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NOTE

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INTRODUCTION

The Federal Rules of Evidence (F.R.E.) govern the introduction of evidence in United States federal courts for the ultimate purpose of ascertaining the truth and securing a just determination.[1] Arguably, one of the most controversial rules is Rule 609, which deals with the admissibility of criminal convictions for the purpose of impeachment.[2] Its origins stem from English common law, in which criminals were deemed automatically incompetent to take the stand, forever marked as untrustworthy because of their prior criminal history.[3] While defendants with criminal history are no longer automatically barred from taking the stand, Rule 609 allows for the introduction of evidence of a defendant's prior criminal history as a means of impeachment if the defendant takes the stand as a witness.[4] As a result, defendants often choose not to take the stand in order to prevent their criminal history from being introduced to the jury by the prosecution.[5]

This Note proposes that by discouraging defendants with a criminal history from taking the stand and individualizing themselves, Rule 609 disadvantages minority defendants. The rule puts these defendants in a position in which it is more likely jurors will rely on heuristic processes when making decisions about the defendant's guilt or innocence, as well as the severity of the defendant's punishment. Furthermore, if a defendant does choose to individualize themselves by taking the stand in order to limit implicit stereotyping, this choice places the defendant at a greater risk for conviction because jurors are more likely to convict a defendant with a prior criminal record.

I. RULE 609 AND CRIMINAL DEFENDANTS

Rule 609 is comprised of two parts that dictate the means by which past convictions can be admitted into evidence to impeach criminal defendants.[6] The first part of the rule, 609(a)(2), addresses convictions for crimes involving

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1 FED. R. EVID. 102; *See also* Todd A. Berger*, Politics, Psychology, and the Law: Why Modern Psychology Dictates an Overhaul of Federal Rule of Evidence 609,* 13 U. PA. J.L. & SOC. CHANGE 203, 203 (2010).

2 FED. R. EVID. 609; Berger*, supra* note 1, at 203.

3 *See* Robert G. Spector, *Rule 609: A Last Plea for Its Withdrawal*, 32 OKLA. L. REV. 334, 335 (1979).

4 FED. R. EVID. 609.

5 Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 836–37 (2016).

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

dishonesty or false statements, which *must* be admitted.[7] This part of the rule does not distinguish between felonies or misdemeanors.[8] The second part of Rule 609, which is arguably more concerning, addresses the admissibility of convictions of crimes that do not involve dishonesty but were "punishable by death or by imprisonment for more than one year."[9] Evidence of these convictions must be admitted "if the probative value of the evidence outweighs its prejudicial effect to [the] defendant."[10] Unfortunately, the text of Rule 609 offers no guidance as to how courts should conduct this balancing test.

The two key cases underlying Rule 609 are *Luck v. United States*[11] and *Gordon v. United States*.[12] These opinions emphasize the importance of considering whether Rule 609 might "deter defendant testimony and thus might deprive the fact finder of valuable information."[13] In *Luck*, a pre-F.R.E. decision, the D.C. Circuit interpreted a provision of the D.C. Code that permitted the impeachment of a defendant on the basis of prior criminal convictions.[14] The court determined that whether a defendant could be impeached by a prior conviction should be determined by "sound judicial discretion," and that the chilling effect on defendant testimony should be considered.[15] In addition, the court emphasized that there will be "cases where the trial judge might think that the cause of truth would be helped more by" allowing the defendant to take the stand and tell their story without fear that they will be prejudiced by evidence of a prior conviction.[16] The D.C. Circuit explored this issue again two years later in *Gordon*, finding that a defendant with a prior conviction "may ask the court to consider whether it is more important for the jury to hear his story than to know about prior convictions in relation to his credibility."[17] Ultimately, the court determined that there may be some instances in which it is more important to avoid the chilling of defendant testimony, despite the probative value of introducing such evidence:

> Even though a judge might find that the prior convictions are relevant to credibility and the risk of prejudice to the defendant does not warrant their exclusion, he may nevertheless conclude that it is more important that the jury have the benefit of the defendant's version of the case than to have the defendant remain silent out of fear of impeachment.[18]

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7 FED. R. EVID. 609(a)(2).

8 *Id.*

9 FED. R. EVID. 609(a)(1).

10 FED. R. EVID. 609(a)(1)(B).

11 348 F.2d 763 (D.C. Cir. 1965).

12 383 F.2d 936 (D.C. Cir. 1967).

13 Roberts, *supra* note 5, at 856.

14 *Luck*, 348 F.2d at 767–68.

15 *Id.* at 768.

16 *Id.*

17 *Gordon*, 383 F.2d at 939.

18 *Id.* at 940–41.

As such, both *Luck* and *Gordon* emphasize that the chilling effect on the defendant testimony can be enough to prohibit Rule 609 motions.[19] Unfortunately, "[n]umerous courts have inverted the meaning of this factor by treating the 'importance of the defendant's testimony' as a reason to permit, rather than prohibit, the impeachment of that testimony."[20] District courts within the Second, Third, Fifth, and Tenth Circuits have inverted the importance of the defendant's testimony to mean that evidence of prior criminal acts should be admitted, and the Sixth, Seventh, and Ninth Circuit courts have done the same.[21]

While the balancing test within the text of Rule 609(a)(2) was designed to prevent chilling defendant testimony, "[a]dmission of prior convictions for impeachment has become the default."[22] A 2006 study of exonerated individuals showed that in every instance of the defendant testifying despite having a criminal record, the trial court permitted the prosecution to impeach the defendant with evidence of their prior convictions.[23] "This was true even when the defendant's prior conviction was for [an identical] or . . . similar offense."[24] Essentially, once the defendant chooses to take the stand as a witness, he or she opens the door for the prosecutor to introduce evidence of his or her prior felony convictions, as well as any other convictions that involve dishonesty.[25]

II. ALWAYS A CRIMINAL, ALWAYS A LIAR: THE HISTORICAL AND PSYCHOLOGICAL BASIS FOR RULE 609

As is true for many other areas of the law, the Federal Rules of Evidence originate from English common law.[26] The basis for Rule 609 developed during the sixteenth and seventeenth centuries in England as a reaction to reforms in criminal procedure that allowed criminal defendants to produce witnesses on their own behalf.[27] Before that time, only the prosecution had the power to produce witnesses.[28] During this time of reformation, rules were developed to determine

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19 Roberts, *supra* note 5, at 874.

20 *Id.* at 846 (quoting Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135, 199–200 (1989)).

21 *Id.* at 847.

22 *Id.* at 835, 856.

23 John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 483–90 (2008).

24 *Id.* at 491.

25 FED. R. EVID. 609(a). While the rule generally allows for prior convictions as a means for impeachment,

> [e]vidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

Berger, *supra* note 1, at 204 n.4.

26 Spector, *supra* note 3, at 335.

27 Robert Popper, *History and Development of the Accused's Right to Testify*, 1962 WASH. U. L.Q. 454, 456.

28 *Id.* at 454–55.

which people would be allowed to testify, and what types of witnesses were competent.[29]

Eventually it was established that convicted felons were not competent to testify in court because their testimony was considered inherently untrustworthy.[30] In addition, defendants were also deemed incompetent to testify on their own behalf due to the heightened risk of perjury.[31] While the automatic disqualification of criminal defendants was swept away with the procedural reforms of the nineteenth century, those same disqualifications formed the basis of Rule 609.[32]

While multiple justifications have been advanced for admitting a defendant's prior convictions, a common rationalization is that a criminal conviction reveals a character trait of dishonesty that makes the defendant's testimony less reliable.[33] This assumption is not entirely outside what psychology tells us of human behavior.[34] In fact, many psychologists agree that there is some continuity between a person's past behaviors and future actions.[35]

In 2000, Dolores Albarracin and Robert Wyer conducted a study to determine the extent that past behaviors influence future actions.[36] In the study, "participants were led to believe that without being aware of it, they had expressed either support for or opposition to the institution of comprehensive exams."[37] Feedback about their past opinions—even though the opinions were manufactured—had a statistically significant impact on the participants' present attitudes and ultimate conclusions.[38] These results suggest that past opinions or behaviors can influence a person's future decisions.[39]

That being said, the assumption that prior convictions automatically lead to inaccurate testimony fails to acknowledge "the role that different circumstances may play in determining how a person may act."[40] Social behaviors have a tendency to be largely variable in different situations.[41] For example, psychologist Walter Mischel conducted a six-year study of children ages seven to thirteen and found that most actions are determined by situational factors rather than general or consistent

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29 *Id.* at 456.

30 Spector, *supra* note 3, at 336.

31 Popper, *supra* note 27, at 456. Perjury: "The act or an instance of a person's deliberately making material false or misleading statements while under oath; esp., the willful utterance of untruthful testimony under oath or affirmation, before a competent tribunal, on a point material to the adjudication." *Perjury*, BLACK'S LAW DICTIONARY (11th ed. 2019).

32 Spector, *supra* note 3, at 335–36.

33 Berger, *supra* note 1, at 204–05.

34 *See id.* at 207–08.

35 *Id.*

36 Dolores Albarracin & Robert Wyer, *The Cognitive Impact of Past Behavior: Influences on Beliefs, Attitudes, and Future Behavioral Decisions*, 79 J. PERSONALITY & SOC. PSYCHOL. 5, 5 (2000).

37 *Id.*

38 *Id.*

39 *Id.*

40 Berger, *supra* note 1, at 207.

41 *See* Walter Mischel, *A Cognitive-Affective System Theory of Personality: Reconceptualizing Situations, Dispositions, Dynamics, and Invariance in Personality Structure*, 102 PSYCHOL. REV. 246, 246 (1995).

personality traits.[42] Psychologists Hugh Hartshorne and Mark May came to a similar conclusion when observing children's tendency to lie, finding that:

> Most children will deceive in certain situations and not in others. Lying, cheating, and stealing as measured by the test situations used in these studies are only very loosely related. Even cheating in the classroom is rather highly specific, for a child may cheat on an arithmetic test and not on a spelling test, etc. Whether a child will practice deceit in any given situation depends in part on his intelligence, age, home background, and the like and in part on the nature of the situation itself and his particular relation to it.[43]

Studies have also found that even in adults, past actions are likely to influence future behavior only when the circumstances surrounding both behaviors are largely the same.[44] In 1998, Judith Ouellette and Wendy Wood conducted a series of studies to determine how much a person's past behaviors dictate his or her future actions.[45] They found that "frequency of past behavior will not always be a good indicator of habit," especially when "contexts shift."[46] These studies raise serious doubts that an individual's prior history is indicative of how honest he or she will be in the future.[47] More often than not, situational factors will determine a person's decision to be honest, rather than his or her history of honesty or dishonesty.[48] As such, there is a limited psychological basis for Rule 609.

III. JURIES AND COGNITIVE REASONING

In order to understand how Rule 609 evidence affects juries' perceptions of minority defendants, it is first important to understand how juries reason. Reasoning is a process that happens over time as a result of the human brain relying on two distinct cognitive systems.[49] This "dual-process" account of human behavior best demonstrates the difficulties, both conscious and subconscious, juries face when tasked with making sound and rational judgments.[50]

The Dual Process theory proposes that "decisions [are] made with either a fast, unconscious, contextual process called System 1 or a slow, analytical,

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42 *Id.* at 248–49.

43 HUGH HARTSHORNE & MARK A. MAY, STUDIES IN THE NATURE OF CHARACTER 411–12 (1928).

44 Judith A. Ouellette & Wendy Wood, *Habit and Intention in Everyday Life: The Multiple Processes by Which Past Behavior Predicts Future Behavior,* 124 PSYCHOL. BULL. 54, 70 (1998).

45 *Id.* at 54.

46 *Id.* at 69.

47 *Id.*

48 *See* Berger, *supra* note 1, at 318.

49 Jennifer T. Kubota, Rachel Mojdehbakhsh, Candace Raio, Tobias Brosch, James S. Uleman & Elizabeth A. Phelps, *Stressing the Person: Legal and Everyday Person Attributions Under Stress*, 103 BIOLOGICAL PSYCHOL. 117, 118 (2014).

50 *See id.* at 122. *See also* Geoff Norman, *Dual Processing and Diagnostic Errors*, Abstract, 14 ADVANCES HEALTH SCI. EDUC. 37, 37 (2009).

conscious, and conceptual process, called System 2."[51] These systems are sometimes also described as the implicit and the explicit, or the subconscious and the conscious.[52] System 1 is typically "considered to be shared by all higher order organisms" and, as such, has had a significantly "longer evolutionary history."[53] It is "commonly associated with visual perception" because it is the system that allows for rapid, contextual, and categorical interpretations.[54] However, System 1 involves more than just visual perceptions; it encapsulates all subsystems that involve associative learning processes.[55] Within System 1, a heuristic analysis occurs, which is "a strategy that ignores part of the information, with the goal of making decisions more quickly, frugally, and/or accurately than more complex methods."[56] While heuristic analysis can be highly efficient in many circumstances, it is often prone to error and the utilization of implicit stereotyping and bias.[57]

System 2, on the other hand, is often considered the rational system, which is slow, deliberative, verbally mediated, and primarily conscious.[58] It is commonly associated with the type of reasoning that leads to "effective problem-solving."[59] Whereas System 1 is automatic, comparing past experiences to present situations, System 2 operates on abstract rules.[60] Because System 2 is abstract, it can handle "hypothetical situations where no prior experience can inform judgments."[61] Essentially, System 2 acts as a "correctional step," to System 1 by "fighting off the primary impulsivity of [S]ystem 1" through analytic judgment and deliberative consideration.[62] While evidence exists to suggest that System 2 can act simply as a post hoc justification for the determinations of System 1, it is in System 2 that the brain is most likely to correct heuristic errors, including implicit racial stereotyping.[63]

Due to the fact that correcting heuristic errors takes mental effort, the System 2 correctional step is more likely to fail when "cognitive resources are drained and busy."[64] Jurors typically experience this type of cognitive drain when

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51 Norman, *supra* note 50.

52 *Id.*

53 Veronika Denes-Raj & Seymour Epstein, *Conflict Between Intuitive and Rational Processing: When People Behave Against Their Better Judgment*, 66 J. PERSONALITY & SOC. PSYCHOL. 819, 819 (1994).

54 Norman, *supra* note 50, at 40.

55 *See* Denes-Raj & Epstein, *supra* note 53, at 820.

56 Gerd Gigerenzer & Wolfgang Gaissmaier, *Heuristic Decision Making*, 62 ANN. REV. PSYCHOL. 451, 454 (2011).

57 Denes-Raj & Epstein, *supra* note 53, at 819–20.

58 *Id.* at 819.

59 Norman, *supra* note 50, at 40.

60 *Id.*

61 *Id.*

62 *Id.* at 42 (quoting Patrick Croskerry, *Critical Thinking and Decision-Making: Avoiding the Perils of Thin-Slicing*, 48 ANNALS EMERGENCY MED. 720, 720 (2006)).

63 *See* Kubota et al., *supra* note 49.

64 *Id.*

they have to make decisions regarding the behavior of defendants.[65] Because jurors are forced to make tough decisions and to process an immense amount of information, jurors often suffer from incomplete cognitive reasoning.[66] When suffering from cognitive drain, jurors are less likely to contemplate all the evidence and possibilities for why a crime occurred.[67] They are more likely to search for a "plausible scenario of 'what happened'" and apply only the evidence that allows them to "attach certainty to this story."[68] As a result of their manufactured certainty, juries relying on System 1 heuristics are more likely to choose extreme verdicts in the event that their "plausible scenario" assigns guilt to the defendant.[69] Without the availability of System 2, juries are at risk of making inaccurate judgments for defendants, specifically minority defendants.[70]

IV. ILLUSORY CORRELATIONS AND MINORITY DEFENDANTS IN THE COURTROOM

The effects of a defendant's race on legal judgments have been studied in many contexts, and both archival and experimental studies indicate that minority defendants "are more likely to be found guilty and, if convicted, [are given] longer sentences than White defendants."[71] Everyday perceptions are influenced by cognitive mechanisms that rely on racial stereotypes, resulting in flawed determinations about the culpability of defendants.[72] This, in part, has to do with the fact that jury members rely heavily on heuristics to make determinations about culpability.[73] Humans tend to "selectively notice and remember . . . events that fit with . . . preconceived conceptions and expectations."[74] This behavior is called "illusory correlation."[75] In essence, jurors are more likely to determine that a person behaved in a certain manner if that person fits within preconceived social notions of behavior.[76]

The unfortunate reality for minority defendants is that they exist in a society that expects that they will break the law.[77] Psychological evidence dating back to

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65 *Id.*

66 *See* Deanna Kuhn, Michael Weinstock, & Robin Flaton, *How Well Do Jurors Reason? Competence Dimensions of Individual Variation in a Juror Reasoning Task*, 5 PSYCHOL. SCI. 289, 295 (1994).

67 *Id.*

68 *See id.*

69 *See id.*

70 *See* Christopher S. Jones & Martin F. Kaplan, *The Effects of Racially Stereotypical Crimes on Juror Decision-Making and Information-Processing Strategies*, 25 BASIC & APPLIED PSYCHOL. 1, 2 (2003).

71 *Id.* at 1.

72 *See* Galen V. Bodenhausen, *The Role of Stereotypes in Decision-Making Processes*, 25 MED. DECISION MAKING 112, 113, 116 (2005).

73 Jones & Kaplan, *supra* note 70, at 1.

74 *Id.* at 113.

75 *Id.*

76 Jones & Kaplan, *supra* note 70, at 2.

77 *See* Bodenhausen, *supra* note 72, at 115.

the 1970s confirms that race is stereotypically associated with certain crimes.[78] African American defendants have some of the worst associated crimes. For example, they are perceived as "more likely than their White counterparts to engage in soliciting, assault-mugging, grand-theft auto, and assault on a police officer."[79] These racial stereotypes, combined with "illusory correlation" behavior, plague jurors' analysis, making it extremely difficult for juries to come to a just result for a minority defendant.

Even jurors who do not consider themselves to be racist or bigoted have implicit, stereotypic misconceptions about minorities. This is because "illusory correlation" behaviors manifest in the subconscious.[80] Even when racial or ethnic stereotypes are subconsciously triggered, these stereotypes systematically distort the way evidence is processed, causing jurors to place an emphasis on information that makes defendants fit within their stereotypic preconceptions.[81]

In a recent experiment, subjects were given information regarding a prisoner in order to determine whether that prisoner should be granted parole.[82] While the information about the prisoner's crime remained the same, the prisoner's ethnicity was manipulated across various trials.[83] In the presence of a racial or minority stereotype, subjects were less likely to consider the prisoner's situational explanations for the crime and more likely to rationalize that the prisoner was the "type of person to commit this crime."[84] Similarly, in another experiment, a trial simulation revealed a strong correlation between the defendant's race, assumptions of culpability, and the administration of punishment.[85] In the trial simulations, minority defendants were more likely to be convicted, and if they were convicted, they were much more likely to be given a harsher punishment than their convicted White counterparts.[86]

These studies establish that minority defendants are already at significant risk for racial stereotypes influencing and distorting jurors' determinations regarding the defendant's culpability.[87] To make matters worse, because Rule 609 discourages defendants with a criminal history from taking the stand, minority defendants with a record are subject to even greater jury prejudice. This is due to the fact that many defendants with records choose to plead the Fifth Amendment and not take the stand, a decision that also has negative affects on jury perceptions of guilt and morality.[88] Despite the fact that jurors are technically instructed that

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78 Jones & Kaplan, *supra* note 70, at 1.

79 *Id.*

80 Bodenhausen, *supra* note 72, at 113, 117.

81 *Id.* at 115.

82 *Id.*

83 Bodenhausen, *supra* note 72, at 115.

84 *Id.* at 116.

85 Jones & Kaplan, *supra* note 70, at 9.

86 *See id.* at 5, 9.

87 *See id.* at 5, 9–10.

88 *See* Justin Sevier, *Omission Suspicion: Juries, Hearsay, and Attorneys' Strategic Choices*, 40 FLA. ST. U. L. REV. 1, 19 (2012).

they "cannot draw negative inferences from a defendant's invocation of the Fifth Amendment," ample evidence suggests that juries do just that.[89] In a study of mock jurors who read a trial transcript where the defendant invoked the Fifth Amendment, jurors tended to believe that the defendant's motivation for invoking the Fifth was to hide the their guilt.[90] In another study, this time in a mock criminal trial, the more the defendant appeared to be withholding information—which is what the Fifth Amendment allows defendants to do—the more the jury believed the defendant to be guilty.[91]

Minority defendants with a criminal history are at a distinct disadvantage. Because minorities live in a society that expects them to commit crime, "illusory correlations" cloud the reasoning of juries faced with a minority defendant charged with a race-congruent crime.[92] The more the defendant fits within the perceived demographic of the type of person who would commit a crime, the more likely it is that jurors will determine that the defendant behaved accordingly, regardless of the quality of the evidence presented.[93] At the same time, minority defendants who choose not to take the stand to avoid introduction of Rule 609 evidence face even more negative inferences against them because jurors assume that not testifying is an admission of guilt.[94] In attempting to avoid Rule 609 evidence by not taking the stand, minority defendants essentially create another "illusory correlation" that proves to jurors, who primarily reason in System 1, that the defendant is guilty.

V. HOW TO PUSH JURIES INTO SYSTEM 2 REASONING

Although modern psychology makes it clear that someone who "is untruthful or willing to break the law in one context does not prove that he or she will be untruthful or break the law in another context," appropriate measures should be taken to ensure that "illusory correlations" do not influence jurors' decisions to assign culpability for minority defendants.[95] One such measure that has been used to combat bias is the process of individuation, which is a method that "relies on preventing stereotypic inferences by obtaining specific information" about a person.[96] Studies suggest that by providing jury members with individualizing information about a defendant, such as a defendant's background, there is a lesser chance that stereotypes will dominate the cognitive process of determining the defendant's culpability.[97]

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89 *Id.*

90 Clyde Hendrick & David Shaffer, *Effect of Pleading the Fifth Amendment on Perceptions of Guilt and Morality*, 6 BULL. PSYCHONOMIC SOC'Y 449, 451 (1975).

91 Sevier, *supra* note 88, at 19.

92 Jones & Kaplan, *supra* note 70, at 2.

93 *Id.*

94 Sevier, *supra* note 88, at 19.

95 Berger, *supra* note 1, at 214.

96 Roberts, *supra* note 5, at 836.

97 *Id.*

Individuation effectively pulls the brain out of System 1 processing and into System 2, replacing heuristic analysis with analytic judgment and deliberative consideration.[98] This makes it less likely that a juror's brain will rely on implicit biases to come to a judgment regarding the defendant's behavior. Furthermore, by individuating the defendant, jurors are more likely to attribute a defendant's behavior to the circumstances surrounding his or her actions rather than inherent traits.[99]

In a study predicting sex stereotypes, participants were asked to read a transcript of a telephone conversation in which an individual described his or her actions and experiences in three different life events.[100] Each individual was given a gender-stereotypic name.[101] To the surprise of the sociologists conducting the study, participants relied on the details of the individual's behavior in evaluating a person's traits rather than on gender stereotypes.[102] Similarly, another study found that after a group of participants listened to an African American student share her experiences for twelve minutes, there was no evidence of stereotypic activation, even though the same study participants showed evidence of stereotypic activation within fifteen seconds of meeting the student.[103] Studies like these emphasize the importance of offering minority defendants the opportunity to individuate themselves.

Taking the stand and revealing background information about themselves may be the most important thing a minority defendant can do to prevent implicit biases.[104] However, in many cases, individualization requires that a defendant take the stand.[105] If they do, Rule 609 allows for prior criminal convictions to be entered as evidence.[106] The incentive to take the stand to individualize oneself is often outweighed by the risk that a jury will learn about prior crimes that affirm implicit stereotypes.[107]

VI. FUNDAMENTAL ATTRIBUTION ERROR AND MINORITY DEFENDANTS ON THE STAND

As discussed above, individuation is an effective method for preventing racial biases and heuristic analysis from clouding the jury's mind when making a

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98 Norman, *supra* note 50, at 42–43.

99 Kubota et al., *supra* note 49, at 122.

100 Anne Locksley, Eugene Borgida, & Nancy Brekke, *Sex Stereotypes and Social Judgment*, 39 J. PERSONALITY & SOC. PSYCHOL. 821, 822 (1980).

101 *See id.* at 822.

102 *Id.* at 825.

103 Ziva Kunda, Paul G. Davies, Barbara D. Adams, & Steven J. Spencer, *The Dynamic Time Course of Stereotype Activation: Activation, Dissipation, and Resurrection*, 82 J. PERSONALITY & SOC. PSYCHOL. 283, 286 (2002).

104 *See* Roberts, *supra* note 5, at 875.

105 Berger, *supra* note 1, at 216.

106 *See* FED. R. EVID. 609.

107 *Cf.* Roberts, *supra* note 5, at 874.

determination regarding the culpability of the defendant.[108] As such, it may seem surprising that any defendant would choose not to take the stand as a witness. However, the fear of introduction of Rule 609 evidence against a minority defendant is typically enough to keep minority defendants from testifying.[109]

Minority defendants place themselves at risk for introducing yet another "illusory correlation" if evidence of a prior conviction is revealed to the jury.[110] As described previously, humans selectively remember behaviors that affirm preconceived expectations.[111] If the assumption is that American society perceives minorities to be criminals, as evidence certainly suggests, then the fact that a minority defendant has already been convicted of a previous crime will certainly be used as an "illusory correlation."[112] As such, evidence of a prior crime further affirms stereotypic biases that already affect minority defendants, and the evidence increases jury members' confidence in relying on those biases.[113]

In addition to creating "illusory correlations" against a defendant, evidence of a defendant's prior conviction, as allowed by Rule 609, also introduces the threat of Fundamental Attribution Error (FAE).[114] This cognitive error is the tendency to "overvalue dispositional explanations . . . and undervalue situational explanations."[115] FAE explains why we think of people in terms of inherent traits rather than in terms of situational behaviors.[116] In his book *The Tipping Point*, Malcolm Gladwell provides the following example of FAE:

> If I asked you to describe the personality of your best friends, you could do so easily, and you wouldn't say things like "My friend Howard is incredibly generous, but only when I ask him for things, not when his family asks him for things," or "My friend Alice is wonderfully honest when it comes to her personal life, but at work she can be very slippery." You would say, instead, that your friend Howard is generous and your friend Alice is honest. All of us, when it comes to personality, naturally think in terms of absolutes: that a person is a certain way or is not a certain way.[117]

While attributing a person's behavior to inherent traits may be a common method of reasoning, such analysis fails to recognize the importance of the circumstances surrounding a person's behavior.[118]

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108 *See id.*

109 *See* Berger, *supra* note 1, at 216. In a recent study of DNA exonerees, ninety-one percent of defendants with prior convictions waived their right to testify at trial, despite their innocence. Roberts, *supra* note 5, at 836.

110 *See* Jones & Kaplan, *supra* note 70, at 1.

111 *See supra* text accompanying notes 69, 76.

112 *See* Bodenhausen, *supra* note 72, at 114.

113 *Id.*

114 Berger, *supra* note 1, at 207–08.

115 Kubota et al., *supra* note 49, at 117.

116 Berger, *supra* note 1, at 207–08.

117 MALCOLM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE, 158 (2000).

118 *See* Berger, *supra* note 1, at 213.

For criminal defendants with prior criminal histories, FAE indicates that cognitively stressed jurors may conclude that the defendant committed a crime in the past, simply because they are the type of person who would commit a crime.[119] A determination that a defendant has an inherent trait to commit crimes will likely influence a jury to believe that the defendant committed the crime in question, regardless of the validity of any other evidence presented.[120] Unfortunately, similar to how "illusory correlations" increase jurors' use of implicit stereotyping and heuristics in decision-making, FAE increases the likelihood that a juror will base the defendant's guilt in a present action on the way they have behaved in the past."[121]

While individuation limits the effects racial biases and heuristics have on jury members' determinations of culpability, Rule 609 removes the opportunity for defendants who have committed crimes in the past to individuate themselves. Evidence of a defendant's prior criminal history creates "illusory correlations" that further attack the innocence of the defendant and influence the jury to rely on heuristics and racial bias.[122] In addition, FAE may lead a jury to believe that the defendant, because he or she committed a crime in the past, has an immutable trait of criminality. Such an attribution would invariably lead a jury to determine criminality despite the quality of other evidence presented.[123] As such, Rule 609 significantly disadvantages minority defendants with a criminal history.

VII. RULE 609 SHOULD EITHER BE ELIMINATED OR AMENDED

The purpose of Rule 609 is to ensure that juries are aware of the credibility of the defendant's testimony.[124] Modern psychology tells us that Rule 609 does not effectuate that purpose.[125] More often than not, situational factors will determine a person's decision to be honest, not his or her history of honesty or dishonesty.[126] As indicated by numerous psychological studies, Rule 609 creates significant prejudice against minority defendants. Thus, Rule 609 should be removed from the Federal Rules of Evidence or amended to only include evidence of prior convictions of perjury.

Looking to how states use prior convictions, evidence suggests that the Federal Rules of Evidence would remain effective even if Rule 609 were eliminated.[127] Montana, for example, prohibits introducing evidence that the witness has been convicted of a crime for the purposes of attacking the witness's

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119 *Id.*

120 *Id.*

121 *See* Bodenhausen, *supra* note 72, at 113–14.

122 *See* Bodenhausen, *supra* note 72, at 115–16; Kubota et al., *supra* note 49, at 120–22.

123 Kubota et al., *supra* note 49, at 122.

124 FED. R. EVID. 609.

125 *See* Berger, *supra* note 1, at 207.

126 *Id.* at 218.

127 *See* Roberts, *supra* note 5, at 851.

credibility.[128] Hawaii only allows evidence of a defendant's prior crimes if the crimes involve dishonesty and the defendant must raise their own credibility.[129] Virginia prohibits the introduction of the name and nature of prior crimes, with the exception of perjury, when attacking a defendant's credibility.[130] These state rules suggest that eliminating Rule 609 would not have a devastating effect on federal criminal procedure, since many states function without it.

Should the outright elimination of Rule 609 prove to be impossible,[131] Rule 609 should be limited to the crime of perjury.[132] If the purpose of the rule is to ensure that jury members are aware of past dishonesty to determine the likelihood of dishonesty in the courtroom, then the only relevant crime is past dishonesty in a courtroom.[133] As such, convictions of perjury should be the only convictions admissible for Rule 609.

CONCLUSION

Rule 609 disadvantages minority defendants with criminal records by forcing them to make a decision with no favorable outcomes. Rule 609 serves to inform juries as to whether someone is likely to lie on the stand by introducing past criminal acts, but modern psychological evidence suggests that Rule 609 does not effectuate that purpose. In fact, Rule 609 ignores how context influences the way people behave and incorrectly presumes that honesty or dishonesty are inherent human traits. Through the introduction of Rule 609 evidence, minority defendants are subject to determinations by juries stuck in System 1 processing. This means juries are more likely to rely on subconscious processes when making decisions regarding the defendant's guilt or innocence. In fact, System 1 practically guarantees that implicit stereotypes are employed.[134] Furthermore, should a defendant attempt to draw juries into System 2 processing by individualizing themselves on the stand, evidence suggests that this places defendants with a criminal history at a greater risk for conviction.[135] This is because jurors are more prone to convict defendants with prior criminal convictions due to "illusory correlations" as well as FAEs.[136] To protect minority defendants, Rule 609 should be significantly amended or generally abolished.

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128 MONT. R. EVID. 609.

129 HAW. R. EVID. 609.

130 VA. R. EVID. 609.

131 Which is certainly a possibility, considering the lack of reform of the Rule despite countless efforts.

132 Berger, *supra* note 1, at 218.

133 *Id.*

134 *See supra* text accompanying note 57.

135 *See supra* Part VI.

136 *See supra* Part VI.