.[95] Congress first addressed the issue of allowing Blacks the right to serve on juries in 1867.[96] Proponents of that bill believed that the right to serve as a juror was a natural evolution in the process for newly freed men; opponents believed that Blacks did not possess the ability to try cases fairly and accurately.[97]

To reinforce the stereotypes that Blacks are inferior to whites, slave owners and legislators stimulated misconceptions that Blacks, especially Black men, are lazy, violent, and ignorant.[98] Rule 401 states that evidence is *relevant* if it has "any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action."[99] Plainly, does the evidence have *any* tendency to make the fact more or less likely than it would without the evidence? It is a loose, porous standard. That someone is of a particular race should not make it more or less likely that they committed the crime charged or will be untruthful upon testifying.[100] Race evidence, while inadmissible, still seeps in to the jury decision making process via Rule 609. Historically, race had and has evidentiary value and relevance because it is used to make the determination that an act did occur simply because the actor is Black.[101]

II. THE SOCIAL SCIENCE PARTNERSHIP

The stereotypes about Black males that dominate American culture naturally find their way into the courtroom. Proponents of post-racialism point to the election of Barack Obama, the country's first Black president, to advance the argument that race is no longer

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[94] James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 910 (2004).
[95] *Id.* at 912.
[96] *Id.*
[97] *Id.* at 912–13.
[98] Carodine, *supra* note 62, at 532.
[99] FED. R. EVID. 401.
[100] Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2264 (2017).
[101] Carodine, *supra* note 62, at 531.

salient to social analysis.[102] But there exists a disparity that too often is left unaddressed: a post-racial society still exists when Blacks are disproportionately more incarcerated than any other demographic of people.[103] Even though America had a Black president, race still matters.[104] Critical Race Theory (CRT) has developed out of legal scholarship and focuses on critically analyzing race and racism from a legal point of view.[105] Emerging in the 1980s, CRT has become one of the fastest growing and most controversial movements in recent legal scholarship.[106] CRT can be summarized as addressing how assumptions about race affect the players within the legal system and have a determining effect on substantive legal doctrines.[107] CRT rests on ten "commitments" or themes, which are outlined as follows:

1. Race inequality is hardwired into the fabric of our social and economic landscape.
2. Because racism exists at both the subconscious and conscious levels, the elimination of intentional racism would not eliminate racial inequality.
3. Racism intersects with other forms of inequality, such as classism, sexism, and homophobia.
4. Our racial past exerts contemporary effects.
5. Racial change occurs when the interests of white elites converge with the interests of the racially disempowered.
6. Race is a social construction whose meanings and effects are contingent and change over time.
7. The concept of color blindness in law and social policy and the argument for ostensibly

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[102] *See* Carbado & Roithmayr, *supra* note 85, at 152.
[103] *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 7 (2010) ("[I]n major cities wracked by the drug war, as many as eighty percent of young African American men now have criminal records and are thus subject to legalized discrimination for the rest of their lives.").
[104] *See* Carodine, *supra* note 62, at 523.
[105] *What is Critical Race Theory*?, UCLA SCH. PUB. AFF. BLOG, https://spacrs.wordpress.com/what-is-critical-race-theory/ (last visited Jan. 1, 2018).
[106] Douglas E. Litowitz, *Some Critical Thoughts on Critical Race Theory*, 72 NOTRE DAME L. REV. 503, 503 (1997).
[107] *Id.* at 503–04.

race-neutral practices often serve to undermine the interests of people of color.
8. Immigration laws that restrict Asian and Mexican entry into the United States regulate the racial makeup of the nation and perpetuate the view that people of Asian and Latino descent are foreigners.
9. Racial stereotypes are ubiquitous in society and limit the opportunities of people of color.
10. The success of various policy initiatives often depends on whether the perceived beneficiaries are people of color.[108]

These commitments and the work of CRT scholars demonstrate that American society is not "post-racial." CRT has been praised for its ability to consider multiple perspectives in legal scholarship, and its ability to bring to light the everyday acts of racism that are extremely subtle and difficult to regulate by law.[109] CRT is also highly regarded for incorporating and giving a voice to those who are underrepresented and experience injustice in the legal system: minorities, women, criminals, the poor, and jurors.[110] Likewise, "Human Centered Civil Justice is rooted in human experience, needs, beliefs, concerns and the adversities that people encounter in the everyday."[111] To better understand how members of the public encounter and experience the civil justice system, "civil justice designers draw on psychological science concerning both procedural justice and distributive justice."[112]

One example of how the public experiences the justice system is through over-policing of Black communities. Racial bias is partly responsible for why Blacks are treated more harshly than whites and contributes to why Black males have greater interaction with law enforcement. However, racial bias has not always been linked to treating individuals as if they are

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[108] Carbado & Roithmyr, *supra* note 85, at 151.
[109] Litowitz, *supra* note 106, at 510.
[110] *Id.* at 511.
[111] Victor D. Quintanilla, *Human-Centered Civil Justice Design*, 121 PENN ST. L. REV. 745, 772 (2017).
[112] *Id.*

older than they are.[113] In a study on the police and racial bias, Dr. Philip Goff showed that white police officers are more likely to use force against Black children when officers dehumanize Blacks.[114] Dr. Goff and his colleagues explored the possibility that "if human childhood affords strong protections against harsh, adult-like treatment, then in contexts where children are dehumanized, those children can be treated with adult severity."[115] In one of four studies to test previously established hypotheses, Goff tested 60 police officers[116], mostly white males with an average age of thirty-eight, to determine whether dehumanization of Blacks leads to worse outcomes in the criminal justice system.[117] First, officers were given a "dehumanization" implicit association test (IAT) to measure the form of their implicit bias against Blacks consisting of Black/White, ape/great cat pairings.[118] Afterwards, the officers were presented with 12 scenarios depicting male targets of a given race (White, Black or Latino) as criminal suspects.[119] Researchers then reviewed the police officers' personnel files to determine when these officers used force while on duty.[120] After adding weights to each "incident" of force based on its severity[121], results revealed that officers overestimated the age of Black felony suspects more than that of Black misdemeanor suspects, as well as all other suspects.[122] The police officers who dehumanized Blacks (associated Blacks with apes) were more likely to have used force against a Black child than those officers who did not dehumanize Blacks.[123] White children were not subject to

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[113] Phillip Atiba Goff, Matthew Jackson, Brooke Di Leone, Carmen Culotta & Natalie DiTomasso, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 526 (2014).
[114] *Id.* at 527.
[115] *Id.*
[116] *See id.* at 535. After the shocking results of this study, Dr. Goff sought to replicate the field component with a larger sample. The results were virtually the same.
[117] *Id.* at 533.
[118] *Id.* at 531.
[119] *Id.*
[120] *Id.*
[121] *Id.* Researchers multiplied each incident by a number representing the severity of the force used. Wrist locks were multiplied by 1, punching 2, and so on up to 8 for the use of deadly force.
[122] *Id.* at 534.
[123] *Id.* at 535.

this overestimation.[124] Further, the research from this study indicated that *only* dehumanization, not prejudice against Blacks, was linked to violent encounters with Black children.[125] The next logical question is what causes white police officers to dehumanize Black children?

Perception matters with age and culpability. Dr. Goff also determined that there is a reduction in perceiving Black children as the children they are.[126] Overestimating age and culpability based on racial differences was linked to the dehumanizing stereotypes found in the first portion of the study.[127] In another study involving participants outside the criminal-justice context, a group of undergraduate students consisting of mostly white females were asked to rate innocence from photos of children in infancy through age twenty-five.[128] Beginning at age ten, Black children were rated significantly less innocent than white children and their ages were overestimated by an average of four-and-a-half years.[129] Dr. Goff's work is just one example of scientific evidence of racial disparities, but his evidence clearly shows that perception of child innocence can be affected by race. For Black children, this can mean that they lose assumed childhood innocence well before they become adults.[130] The research from this study indicates that Black children are more likely to be perceived as dangerous, aggressive, and less innocent "at an age when white boys still benefit from the presumption that children are essentially innocent."[131] When Black children are considered older (by four-and-a-half years) and more culpable than they are in reality, a mere thirteen-year-old child is perceived to be an adult. More importantly, Black males have more encounters with police earlier in life than their white counterparts.[132]

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[124] *Id.*
[125] *Id.*
[126] *Id.* at 532.
[127] *Id.*
[128] *Id.* at 529.
[129] Press Release, Am. Psychological Ass'n, *Black Boys Viewed as Older, Less Innocent than Whites, Research Finds* (Mar. 6, 2014) (https://www.apa.org/news/press/releases/2014/03/black-boys-older.aspx).
[130] *Id.*
[131] *Id*.
[132] *See generally* Radley Balko, Opinion, *There's overwhelming evidence that the criminal-justice system is racist. Here's the proof.*, WASH. POST, Sept. 18, 2018, https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-

In terms of minorities and Rule 609, the problem is not simply that crime has been racialized (when we think of crime, we have Blacks in mind); it is also that race is criminalized (when we think of Blacks, we have crime in mind).[133] Researchers have concluded that blackness essentially primes us to think about crime, and in turn, crime primes us to pay close attention to Black people.[134] As seen in the studies conducted by Dr. Goff, crime has been racialized for Black youth who have more exposure to the criminal system than other demographics. Therefore, if the prototypical criminal is a Black person and Black identity has become associated with criminality, it follows that racial suspicion shapes behavior in the world: whether it be the behavior of law enforcement, decision-making juries, or policy-making legislators.[135] Recall that the theory underlying Rule 609 is that a jury might be misled to think the defendant is trustworthy without Rule 609 as an impeachment method. Rule 609 assumes that in addition to whatever else law breaking may tell the court about a witness, it reveals that the witness has a substantially increased likelihood of telling lies.[136] The misperception problem with prior convictions works in the opposite direction with white defendants and witnesses as well. "If a White defendant or a White witness does not have a prior record, the jury will assume that person has led an honorable life and is worthy of belief."[137] "White credit"[138] in the criminal-justice system works favorably for white defendants who will likely be viewed differently from a Black defendant who has had numerous run-ins with the law.[139]

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overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/?noredirect=on&utm_term=.b557235ced8b (discussing and providing information from several studies regarding racial injustice such as over policing of minority communities).

[133] Carbado & Roithmyr, *supra* note 85, at 152.

[134] *Id.* ("[S]eeing blackness makes a participant more attuned to criminality.").

[135] *Id.* at 153.

[136] SAKS & SPELLMAN, *supra* note 38, at 168.

[137] Carodine, *supra* note 62, at 560.

[138] *Id.* Carodine describes "white credit" as a corollary to the "black tax" where white criminal defendants enjoy an undeserved benefit from being White because the face of crime in America is decidedly Black.

[139] Carodine, *supra* note 62, at 560.

What begins to happen next in the courtroom, underscoring blackness as criminal, is that Black criminal defendants become subject to use of their prior convictions as character propensity. In other words, instead of the jury using the prior conviction to assist them exclusively in assessing credibility, jurors often draw the inference that a person who commits a crime has a criminal character and is therefore more likely to be guilty of the crime charged.[140] As has already been discussed, character evidence is generally inadmissible.[141] But when jurors look at a Black defendant and rely on their available heuristics (mental shortcuts that help people make mental assessments), race comes to mind.[142] Further, popular discourse makes it easier for people to retrieve examples of African Americans as criminals.[143] It is for these reasons that defendants with prior convictions will often not take the stand. Rule 609 can only be triggered if the witness takes the stand; if there is no witness, then impeachment cannot be satisfied.[144] Rule 609 creates substantial risk for the defendant to take the stand on his own behalf if he has prior convictions that the prosecution could introduce to the jury.[145] Moreover, the jury may still draw a negative inference from a defendant's silence.[146] Sadly, a large number of factually innocent defendants with prior convictions have sat silently through trial before being found guilty.[147]

As discussed, it has become quite doubtful that jurors are able to restrict their use of prior conviction evidence to assess a witness's credibility only. To undercut this challenging psychological process, courts may even instruct jurors to use the evidence solely to evaluate credibility.[148] Unfortunately, research shows these instructions do little to prevent jurors from walking down the forbidden path of using prior-crimes evidence to

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[140] SAKS & SPELLMAN, *supra* note 38, at 168.
[141] *See generally* Okun, *supra* note 13, for a discussion and the text of FED. R. EVID. 404.
[142] Carbado & Roithmyr, *supra* note 85, at 153.
[143] *Id.*
[144] FED. R. EVID. 607 ("Any party, including the party who called the witness, may attack the witness's credibility.").
[145] Dodson, *supra* note 23, at 46–47.
[146] Gold, *supra* note 14, at 2314-15.
[147] Roberts, *supra* note 17, at 575.
[148] SAKS & SPELLMAN, *supra* note 38, at 169.

make inferences about the crime charged.[149] The research in favor of excluding prior conviction evidence suggests that prior-conviction evidence contributes little or nothing to the credibility assessment of defendants who take the witness stand, and it creates the risk that jurors will draw improper propensity inferences.[150] Additional research shows that while the American jurisprudence system places a great deal of trust in the job of the jury, the average juror does little better than chance at reliably detecting truth telling![151] Further, the impeachment by prior conviction regime fails to take account for disparities in law enforcement, the growing body of data on wrongful convictions, and the nature and dominance of plea bargaining—all of which challenge the theory that prior-conviction evidence is a reliable indicator of character for truthfulness.[152] Therefore, evidence of prior convictions prejudices the Accused from taking the stand in his or her own defense and increases the Accused's chances of being convicted again.[153] Rule 609 creates dangerous risks that improper propensity inferences will be used by the jury.[154] To make matters worse, if the Accused sees testifying as too risky, he will likely seek a plea bargain.[155] The Accused's own testimony, possibly the most viable line of defense, is gone. This alliance between prior conviction evidence and the plea bargain minimizes public reform of the criminal justice system and perpetuates the systemic racism already embedded within it.[156] Defendants quickly lose the established presumption of innocence when they don't take the stand, increasing the chances of reconviction without consideration of culpability.[157]

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[149] *See generally* Renee McDonald Hutchins, *You Can't Handle the Truth! Trial Juries and Credibility*, 44 SETON HALL L. REV. 505 (2014); Max Minzner, *Detecting Lies Using Demeanor, Bias, and Context*, 29 CARDOZO L. REV. 2557 (2008).
[150] SAKS & SPELLMAN, *supra* note 38, at 168.
[151] *See* Hutchins, *supra* note 142, at 526 n.84.
[152] *See* Roberts, *supra* note 17, at 563–64.
[153] *See* Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 ANN. REV. L. SOC. SCI. 269, 279 (2015).
[154] *See* Hornstein, *supra* note 22, at 4, n.11.
[155] Roberts, *supra* note 17, at 575.
[156] Roberts, *supra* note 17, at 575.
[157] *Id.* at 574.

Evidence of a defendant's prior conviction should have one purpose: to assist in assessing credibility.[158] Even with the current version of Rule 609, courts still struggle to apply the rule and there is disagreement about which crimes are usable for this purpose.[159] For example, under Rule 609(a)(1)(B), most circuits have settled on the five-prong balancing test established in the late 1960s from *Gordon v. United States*.[160] Despite this test, the application of the factors is fraught with inconsistency when determining the probative value of the prior conviction against the prejudicial effect.[161] One factor, "the similarity between the past crime and the crime charged," is derived from early case law that regarded "similarity" as a factor that discouraged admissibility because it increased the risk that the conviction would be considered relevant to the defendant's propensity to commit the crime charged rather than the defendant's credibility.[162] But some subsequent caselaw favors the admissibility of a similar crime.[163] These "confusions" often do lead to admissibility of prior crimes evidence, and this evidence is often upheld by appellate courts further supporting the racial disparities of the criminal justice system.[164]

III. RULE 609 PERPETUATES THE CYCLE OF RACISM IN THE CRIMINAL-JUSTICE SYSTEM

The consideration that Rule 609 is neutral becomes questionable when juxtaposed against the backdrop of racism and criminalization in the history of America. Blacks are more likely to have their cars searched, to be arrested for drug use, to be jailed while awaiting trial, to be offered a plea deal that includes prison time, to be excluded from juries because of their race, to serve longer sentences than other ethnic groups for the same offense,

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[158] *See Rule of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 270 (1973).
[159] *Id.*
[160] *See* Roberts *supra* note 17, at 569.
[161] *Id.*
[162] Roberts, *supra* note 17, at 570.
[163] *Id.*
[164] *Id.*

and to have their probation revoked.[165] Recent statistics show that nearly half of inmates in state or federal prisons and local jails are non-Hispanic Blacks.[166] In terms of raw numbers, there are more than two-million Blacks in prison or jail on any given day.[167] Commentators have offered various theories explaining the disproportionate number of incarcerated Blacks, including: the "over-policing" of Black communities, the War on Drugs (which unfairly targets minorities), prosecutorial bias, and other flaws and biases in the trial process that result in Blacks receiving harsher treatment than whites and innocent minority defendants being convicted.[168] These aforementioned 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.[169] "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)" under the impeachment with prior convictions regime.[170] Rule 609 perpetuates the criminalization of the Black population.[171]

For the last several decades, critical race theorists have argued that Blacks do not receive the benefit from the presumption of innocence.[172] Bryan Stevenson goes so far as to say that Black children are born with a presumption of guilt.[173] In the few times the Supreme Court has used social science in its decisions, the outcome

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[165] Andrew Kahn & Chris Kirk, *What It's Like to be Black in the Criminal Justice System*, SLATE (Aug. 9, 2015), http://www.slate.com/articles/news_and_politics/crime/2015/08/racial_disparities_in_the_criminal_justice_system_eight_charts_illustrating.html (outlining how Blacks experience the criminal-justice system).

[166] *Criminal Justice Fact Sheet*, NAACP.ORG, http://www.naacp.org/criminal-justice-fact-sheet/ (last visited Jan. 1, 2018).

[167] *Id.*

[168] *The Center for Prisoner Health and Human Rights*, PRISONERHEALTH.ORG, https://www.prisonerhealth.org/educational-resources/factsheets-2/race-and-incarceration/ (last visited May 1, 2019).

[169] Carodine, *supra* note 62, at 526.

[170] *Id.*

[171] *Id.*

[172] Carbado & Roithmyr, *supra* note 85, at 152.

[173] Bryan Stevenson, *A Presumption of Guilt*, N.Y. REV. BOOKS (July 7, 2017), https://www.nybooks.com/articles/2017/07/13/presumption-of-guilt/.

was quite favorable for race relations. The Supreme Court, in its landmark *Brown v. Board of Education* decision, cited the work of Black psychologists Kenneth Clark and Mamie Clark.[174] Drs. Kenneth and Mamie Clark, a husband and wife duo, conducted a series of experiments known as "The Doll Test" in the 1940s.[175] Their subjects, children between the ages of three to seven, were asked to identify both the race of the dolls and which color doll they prefer.[176] A majority of the children preferred the white doll and assigned positive characteristics to it.[177] In an effort to leverage the outcome of these experiments, the *Brown* legal team relied on the testimonies and research of social scientists as a part of their legal strategy.[178] This research proved fruitful when the Court held that state laws designating separate public schools for Black and white children were unconstitutional.[179] The results of The Doll Test empirically proved that prejudice, segregation, and discrimination created inferiority among Black children and damaged their self-esteem.[180] Through *Brown*, social science research remarkably contributed to one of the most important court decisions in twentieth-century America.[181]

A more recent study from 2004 shows a similar effect to the one the Clarks discovered over sixty years ago, where researchers investigated the relationship between stereotypical associations and visual processing.[182] Researchers primed participants with images of either Black or white male faces, then showed objects on a computer screen that were either crime

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[174] *See* Ludy T. Benjamin, Jr. & Ellen M. Crouse*, The American Psychological Association's Response to* Brown v. Board of Education: *The Case of Kenneth B. Clark,* 57 AM. PSYCHOL. 38, 40–41 (2002).
[175] NAACP LEGAL DEF. FUND, *The Significance of "The Doll Test,"* http://www.naacpldf.org/brown-at-60-the-doll-test (last visited Jan. 1, 2018).
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *See* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (holding that segregation of white and black children in public schools has a detrimental effect upon the black children).
[180] *See* Charles J. Olgetree, Jr., *The Significance of Brown*, 20 Harv. Blackletter L.J. 1, 5 (2004).
[181] *See* Dodson, *supra* note 23, at 40.
[182] *See* Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004).

relevant (a gun) or irrelevant (a camera).[183] The images were initially degraded, then slowly enhanced to discern what the image was.[184] Researchers measured the time it took to identify the object based on what racial prime was provided at the beginning of the test.[185] As expected, Black face primes dramatically reduced the number of frames needed to accurately detect crime relevant objects.[186] In other words, when participants were primed with the faces of Black males, they identified crime-related objects faster than objects not associated with crime.[187] In the criminal context, the study proves that police officers also think about crime when they see Black people and are likely to be more attentive to them.[188] And taking this one step further, this means the presence of Black people means law enforcement is more likely to be attentive to the possibility of crime.

Professor Carodine[189] has noted the varieties of racism that exist to support the theory that criminality based on race is "reasonable"[190]: "Negrophobia" is described as a form of post-traumatic stress that a person encounters after a traumatic experience with a Black person, "The Reasonable Racist" is someone who believes that it is reasonable to believe that Blacks are more likely to commit crime because other similarly situated Americans would believe this to be true as well, and the "Involuntary Negrophobe" is a person who has developed a phobia towards all Blacks.[191] What these figures have in common is that they represent the various perceptions of Black Americans and reduce the reliability of criminal convictions.[192] Racism is inherently unreliable.[193]

For example, social science data has proven the existence of crossracial impairment. Cross-racial identification occurs when an eyewitness is asked to

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[183] *Id.* at 879.
[184] *Id.*
[185] *Id.* at 880.
[186] *Id.*
[187] Carbado & Roithmyr, *supra* note 85, at 152.
[188] *Id.*
[189] *See supra* note 62 for the text of this author's work being referenced.
[190] Carodine, *supra* note 62, at 578.
[191] *Id.*
[192] *See id.* at 579.
[193] *Id.*

identify a person of another race.[194] In the New Jersey Supreme Court case, *State v. Cromedy*, the victim was raped and robbed in her home.[195] The attacker made no attempt to conceal his face, and the victim believed she saw his face clearly in the brightly lit apartment.[196] Approximately eight months later, the victim saw a Black male across the street who she believed was her attacker.[197] Citing *Brown v. Board of Education* and relying on a plethora of social-science research, the court had to determine whether cross-racial impairment of eyewitnesses was a scientifically accepted fact.[198] The court held that not only does this impairment exist, it is strongest when white witnesses attempt to recognize Black subjects.[199] The court rejected the State's contention that it should not require a cross-racial identification charge to the jury before it has been demonstrated that there is substantial agreement in the relevant scientific community to support such a charge.[200] It was demonstrated that there was substantial agreement in the relevant scientific community that cross-racial recognition impairment exists, and that therefore Mr. Cromedy was entitled to a jury instruction apprising jurors of that fact.[201] Even if there were no such agreement, the court concluded that empirical data indicated that problems with cross-racial exist as a matter of ordinary human experience not scientific knowledge.[202] *State v. Cromedy* represents an instance were identification of the defendant was the critical issue.[203] Mr. Cromedy, was wrongfully convicted even after the New Jersey Supreme Court remanded for a new trial.[204] His case also represents yet another wrinkle to the existence of racial disparity in the criminal justice

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[194] Aaron H. Chiu, *"We Can't Tell Them Apart": When and How the Court Should Educate Jurors on the Potential Inaccuracies of Cross-Racial Identifications*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 415, 416 (2008).
[195] State v. Cromedy, 727 A.2d 457, 459 (N.J. 1999).
[196] *Id.*
[197] *Id.*
[198] *Id.* at 463.
[199] *Id.* at 462.
[200] *Id.* at 466.
[201] *Id.*
[202] *Id.* at 467.
[203] *Id.* at 465.
[204] Chiu, *supra* note 198, at 415.

system. While many scholars support the idea of including expert testimony to educate jurors on cross-racial identification, few trial judges permit this.[205] Instead, special jury instructions are employed but again those cannot be relied upon as a safeguard for defendants.[206]

In lieu of these challenging perspectives, there are a few states trying to do it right, like Montana, Hawaii, and Georgia for example. In *State v. Maine*, the Montana Supreme Court diverged from United States Supreme Court precedent and ruled that a prior conviction cannot be used to increase the punishment for a subsequent offense if the prior conviction is tainted by any kind of constitutional violation.[207] Indeed, a defendant whose sentence is enhanced based on an unreliable prior conviction is made to suffer punishment twice for a conviction that was not reliable enough to punish him the first time.[208] Hawaii was the first state to adopt a version of Rule 609 that departed from the federal rule by disallowing the use of a prior-conviction to impeach a criminal defendant.[209] Hawaii's Supreme Court showed concern that prior convictions have little probative value on witness credibility and ruled such impeachment unconstitutional under its state constitution.[210] Likewise in *United States v. Leviner,*[211] Judge Nancy Gertner of the U.S. District Court for the District of Massachusetts declined to accept the presumptive weight of Mr. Leviner's prior convictions for sentencing purposes and instead examined the circumstances of the convictions.[212] In this case specifically, the prior convictions left the Judge feeling concerned that the convictions had been a product of racial profiling.[213] She sentenced the defendant as if these prior convictions did not exist.[214] Judge Gertner sets the standard at the federal level for the way

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[205] *Id.* at 421.
[206] Dodson, *supra* note 23, at 15.
[207] Paul M. Leisher, *Examining Montana's Right to Attack Unconstitutional Prior Convictions at Sentencing:* State v. Maine*,* 74 MONT. L. REV. 183, 183 (2013).
[208] *Id.* at 184.
[209] Dodson, *supra* note 23, at 14.
[210] *Id.*
[211] 31 F. Supp. 2d 23, 25 (D. Mass. 1998).
[212] Gold, *supra* note 14, at 565–66.
[213] *Id.* at 566.
[214] *Id.*

in which prior conviction evidence should be identified and assessed: she refused to compound injustice.

CONCLUSION

Use of prior convictions is unreliable. The fact that Black people are more likely than whites to have a criminal record and be impeached with their prior convictions compounds the unreliability problem. As one scholar has noted, support for the disparate treatment of Blacks affects jury decision making and creates due process concerns.[215] While due process is beyond the scope of this paper, it is important to underscore that use of prior convictions, as proof of the defendant's character for veracity, are not supported by social-science research. As Judge Easterbrook noted several decades ago, "[W]e do not pretend that a jury can keep one inference in mind without thinking about the other."[216]

The use of prior convictions also stands on the assumption that the defendant's prior conviction was vigorously tried the first time; thereby creating a vicious cycle in which it is assumed the conviction was reliable to begin with. This is not true for all defendants. Even judges possess bias.[217] With the compounding amount of racial bias apparent in the criminal justice system, these assumptions must be challenged, and social science has and continues to do so. Study after study demonstrates that Blacks are more likely to be targets of crime and to be charged with crimes from adolescence through adulthood.[218] How can we continue to give a neutral face to these inaccuracies?

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[215] Carodine, *supra* note 62, at 553.
[216] United States v. DeCastris, 798 F.2d 261, 264 (7th Cir. 1986).
[217] *See* Jeffrey J. Rachlinski & Sheri Lynn Johnson, *Does Unconscious Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1195 (2009) (noting that judges harbor the same kind of implicit biases as others).
[218] *See generally* Devon Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1485 (2016) (discussing in Part I how repeated exposure to police violence derives from the disproportionate contact Blacks have with police in the first place); *see also* Goff, *supra* note 113, at 536 (discussing how "[t]he results of Study 3b provide further evidence that the implicit dehumanization of Black is related to Black children's disproportionate (as compared to their White peers) experiences of violent encounters with police officers.

This paper proposes that a federal task force be developed to address Rule 609 and the implicit bias it contains. Against the backdrop of historic racism, where racial inequality has been hardwired into our culture, Rule 609 needs an immediate facelift. First, Rule 609(a)(2) makes sense to allow crimes of dishonesty to be automatically admissible because veracity of the witness in a proceeding is important. However, even with Rule 609(a)(1)'s immediate admission of these specific convictions, the court should thoroughly assess the record to ensure—as states like Montana and Hawaii do—that the prior conviction is not tainted by any sort of constitutional violation. If so, the defense should be entitled to object. In regard to Rule 609 in totality, racial inequality in America urges a collaboration with CRT and the social sciences to acknowledge that race is a social construction whose meanings and effects change over time. More specifically, Congress should seek to work directly with social science to incorporate the work that social scientists have already done and use human-centered design methods to acknowledge and reconfigure the rule in such a manner that fulfills its purpose: the administration of a fair proceeding and, ultimately, a fair determination. By doing so, we create the potential that rule drafters will respond appropriately to an ever-evolving racial landscape, that prosecutors will think twice before introducing evidence of a prior conviction that may not have been obtained fairly, that judges will better screen and become introspective of their own prejudices, and that defendant-witnesses will hold fast to their defense of testifying on their own behalf without the dreaded fear of being impeached. A swift and urgent review of Rule 609 would begin to thwart the repetitious cycle of racism in our criminal justice system and make the next fight for a defendant fairer.

Many scholars have proposed a range of options for Rule 609. Proposals include complete elimination of the rule, consideration that courts and rule drafters take a deeper look into prior convictions as reliable sources of evidence, and advocacy for a complete turn toward a critical race theory of evidence entirely.[219] I do not believe

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[219] *See* Montré D. Carodine, *The Mis-Characterization of the Negro: A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 583-585

the rule in its entirety should be eliminated, yet I do agree that reliance on prior convictions has gone too far. I believe implicit bias exists. I believe that any respected, ethical judge and litigator knows that it exists even if they do not understand its applicability to the law. Incidents of racism often appear in the news and at least 64% of Americans believe racism remains a problem in America. [220] So, we are beyond ignorance and misunderstanding. As Professor Roberts has suggested, the place to start is with the litigators of the system.[221] My suggestion is to use the agreed-upon bias in the rule among evidence scholars and social scientists to create a platform of collaboration between legal scholars and social scientists in order to reassess the operation of the rules that present bias. If racial evidence is prohibited and character evidence is generally inadmissible to prove that a person is likely to behave a certain way, why does our legal system allow prior convictions against people of color who experience the criminal-justice system more than anyone else? We know that jurors use race as a proxy for character—and they should not. Because Rule 609 is considered the most controversial of them all, a task force to review Rule 609's necessity with legal and CRT scholars, social scientists, behavioral realists, and lay people would certainly be a significant start.

Professor Jerry Kang has provided a model through behavioral realism by which such a task force could begin its review of Rule 609.[222] Step one involves seeking more accurate models of human behavior.[223] This should not be a difficult task because, as I have discussed *infra*, the work of social scientists exists on a wide spectrum within

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(2009) (proposing elimination of the use of prior convictions to impeach as an unreliable form of hearsay; Jasmine Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2245 (2017) (proposing use of CRT scholarship to spur conversation, train litigators, and apply fully to evidence law); Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV., 563, 608 (2014) (proposing that judges be permitted to inquire into the reliability of the conviction and, likewise, prosecutors inquire into reliability of the conviction before proffering them as evidence).

[220] Andrew Arnage, Stephanie Perry & Dartunorro Clark, *Poll: 64 percent of Americans say racism remains a major problem*, https://www.nbcnews.com/politics/politics-news/poll-64-percent-americans-say-racism-remains-major-problem-n877536 (last visited May 1, 20190.

[221] *See* Roberts, *supra* note 17, at 608.

[222] *See* Kang, *supra* note 18, at 635.

[223] *Id.*

law and in many areas of the criminal justice. Step two is to excavate old law.[224] Again, once new and accurate models of human behavior and implicit bias are accounted for in police and prosecutorial culture and training, courtrooms, and juries, we may see a break in behavior.[225] Step three account for the gap.[226] Where there is a sufficiently large gap between old law and new models of behavior, we should pressure the law to take account.[227] As it relates to Rule 609, I have discussed the ways in which convictions offered for impeachment are prejudicial and misrepresent a defendant-witness's veracity for truthfulness. Furthermore, the potential that jurors will use that conviction evidence improperly burdens a defendant's rights to testify and proceeds under the assumption that the defendant's prior conviction was vigorously defended, free of implicit bias, and is a reliable indicator of his character for truthfulness. These assumptions have and should be challenged. All we must do is wait for the criminal justice system to reflect and remove the seemingly insurmountable amount of racial bias that Black defendants face within it. Such an effort, to address the bias that is inherent in Rule 609, could be a catalyst to promote new policies around discrimination in legal proceedings overall to ensure that the Rules preserve their purpose to "administer every proceeding fairly" for everyone. A deeper collaboration with the social sciences is not just necessary, it is imperative.

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[224] *Id.*
[225] *See* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 U.C.L.A. L. Rev. 1124, 1169-1186 (2015).
[226] Kang, *supra* note 18, at 636.
[227] *Id.*