

# Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight against Implicit Stereotyping

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*Implicit courtroom stereotypes are an urgent problem. When trial defendants are African American, as is disproportionately the case, they are vulnerable to implicit fact finder stereotypes that threaten the presumption of innocence: unconscious associations linking the defendants with violence, weaponry, hostility, aggression, immorality, and guilt. Implicit-social-cognition research reveals that one valuable tool in combating this threat is individuating information—information that, through methods such as defendant testimony, brings an individual to unique life.*

*Yet courts frequently chill defendant testimony by permitting impeachment by prior conviction. Courts determining whether criminal defendants should be impeached by their prior convictions use a multifactor test, one factor of which is “the importance of the defendant’s testimony.” This factor was designed to prevent defendant testimony from being chilled: if the testimony was important, then impeachment was to be avoided. Now, courts often invert this factor’s meaning: they find that if the defendant’s testimony is important, the government should be able to impeach it. The distortion of this factor means not only that impeachment is typically permitted—and defendants frequently silenced—but also that a valuable opportunity to tackle courtroom bias is lost.*

*This Article proposes that the “importance of the defendant’s testimony” factor should be reclaimed as a means for defendants to argue that the individuating information that their testimony can offer militates against permitting impeachment. When the defendant’s race risks triggering stereotypes that threaten the presumption of innocence, individuation represents a crucial part of the struggle for a fair trial.*

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INTRODUCTION .....	836
I. IMPEACHMENT BY PRIOR CONVICTION AND HOW A DEFENSE OPPORTUNITY WAS LOST.....	840
A. FRE 609 and Its State Analogues .....	840
B. The Case Law Roots of FRE 609 .....	842
1. <i>Luck v United States</i> .....	843
2. <i>Gordon v United States</i> .....	844
C. The Case Law Roots Become Twisted.....	845
1. Courts and a lost opportunity. ....	846
2. Defense briefs and a lost opportunity. ....	850
3. Commentators and a lost opportunity. ....	852
4. Lost opportunity even when the factor's root meaning is preserved.....	854
D. The Consequences for Defendant Testimony and Trial .....	856
II. IMPLICIT STEREOTYPES THAT THREATEN TO FILL THE SILENCE .....	860
A. Implicit Stereotypes Targeting Criminal Defendants.....	861
B. Efforts to Remedy Courtroom Fairness .....	869
III. THE IMPORTANCE OF THE DEFENDANT'S TESTIMONY AS A WAY TO COMBAT IMPLICIT STEREOTYPING .....	873
A. Introduction to Individuation as a Method of Combating Bias .....	874
B. Applicability of Individuation to Defendants' Testimony .....	875
C. Applying Individuation to the Impeachment Context .....	878
IV. RESPONSES TO POTENTIAL OBJECTIONS.....	883
A. Case Law Has Not Mooted the Factor .....	883
B. The Use of This Factor for Individuation Arguments Is Worthwhile.....	885
1. Defendant testimony is one of several important ways of attempting individuation.....	885
2. The risks do not outweigh the benefits.....	887
3. This proposal does not impose an unfair burden on the prosecution.....	889
CONCLUSION .....	891

## INTRODUCTION

A recent study of DNA exonerees revealed that, despite their factual innocence, 91 percent of those with prior convictions waived their right to testify at trial.<sup>1</sup> The most common reason given by their counsel was the fear of the impact of impeachment

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<sup>1</sup> John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J Empirical Legal Stud 477, 491 (2008).

by prior conviction.<sup>2</sup> That fear was justified. First, in every case in which one of the exonerees with a criminal record did testify, the trial court permitted this type of impeachment;<sup>3</sup> second, allowing the jury to learn of a defendant's criminal record increases the rate of conviction by as much as 27 percent.<sup>4</sup> A regime in which stories of innocence are kept from the fact finder by a well-supported fear that they will be drowned out through prior conviction impeachment is one that needs scrutiny.

Comparing early opinions on whether impeachment should be permitted with opinions that postdate the Federal Rules of Evidence (FRE) reveals that in many instances an important opportunity for defendants—and fact finders—has been lost. The restoration of this opportunity offers the potential to combat one of the most significant threats to courtroom fairness: implicit racial stereotyping.

The early case law emphasized that a paramount consideration in determining whether to permit prior conviction impeachment was whether the defendant would be chilled from testifying.<sup>5</sup> Even if prior conviction evidence was probative of the defendant's credibility, and even if the probative value outweighed the prejudice, the risk that defendants might be deterred from testifying weighed heavily against permitting impeachment.<sup>6</sup>

The case law that followed the enactment of the FRE ostensibly preserved these early themes. “The importance of the defendant's testimony” is one factor in the multifactor test that most circuits and many states use in conducting the probative/prejudicial balancing test that the relevant rule of evidence requires.<sup>7</sup> Yet federal and state judges often ignore this factor or treat it as if it were of little worth.<sup>8</sup> Most strikingly, in many instances, judges

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<sup>2</sup> See *id.* (“In almost all instances in which a defendant with a prior record did not testify, counsel for the wrongfully convicted defendant indicated that avoiding impeachment was the principal reason the defendant did not take the stand.”).

<sup>3</sup> *Id.* at 479.

<sup>4</sup> *Id.* at 487 n 39, citing generally Harry Kalven Jr and Hans Zeisel, *The American Jury* (Little, Brown 1966).

<sup>5</sup> See Part I.B.

<sup>6</sup> See text accompanying notes 44–45.

<sup>7</sup> For the probative/prejudicial balancing test, see FRE 609(a)(1)(B). For the use of this particular factor, see text accompanying notes 51, 69.

<sup>8</sup> See notes 64–78 and accompanying text. See also Roderick Surratt, *Prior-Conviction Impeachment under the Federal Rules of Evidence: A Suggested Approach to Applying the “Balancing” Provision of Rule 609(a)*, 31 *Syracuse L Rev* 907, 938, 941 (1980) (noting that the number of opinions in which courts discuss and apply all five factors is “relatively small”).

invert its root sense: whereas originally the importance of the defendant's testimony militated against permitting impeachment—under the theory that important testimony must be heard—now it often justifies impeachment, under the theory that important testimony must not go unchallenged.<sup>9</sup>

The effect of this and other trends in impeachment law has been to make the granting of motions to impeach by prior conviction the default.<sup>10</sup> As shown by the exoneree research, the implications are troubling. When defendants waive their right to testify because of the fear of impeachment, important information is kept from the fact finder—information that may establish innocence and that may help build a richer factual context for the fact finder's decisionmaking.

Research into implicit stereotyping and its amelioration shows why the collapse of the “importance of the defendant's testimony” factor is particularly significant. Implicit racial stereotyping constitutes one of the most significant, and intractable, threats to courtroom fairness. Those accused of crimes are disproportionately people of color,<sup>11</sup> and people of color are frequently targets of implicit racial stereotyping.<sup>12</sup> Those put on trial have the right to the presumption of innocence;<sup>13</sup> implicit racial stereotyping by fact finders threatens that presumption, because when defendants are African American, unconscious associations are invoked between their race and concepts such as violence, weaponry, hostility, aggression, immorality,<sup>14</sup> and—most damning of all—criminal guilt.<sup>15</sup> And yet, as research into implicit stereotyping expands from demonstrating the breadth of the phenomenon to exploring solutions,<sup>16</sup> some hope emerges. Research in the area of social cognition indicates that when fact finders hear from a member of a stereotyped group, and particularly when they hear information that *individuates*—or paints a unique picture of—that person, they are more likely to be able to

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<sup>9</sup> See text accompanying notes 53–62, 69–73.

<sup>10</sup> See text accompanying notes 133–42.

<sup>11</sup> Abbe Smith, *Defending Those People*, 10 Ohio St J Crim L 277, 287 (2012).

<sup>12</sup> See text accompanying notes 181–91.

<sup>13</sup> See, for example, *Estelle v Williams*, 425 US 501, 503 (1976).

<sup>14</sup> See notes 183–87 and accompanying text.

<sup>15</sup> See note 191 and accompanying text.

<sup>16</sup> See David M. Amodio and Saaid A. Mendoza, *Implicit Intergroup Bias: Cognitive, Affective, and Motivational Underpinnings*, in Bertram Gawronski and B. Keith Payne, eds, *Handbook of Implicit Social Cognition: Measurement, Theory, and Applications* 353, 362 (Guilford 2010) (noting that the “holy grail of implicit race bias research is to change the underlying associations that form the basis of implicit bias”).

form judgments about that individual that are based on the evidence rather than on stereotypes.<sup>17</sup>

Forging new connections between impeachment law and the science of implicit stereotyping, this Article proposes that attorneys reclaim the “importance of the defendant’s testimony” factor as a vehicle for innovative defense arguments. When defendants are the targets of stereotypes that threaten the presumption of innocence or the right to a fair trial, those arguments could include the need to preclude prior conviction impeachment because it is vitally important for the fact finder to hear individuating testimony. This would serve not only to bring sense back into the multifactor test and to restore a key strand of case law underlying the rule but also to resist the trend toward the automatic admission of impeachment evidence and the resulting silencing of defendants.

Part I describes the contemporary rules governing the admission of prior conviction impeachment evidence and their roots. It illustrates the ways in which a factor that was originally intended to aid defense objections to this evidence has lost its vitality and, in many instances, become a tool for the prosecution. This and other aspects of impeachment law have created a situation in which impeachment is routinely permitted and defendants are frequently silenced.

Part II illustrates the particular harms associated with the weakening of the “importance of the defendant’s testimony” factor by highlighting the risks of implicit racial stereotyping in the courtroom. When an African American is on trial, implicit racial stereotypes threaten the presumption of innocence by allowing fact finders to assume guilt—or elements of guilt—on the basis of the defendant’s race.<sup>18</sup> When a defendant sits silently in the courtroom, these assumptions run riot, and efforts at tackling implicit courtroom bias have thus far had little success. Research into social cognition, however, suggests that individuating information can combat stereotyping.

Part III urges that the “importance of the defendant’s testimony” factor should be revived. Restoring its original meaning will enable courts to give weight to all of the factors in the impeachment test, will transform this factor—and the test—from a

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<sup>17</sup> See Part III.A.

<sup>18</sup> This Article restricts itself to the consideration of implicit racial stereotypes and particularly those targeting African Americans, but its arguments are potentially applicable to other stereotyped groups.

mere rubber stamp for impeachment, and will play a role in combating the extraordinary threat that implicit stereotypes pose to criminal defendants and to the presumption of innocence. Part IV addresses possible objections.

#### I. IMPEACHMENT BY PRIOR CONVICTION AND HOW A DEFENSE OPPORTUNITY WAS LOST

This Part lays out the relevant aspects of the current federal rule governing impeachment by prior conviction, as well as its state analogues. It then describes the case law roots of the federal rule before examining the ways in which a key concern of that early case law—the risk that permitting impeachment would keep valuable defendant testimony from the fact finder—has been neglected. The result of this neglect is that impeachment by prior conviction evidence is easier to achieve and the silencing of the defendant is more likely to result.

##### A. FRE 609 and Its State Analogues

FRE 609 governs impeachment by prior conviction in the federal courts. Two types of convictions can be admitted into evidence to impeach criminal defendants. The first consists of those convictions with regard to which “the court can readily determine that establishing the elements of the crime required proving—or the [defendant’s] admitting—a dishonest act or false statement.”<sup>19</sup> Under FRE 609(a)(2), these *must* be admitted into evidence.<sup>20</sup> The second, with which this Article is concerned, consists of convictions for crimes that were “punishable by death or by imprisonment for more than one year.”<sup>21</sup> Under FRE 609(a)(1)(B), this type must be admitted “if the probative value of the evidence outweighs its prejudicial effect to [the] defendant.”<sup>22</sup>

Prior convictions are admissible under FRE 609 for the purpose of “attacking a [testifying defendant’s] character for truthfulness.”<sup>23</sup> Naturally, there is a risk that they will be used for other, forbidden purposes, such as creating the inference that if a defendant “did it once, he did it again,” or that if he “did it

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<sup>19</sup> FRE 609(a)(2).

<sup>20</sup> FRE 609(a)(2).

<sup>21</sup> FRE 609(a)(1).

<sup>22</sup> FRE 609(a)(1)(B).

<sup>23</sup> FRE 609(a).

once,” it would be best if he were incarcerated.<sup>24</sup> The drafters of FRE 609 were alert to this risk, and they made the standard for impeaching criminal defendants more exacting than the standard for impeaching other witnesses.<sup>25</sup> In addition, defendants are entitled to jury instructions prohibiting jurors from using this evidence for these forbidden purposes.<sup>26</sup>

Supreme Court cases have set parameters for the administration of FRE 609. In *Luce v United States*,<sup>27</sup> for example, the Court held that if defendants exercise their right not to testify, they have no right to a subsequent appeal of a decision that they

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<sup>24</sup> See, for example, Ted Sampsel-Jones, *Preventive Detention, Character Evidence, and the New Criminal Law*, 2010 Utah L Rev 723, 732–33.

<sup>25</sup> See FRE 609(a)(1)(A) (stating that convictions “punishable by death or by imprisonment for more than one year . . . must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant”). FRE 403 allows judges to exclude evidence only when its probative value is “substantially outweighed” by the risk of one or more problematic phenomena, including “unfair prejudice.” FRE 403 (emphasis added). See also Joseph M. McLaughlin, Jack B. Weinstein, and Margaret A. Berger, 4 *Weinstein's Federal Evidence: Commentary on Rules of Evidence for the United States Courts* § 609.05[3][a] at 609-37 (Matthew Bender 2d ed 2014):

The contrast between a criminal defendant and other witnesses [ ] appears in the fact that Rule 403 protects witnesses other than a criminal defendant only against the danger of “unfair prejudice” from evidence of their prior convictions, while Rule 609 more broadly protects the defendant against any “prejudicial effect” of evidence of prior convictions.

(citation omitted). See also *United States v Orlando-Figueroa*, 229 F3d 33, 46 (1st Cir 2000) (noting that “Rule 609 . . . is primarily concerned with potential unfairness to a defendant when his prior convictions are offered”); Jack B. Weinstein, Margaret A. Berger, and Joseph M. McLaughlin, 3 *Weinstein's Evidence: Commentary on Rules of Evidence for the United States Courts and State Courts* ¶ 609[04] at 609-42 (Matthew Bender 1996), quoting FRE 609, Advisory Committee Notes to the 1990 Amendments:

The amended Rule 609(a)(1) was intended to resolve problems of fairness by treating criminal defendants differently from other witnesses. The Advisory Committee was aware of the “unique risk of prejudice” faced by criminal defendants who want to testify on their own behalf: that prior conviction evidence will be “misused by a jury as propensity evidence.”

See also *Federal Rules of Evidence*, S Rep No 93-1277, 93d Cong, 2d Sess 14 (1974), reprinted in 1974 USCCAN 7051, 7061 (“[T]he danger of unfair prejudice is far greater when the accused, as opposed to other witnesses, testifies, because the jury may be prejudiced not merely on the question of credibility but also on the ultimate question of guilt or innocence.”); Abraham P. Ordovery, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 Emory L J 135, 145–46 (1989) (“The purpose of the balancing test in Rule 609(a)(1) was to prod defendants to testify.”); *People v Allen*, 420 NW2d 499, 523 (Mich 1988) (explaining that with nondefendant defense witnesses and prosecution witnesses, “the only ‘prejudice’ arises out of the fact that the witness may not be believed, as the nondefendant witness’ general character will not be considered by the jury”).

<sup>26</sup> See FRE 105.

<sup>27</sup> 469 US 38 (1984).

could be impeached—even if that decision may have led them not to testify.<sup>28</sup>

Numerous states have adopted rules that exactly or closely mirror FRE 609.<sup>29</sup> Many have also adopted the limitations on appellate review of impeachment rulings that *Luce* established at the federal level; some, however, have rejected *Luce* and permit appeals of impeachment rulings even when the defendant exercised his or her right not to testify.<sup>30</sup>

The text of FRE 609 gives no guidance to courts with respect to how they should conduct the required balancing test when they assess whether felony convictions should be admitted as impeachment evidence; it gives no guidance, in other words, on how courts should decide whether “the probative value of the evidence outweighs its prejudicial effect to [the] defendant.”<sup>31</sup> However, the great majority of federal appellate courts, as well as many states, have developed versions of a multifactor test.<sup>32</sup> This test has its roots in case law that predated and shaped FRE 609. The next Section describes those roots.

#### B. The Case Law Roots of FRE 609

This Section describes the two key cases underlying FRE 609—*Luck v United States*<sup>33</sup> and *Gordon v United States*.<sup>34</sup> It focuses, in particular, on one of the ideas emphasized in both of those cases: that courts should be very alert to the risk that granting motions to impeach by prior conviction might deter defendant testimony and thus might deprive the fact finder of valuable information. These opinions describe this consideration as one of the most important of the factors—or *the* most important of the factors—to weigh. As Part I.C describes, post-FRE case law has preserved the importance of the defendant’s testimony as a relevant factor—but its interpretation has greatly reduced its usefulness to the defense and to the fact finder.

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<sup>28</sup> *Id.* at 43.

<sup>29</sup> For a helpful summary of state analogues to FRE 609, see Blume, 5 *J Empirical Legal Stud* at 499–505 (cited in note 1).

<sup>30</sup> See text accompanying note 290.

<sup>31</sup> FRE 609(a)(1)(B). The Advisory Committee Notes to FRE 609 also provide no guidance on this issue.

<sup>32</sup> See text accompanying notes 46–51.

<sup>33</sup> 348 F2d 763 (DC Cir 1965).

<sup>34</sup> 383 F2d 936 (DC Cir 1967).



1. *Luck v United States*.

*Luck*, a 1965 decision from the DC Circuit, served as the “prototype” for FRE 609(a)(1).<sup>35</sup> The case interpreted a provision of the DC Code, which appeared to permit the impeachment of any witness on the basis of a criminal conviction.<sup>36</sup> The court declared that, in fact, “sound judicial discretion” should operate to determine whether a defendant could be impeached by a prior conviction.<sup>37</sup> The court repeatedly invoked the risk of chilling a defendant’s testimony as a reason to refrain from granting a motion to impeach. There might well be, for example, “cases where the trial judge might think that the cause of truth would be helped more by letting the jury hear the defendant’s story than by the defendant’s foregoing that opportunity because of the fear of prejudice founded upon a prior conviction.”<sup>38</sup> The court stated that when a trial court exercises its discretion, a number of factors might be relevant, including, “*above all*, the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant’s story than to know of a prior conviction.”<sup>39</sup> The court went on to say that

[t]he goal of a criminal trial is the disposition of the charge in accordance with the truth. The possibility of a rehearsal of the defendant’s criminal record in a given case, especially

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<sup>35</sup> McLaughlin, Weinstein, and Berger, 4 *Weinstein’s Federal Evidence* at § 609App.101[1] at 609App.-21 (cited in note 25) (“In the last few years before the rules of evidence went into effect, a number of circuits were influenced by the line of cases implementing the 1965 District of Columbia decision in *Luck v. United States* which ultimately . . . emerged as the prototype for Rule 609(a)(1) and (b).”).

<sup>36</sup> DC Code § 14-305 (1961):

No person shall be incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime, but such fact may be given in evidence to affect his credit as a witness, either upon the cross-examination of the witness or by evidence aliunde [that is, extrinsic evidence]; and the party cross-examining him shall not be concluded by his answers as to such matters.

<sup>37</sup> *Luck*, 348 F2d at 768.

<sup>38</sup> *Id.* See also *id.* at 768 n 7, quoting Charles T. McCormick, *Handbook of the Law of Evidence* § 43 at 94 (West 1954) (“On balance it seems that to permit . . . one accused of crime to tell his story without incurring the overwhelming prejudice likely to ensue from disclosing past convictions, is a more just, humane and expedient solution.”).

<sup>39</sup> *Luck*, 348 F2d at 769 (emphasis added) (mentioning, in addition, “the nature of the prior crimes, the length of the criminal record, [and] the age and circumstances of the defendant”) (citation omitted).

if it means that the jury will be left without one version of the truth, may or may not contribute to that objective.<sup>40</sup>

## 2. *Gordon v United States*.

The DC Circuit further developed its analysis two years later in *Gordon*, another pre-FRE opinion. Then-Judge Warren Burger authored the opinion, and in it he announced the aim of clarifying the issue of prior conviction impeachment,<sup>41</sup> motivated in part by a dissenting opinion written the year before, in which a colleague of his had stated that “[t]he whole subject [of prior conviction impeachment] needs further study in the interest of the integrity of trials for crime.”<sup>42</sup> The *Gordon* court summarized certain points that were made in *Luck*, including that a defendant with a criminal record “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.”<sup>43</sup> Among the many factors that might be relevant to a trial court’s determination, “[o]ne important consideration is what the effect will be if the defendant does not testify out of fear of being prejudiced because of impeachment by prior convictions.”<sup>44</sup> Indeed, the need to avoid chilling defendant testimony could trump, even though the weighing of prejudice and probative value might seem to favor the prosecution:

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.<sup>45</sup>

Thus, *Gordon* echoed *Luck* in characterizing the silencing of a criminal defendant as a possible hindrance to the cause of truth. Both courts emphasized the risk that, by permitting prior conviction impeachment, a trial judge might chill important defendant testimony. Indeed, while both courts indicated that trial

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<sup>40</sup> *Id.*

<sup>41</sup> *Gordon*, 383 F2d at 938.

<sup>42</sup> *Stevens v United States*, 370 F2d 485, 486 (DC Cir 1966) (Fahy dissenting). For the role *Stevens* played in motivating the *Gordon* opinion, see *Gordon*, 383 F2d at 938.

<sup>43</sup> *Gordon*, 383 F2d at 939.

<sup>44</sup> *Id.* at 940.

<sup>45</sup> *Id.* at 940–41.

judges might consider a number of factors in making their decisions about prior conviction impeachment, they gave this factor an exalted status: *Luck* suggested that it was the most important factor of all, and *Gordon* indicated that, regardless of the results of the balancing test, it might persuade a court to preclude this form of impeachment.

### C. The Case Law Roots Become Twisted

This strand of case law was engrafted onto the FRE in 1976 by the Seventh Circuit in *United States v Mahone*.<sup>46</sup> That court was interpreting a provision of then-new FRE 609 that was, in all relevant respects, identical to the current FRE 609(a)(1)(B).<sup>47</sup> The court presented a slimmed-down, smoothed-out version of five factors mentioned in *Gordon*,<sup>48</sup> describing them as some of the considerations that trial courts should weigh:

- (1) The impeachment value of the prior crime.
- (2) The point in time of the conviction and the witness' subsequent history.
- (3) The similarity between the past crime and the charged crime.
- (4) The importance of the defendant's testimony.
- (5) The centrality of the credibility issue.<sup>49</sup>

*Mahone* contained no further discussion of these factors. Thus, while the factor termed "the importance of the defendant's testimony" originated in the discussions in *Luck* and *Gordon* of how vital it was to ensure that the threat of impeachment not chill defendant testimony, its decontextualized inclusion in *Mahone* left it vulnerable to interpretations that departed from its origins as a protection for the defendant. Similarly, while

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<sup>46</sup> 537 F2d 922 (7th Cir 1976).

<sup>47</sup> Compare FRE 609(a)(1)(B) (stating that evidence of crimes "punishable by death or by imprisonment for more than one year . . . must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect"), with *Mahone*, 537 F2d at 928 (excerpting an early version of FRE 609(a)(1)):

[With respect to] attacking a witness's character for truthfulness by evidence of a criminal conviction . . . for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence . . . must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant.

<sup>48</sup> *Gordon*, 383 F2d at 940–41.

<sup>49</sup> *Mahone*, 537 F2d at 929.

*Luck* and *Gordon* presented the factor as a consideration that could trump the result of balancing relevance and prejudice,<sup>50</sup> its inclusion in a list of considerations for a court conducting such a balancing threatened to remove its status as the most important consideration—one that stood apart from the balancing—and to make it instead just one more factor for a court to run through as it conducts the balancing.

As this Section explores, these threats have been realized. A multifactor test that includes “the importance of the defendant’s testimony” or something similar has proved a popular one for courts to run through as they conduct the FRE 609(a)(1)(B) balancing. All but two of the federal appellate courts have adopted it.<sup>51</sup> The “importance of the defendant’s testimony” no longer is a trump card but rather sits patiently in the deck as “the fourth factor.”<sup>52</sup> As courts run through the factors, they typically fail to acknowledge—much less honor—the roots of this factor as a protection for the defendant, and indeed as an opportunity for the defense to prevent this kind of impeachment, no matter the result of the balancing test. In many instances, the meaning of this factor has been inverted so that courts take the importance of the defendant’s testimony as a reason to permit, rather than prohibit, impeachment. As this Section shows, not only courts—federal and state—but also defense attorneys and commentators have distorted or neglected the root meaning of this factor. Part I.D explores the consequences.

### 1. Courts and a lost opportunity.

Numerous 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.<sup>53</sup> Nor is this just a case of trial courts using the considerable

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<sup>50</sup> See text accompanying notes 39, 44–45.

<sup>51</sup> The First, Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and DC Circuits use this factor or a close variant. See *United States v Brito*, 427 F3d 53, 64 (1st Cir 2005); *United States v Hawley*, 554 F2d 50, 53 (2d Cir 1977); *United States v Caldwell*, 760 F3d 267, 286 (3d Cir 2014); *United States v Acosta*, 763 F2d 671, 695 n 30 (5th Cir 1985); *United States v Moore*, 917 F2d 215, 234 (6th Cir 1990); *United States v Causey*, 9 F3d 1341, 1344 (7th Cir 1993); *United States v Browne*, 829 F2d 760, 762–63 (9th Cir 1987); *United States v Smalls*, 752 F3d 1227, 1240 (10th Cir 2014); *United States v Pritchard*, 973 F2d 905, 909 (11th Cir 1992); *United States v Jackson*, 627 F2d 1198, 1209 (DC Cir 1980). As discussed below, even judges and lawyers in the Fourth and Eighth Circuits sometimes use this factor. See text accompanying note 266.

<sup>52</sup> See, for example, *United States v Darr*, 2007 WL 2700064, \*1–2 (CD Ill).

<sup>53</sup> See Ordover, 38 Emory L J at 199–200 (cited in note 25):

discretion that they are given in making their impeachment decisions—discretion that has been likened to “a wild stallion in our usually well domesticated barnyard.”<sup>54</sup> Several federal *circuit* courts have inverted the original meaning of this factor—the Sixth,<sup>55</sup> Seventh,<sup>56</sup> and Ninth<sup>57</sup> Circuits—and district courts within other circuits—the Second,<sup>58</sup> Third,<sup>59</sup> Fifth,<sup>60</sup> and Tenth<sup>61</sup> Circuits—have done the same.<sup>62</sup>

In a less radical break from the factor's roots—but still a significant one, given the emphasis in early case law on the importance of this factor<sup>63</sup>—other federal opinions give it little or no weight. Even though these opinions may lay out the full list

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Where the defendant's testimony is crucial to the defense, one might expect that the courts would give serious attention to the Rule 609(a)(1) balancing test that places the burden on the prosecution and favors the defense. Yet, what seems to occur is that courts will acknowledge that the defendant's evidence is important; that credibility is the central issue; and, therefore, the prior conviction must be admitted to impeach the defendant's credibility. This is the opposite of the policy expressed by the line of authority that led to the adoption of Rule 609(a).

(citation omitted).

<sup>54</sup> *State v McClure*, 692 P2d 579, 589 (Or 1984), quoting Maurice Rosenberg, *The Discretion of the Trial Judge and Its Implications*, 4 Trial Judges' J 4, 4 (July 1965).

<sup>55</sup> See *United States v Frazier*, 314 Fed Appx 801, 805 (6th Cir 2008).

<sup>56</sup> See *United States v Nururdin*, 8 F3d 1187, 1192 (7th Cir 1993).

<sup>57</sup> See *Broune*, 829 F2d at 763–64; *United States v Alexander*, 48 F3d 1477, 1489 (9th Cir 1995); *United States v Avila-Castorena*, 1989 WL 90230, \*1 (9th Cir).

<sup>58</sup> See, for example, *United States v Bumagin*, 2015 WL 5725870, \*11 (EDNY).

<sup>59</sup> See, for example, *United States v Rosato*, 1999 WL 58577, \*3 (ED Pa) (finding the conviction inadmissible “despite the importance of the Defendant's testimony and the centrality of his credibility”).

<sup>60</sup> See, for example, *Crocker v Dretke*, 2003 WL 22410570, \*6 (ND Tex) (“Where . . . a defendant testifies professing his [innocence] and presents no alibi defense, the importance of the defendant's testimony and his credibility escalates as does the need for the State to be afforded the opportunity to impeach his credibility.”).

<sup>61</sup> See, for example, *United States v Willis*, 2014 WL 2589475, \*2 (ND Okla) (excluding a prior conviction, despite the significance of the defendant's testimony, because the multiplicity of witnesses against him indicated that there was “far less of a need for the government to undermine [the defendant's] testimony through impeachment”).

<sup>62</sup> The Fourth and Eighth Circuits have not adopted the *Mahone* test. For the Fourth Circuit's approach, see, for example, *United States v Ledingham*, 340 Fed Appx 150, 152 (4th Cir 2009) (treating the similarity between the prior conviction and the charged offense as the only relevant factor); *United States v Sanders*, 964 F2d 295, 297–98 (4th Cir 1992) (identifying only the remoteness in time, the similarity to the present offense, and the bearing “on the likelihood that defendant would testify truthfully” as the relevant factors). For the approach among district courts in the Eighth Circuit, see, for example, *United States v O'Neil*, 839 F Supp 2d 1030, 1035–36 (SD Iowa 2011) (considering only whether the prior conviction contained “any element of dishonesty,” the “similarity between this Defendant's prior conviction and the current charge against him,” and the lapse of time since the prior conviction).

<sup>63</sup> See Part I.B.

of factors, when it comes time to apply the factors they often omit any application of the “importance” factor.<sup>64</sup> In many opinions, interpretations of the fifth factor—the “centrality of the credibility issue”—contribute to the weakness of the importance factor. Opinions often treat these two factors as virtually synonymous,<sup>65</sup> merge their analyses under one heading,<sup>66</sup> or indicate that the two factors are a “wash”<sup>67</sup> and cancel each other out, since even if the importance of the defendant’s testimony were to militate against permitting impeachment, the centrality of the credibility issue would necessarily push in the other direction—in a way that makes them both a nullity.<sup>68</sup>

In the many states that use something like the “importance of the defendant’s testimony” factor in interpreting their versions of FRE 609, opinions display similar inversions and abandonments of that factor’s root meaning. The highest courts of at least twenty states apply a version of this factor,<sup>69</sup> and one sees within those twenty states the same tendencies as in the federal

<sup>64</sup> See, for example, *United States v Harper*, 2010 WL 1507869, \*5 (ED Wis); *United States v Pettiford*, 238 FRD 33, 41–43 (DDC 2006); *United States v Grove*, 844 F Supp 1495, 1497–98 (D Utah 1994); *United States v Bean*, 1991 WL 26471, \*2 (9th Cir).

<sup>65</sup> See, for example, *United States v Stolica*, 2010 WL 538233, \*2 (SD Ill); *THK America, Inc v NSK, Ltd*, 917 F Supp 563, 570–71 (ND Ill 1996).

<sup>66</sup> See, for example, *United States v Sallins*, 1993 WL 427358, \*4 (ED Pa) (treating these factors under one heading); *United States v Ketner*, 1987 WL 36629, \*4 (6th Cir) (treating these factors together in the same paragraph).

<sup>67</sup> *Jackson v State*, 668 A2d 8, 20 (Md 1995) (Bell dissenting) (“I am prepared to consider factors (4) and (5) as being a wash, they counterbalance and negate each other.”).

<sup>68</sup> See, for example, *United States v Jackson*, 1995 WL 337067, \*2 (ND Ill) (“[T]he importance of Stephens’ testimony makes the issue of his credibility equally critical and supports the admission of potentially impeaching evidence.”).

<sup>69</sup> These states include Arizona, Arkansas, Georgia, Indiana, Iowa, Maryland, Michigan, Minnesota, Mississippi, New Hampshire, New Mexico, North Dakota, Oklahoma, Oregon, South Carolina, Texas, Utah, Vermont, and Washington. See, for example, *State v Green*, 29 P3d 271, 274 (Ariz 2001); *Hubbard v State*, 946 SW2d 663, 667 (Ark 1997); *Clay v State*, 725 SE2d 260, 272 (Ga 2012); *Scalissi v State*, 759 NE2d 618, 625 (Ind 2001); *State v Redmond*, 803 NW2d 112, 123–24 (Iowa 2011); *Cure v State*, 26 A3d 899, 914, 917 (Md 2011); *People v Finley*, 431 NW2d 19, 22 (Mich 1988); *State v Swanson*, 707 NW2d 645, 654 (Minn 2006); *Johnson v State*, 666 S2d 499, 503 (Miss 1995); *State v Hickey*, 523 A2d 60, 64 (NH 1986); *State v Mora*, 950 P2d 789, 803 (NM 1997), recognized as overruled on other grounds, *Kersey v Hatch*, 237 P3d 683, 689 (NM 2010); *State v Stewart*, 646 NW2d 712, 716 (ND 2002); *Hardiman v State*, 798 P2d 222, 224 (Okla Crim App 1990); *McClure*, 692 P2d at 585, 588–89; *State v Colf*, 525 SE2d 246, 248 (SC 2000); *Theus v State*, 845 SW2d 874, 880 (Tex Crim App 1992); *State v Banner*, 717 P2d 1325, 1334 (Utah 1986); *State v Brewer*, 12 A3d 554, 556–57 (Vt 2010); *State v Pam*, 659 P2d 454, 459 (Wash 1983), overruled on other grounds, *State v Brown*, 782 P2d 1013, 1025 (Wash 1989). While the factors are “not necessarily mandated” in South Dakota, they appear in that state’s case law. *State v King*, 346 NW2d 750, 751–52 (SD 1984).

system to invert the meaning of the factor,<sup>70</sup> ignore it in application,<sup>71</sup> merge it with the fifth factor (the “centrality of the credibility issue”),<sup>72</sup> or declare that it and the fifth factor cancel each other out.<sup>73</sup> The Tennessee Supreme Court, while acknowledging that examination of the factors “may be useful to trial judges in some cases,” has declined to adopt them.<sup>74</sup> The court based its decision, at least in part, on its rejection of the “importance of the defendant’s testimony” factor, of which it said the following:

[W]e are somewhat at a loss to know what factors of a murder case render the defendant’s testimony more important than in others and how to equate that situation with the exercise of the Fifth Amendment [right to testify]. In short, we reject the use of that factor as having any significance whatsoever in balancing probative value with prejudicial effect.<sup>75</sup>

As suggested by this quotation, some states have lost sight of the origins of the factor as a potential trump card: a consideration that could militate against permitting impeachment *even if* the probative value of the conviction might outweigh its prejudicial value.<sup>76</sup> The Supreme Court of Michigan, even while citing *Luck* and *Gordon*,<sup>77</sup> declared that one must line up the factors, as if in an “equation,” on either the probative value side or the prejudicial effect side, and that the “importance of the defendant’s testimony” factor belongs on the prejudicial effect side: “For purposes of the prejudice factor, only the similarity to the

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<sup>70</sup> See, for example, *Gonzalez v State*, 134 S3d 350, 354–55 (Miss App 2013); *Fulp v State*, 745 A2d 438, 444 (Md Spec App 2000); *Dowdy v State*, 672 NE2d 948, 952 (Ind App 1996).

<sup>71</sup> See, for example, *Smith v State*, 771 SE2d 8, 11–12 (Ga App 2015); *State v Cooper*, 687 SE2d 62, 69 (SC App 2009); *Stewart*, 646 NW2d at 716–17; *Sims v State*, 766 SW2d 20, 21–22 (Ark App 1989).

<sup>72</sup> See, for example, *Cure*, 26 A3d at 917; *Brewer*, 12 A3d at 556; *Swanson*, 707 NW2d at 655–56.

<sup>73</sup> See *McClure*, 692 P2d at 591; *Jackson*, 668 A2d at 16. The Michigan Supreme Court, concluding that the importance factor and the credibility factor contradicted each other, has resolved the issue by excising the credibility factor. *Allen*, 420 NW2d at 520 (“It is our view that it is the effect on the decisional process if the defendant does not testify which must predominate and so the contradicting ‘credibility contest’ factor must therefore be eliminated.”).

<sup>74</sup> *State v Sheffield*, 676 SW2d 542, 548 (Tenn 1984).

<sup>75</sup> *Id* at 549.

<sup>76</sup> See Part I.B.

<sup>77</sup> See *Allen*, 420 NW2d at 510–12.

charged offense and the importance of the defendant's testimony to the decisional process would be considered."<sup>78</sup>

## 2. Defense briefs and a lost opportunity.

When courts fail to give appropriate weight and meaning to the "importance of the defendant's testimony" factor, it is not typically because they are rejecting or overlooking powerful arguments from defense counsel. Defense attorneys are implicated in the lost opportunity represented by this factor because they often participate in the same distortion and weakening of the factor that court opinions display. Thus, within numerous circuits—the Third,<sup>79</sup> Fifth,<sup>80</sup> Sixth,<sup>81</sup> Seventh,<sup>82</sup> and Ninth<sup>83</sup> Circuits—defense attorneys have filed briefs in which the root meaning of the "importance of the defendant's testimony" factor is inverted. In other words, defense attorneys buy into the notion that the more important the defendant's testimony, the more important it is that it be impeached. As a result, they are left in the bizarre posture of arguing that their clients' testimony is "not that particularly important."<sup>84</sup> These briefs seem to ignore or forget that the "importance of the defendant's testimony" factor is rooted in their clients' constitutional right to testify.<sup>85</sup>

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<sup>78</sup> Id at 522 ("For purposes of the probativeness side of the equation, only an objective analysis of the degree to which the crime is indicative of veracity and the vintage of the conviction would be considered, not either party's need for the evidence.") (citations omitted). See also Mich Rule Evid 609(b) (requiring courts to consider "only the age of the conviction and the degree to which a conviction . . . is indicative of veracity" in determining probative value, and "only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify" in determining prejudicial effect).

<sup>79</sup> See, for example, Brief for Appellant, *United States v Hundley*, Docket No 94-3196, \*12 (3d Cir filed July 11, 1994) (available on Westlaw at 1994 WL 16168058).

<sup>80</sup> See, for example, Brief of Defendant-Appellant, *United States v Compean*, Docket No 01-50099, \*15-16 (5th Cir filed May 25, 2001) (available on Westlaw at 2001 WL 34155141).

<sup>81</sup> See, for example, Final Brief of Defendant/Appellant Thomas Jeffress, *United States v Jeffress*, Docket No 06-6510, \*27-28 (6th Cir filed Mar 10, 2008) (available on Westlaw at 2008 WL 4574176).

<sup>82</sup> See, for example, *United States v Thomas*, 79 Fed Appx 908, 914 (7th Cir 2003) (citing the defendant's arguments).

<sup>83</sup> See, for example, Appellant's Opening Brief, *United States v Martinez-Aguilar*, Docket No 99-50253, \*11-12 (9th Cir filed Feb 2, 2000) (available on Westlaw at 2000 WL 34001874).

<sup>84</sup> Id at \*11. See also *Thomas*, 79 Fed Appx at 914 (citing the defendant's argument that "his testimony was unimportant").

<sup>85</sup> See, for example, *Jackson*, 668 A2d at 16 ("Factors four and five are restatements of the considerations that underlie the Rule: balancing the defendant's right to testify against the State's right to impeach the witness on cross-examination.").



They seem to ignore or forget the monumental nature of the decision to testify, in the face of risks that include eviscerating cross-examination,<sup>86</sup> skeptical fact finders,<sup>87</sup> possible perjury charges,<sup>88</sup> and steep sentencing enhancements.<sup>89</sup> These are risks that few take,<sup>90</sup> and they are generally not taken without good reason.<sup>91</sup> Never mind any of that, these briefs seem to say: the proffered testimony is not so important that anyone should bother to impeach it.

The prosecution, too, frequently adopts this inverted meaning, which leaves it arguing that impeachment needs to be permitted because the defendant's proffered testimony is "absolutely crucial,"<sup>92</sup> "critical,"<sup>93</sup> or the "keystone of his case."<sup>94</sup> Ninth Circuit prosecutors have taken this position, although they appear to work from a template that contains a Freudian error, since they argue that "[t]he importance of [the defendant's] testimony cannot

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<sup>86</sup> See *United States v Libby*, 475 F Supp 2d 73, 93 (DDC 2007) ("[A] defendant's choice to testify inevitably presents the possibility of a devastating cross-examination, while declining to testify may mean that the accused gives up the chance to put the most probative evidence in his favor before the jury.").

<sup>87</sup> See Anna Roberts, *Impeachment by Unreliable Conviction*, 55 BC L Rev 563, 576–77 (2014).

<sup>88</sup> See Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 NYU L Rev 1449, 1460 (2005) ("Even truthful defendants risk perjury charges and sentencing enhancements by contradicting the government's evidence.").

<sup>89</sup> For examples of courts upholding sentencing enhancements for perjury, see *United States v Dunnigan*, 507 US 87, 96–98 (1993); *United States v Grayson*, 438 US 41, 54–55 (1978).

<sup>90</sup> See Surratt, 31 Syracuse L Rev at 912 (cited in note 8) ("Because of the widespread belief that jurors are incapable of complying with the limiting instruction, it is well known that defense attorneys frequently advise their clients who have criminal records not to take the stand.") (quotation marks omitted).

<sup>91</sup> See, for example, Charles E. Feldmann, *Should a Criminal Defendant Testify?* (Feldmann Nagel, LLC, Sept 11, 2014), archived at <http://perma.cc/A7GT-34FE> ("In my experience, there would have to be a very good reason, above and beyond my client's innocence, for [testifying] to be a good idea."); Frederick Leatherman, *Will the Defendant Testify or Not Testify?* (Frederick Leatherman Law Blog, July 6, 2013), archived at <http://perma.cc/L9C9-89BT> ("I advised my clients not to testify, unless there was some specific reason why I believed they had to testify.").

<sup>92</sup> Brief for Appellee United States, *United States v Dunn*, Docket No 99-50641, \*18 (9th Cir filed Feb 22, 2000) (available on Westlaw at 2000 WL 34001422). See also Brief for the United States, *United States v Taylor*, Docket No 98-4141, \*46 (11th Cir filed Mar 4, 1999) (available on Westlaw at 1999 WL 33643277) (arguing that the defendant's testimony was important to his nullification defense and that it therefore justified impeachment).

<sup>93</sup> Brief for the United States, *United States v Colon*, Docket No 10-15099, \*50 (11th Cir filed May 17, 2011) (available on Westlaw at 2011 WL 2118492) (arguing that one defendant's testimony was "critical to establishing his lack of intent").

<sup>94</sup> Brief for Appellee, *United States v Agtuca*, Docket No 94-30257, \*33 (9th Cir filed Mar 29, 1995) (available on Westlaw at 1995 WL 17116196).

be understated [sic].”<sup>95</sup> As part of its arsenal, the prosecution is using a factor originally designed to assist the defense;<sup>96</sup> the fact that in doing so it relies on a template—and a typographically erroneous one at that—suggests that it may be encountering little resistance from the other side.

Even when defense attorneys refrain from inverting the root meaning of this factor, they often fail to give it proper weight and meaning. Defense briefs frequently ignore the factor<sup>97</sup> or merge it with the credibility factor.<sup>98</sup>

One recent case illustrates the extent to which defense attorneys have given up on the usefulness of the “importance of the defendant’s testimony” factor. A defense brief in the Seventh Circuit—the home of *Mahone*—argued that both the fourth and fifth factors should be excised,<sup>99</sup> since their effect is to “ensure prior convictions will be admitted.”<sup>100</sup>

### 3. Commentators and a lost opportunity.

Numerous commentators have also given up on the usefulness of this factor to both the defense and the fact finder. One of the leading contemporary scholars of prior conviction impeachment—Professor Jeffrey Bellin—cites a number of commentators

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<sup>95</sup> Brief for Appellee United States, *United States v Torres*, Docket No 03-50589, \*18 (9th Cir filed Apr 2, 2004) (available on Westlaw at 2004 WL 1125611) (“The importance of Torres’ testimony cannot be understated. He was the only witness to testify at trial who could tell the jury whether or not he knew there was an alien concealed in the vehicle.”). See also Brief for Appellee United States, *United States v Aguila-Montes de Oca*, Docket No 05-50170, \*29 (9th Cir filed Sept 27, 2005) (available on Westlaw at 2005 WL 3577835) (“The importance of Aguila’s testimony cannot be understated: it was crucial given his denial of intent to commit the crime. He was the only witness to testify at trial who could tell the jury whether or not he intended to enter the United States.”).

<sup>96</sup> See Part I.B.

<sup>97</sup> See, for example, Brief of Appellant, *United States v Mayes*, Docket No 01-60095, \*14–15 (5th Cir filed May 30, 2001) (available on Westlaw at 2001 WL 34154604).

<sup>98</sup> See, for example, Opening Brief of Defendant-Appellant, *United States v Parks*, Docket No 90-50189, \*33 (9th Cir filed Oct 24, 1990) (available on Westlaw at 1990 WL 10534042) (“[T]he defendant’s credibility (factors 4 and 5) was not the central issue in the case.”); Defendant’s Brief, *United States v Perkins*, Docket No 88-5237, \*33 (9th Cir filed June 29, 1990) (available on Westlaw at 1990 WL 10084595) (stating that the court must “determine the importance of the defendant’s testimony in the light of the centrality of the credibility issues”).

<sup>99</sup> Brief and Required Short Appendix of Appellant Lamar Tucker, *United States v Tucker*, Docket No 13-1403, \*29–30 (7th Cir filed July 10, 2013) (available on Westlaw at 2013 WL 3803045).

<sup>100</sup> *Id* at \*29.

who have been skeptical about the factor's operability,<sup>101</sup> but he then goes further, declaring that the factor, "as originally intended, is rendered meaningless in the wake of *Luce*."<sup>102</sup> To remedy this, he considers merely "lopping off the fourth and fifth *Mahone* factors,"<sup>103</sup> but he concludes that despite the fact that there are "undoubtedly serious substantive flaws in the fourth and fifth *Mahone* factors, the excision of these factors would leave more subtle underlying flaws untouched."<sup>104</sup> He therefore advocates getting rid of the *Mahone* factors altogether, in favor of a new analysis that is "miles from the current state of the federal case law"<sup>105</sup> and that does not inquire into the importance vel non of the defendant's testimony.<sup>106</sup>

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<sup>101</sup> Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 UC Davis L Rev 289, 318–19 (2008), citing Ordover, 38 Emory L J at 199 (cited in note 25), and Surratt, 31 Syracuse L Rev at 942–45 (cited in note 8):

Soon after *Mahone* was decided . . . [c]ommentators noted that *Mahone*'s fourth and fifth factors, "the importance of the defendant's testimony" and "the centrality of the credibility issue," not only lacked explicit legislative authorization, but also could not be applied in a "principled" manner. In essence, the factors cancel each other out. To the extent a defendant's testimony is "important" (for example, if the defendant is the key defense witness), his credibility becomes "central" in equal degree, leading to a curious equipoise. . . . Thus, the fourth and fifth *Mahone* factors seemed to have no practical significance at all, existing in a rough state of equipoise that prevented either factor from impacting the overall impeachment calculus.

(citations omitted).

<sup>102</sup> Bellin, 42 UC Davis L Rev at 323 (cited in note 101). Bellin bases this claim on the fact that if a trial court delays its decision on prior conviction impeachment until the defendant has already testified, the trial court will not need to consider the risk that the defendant's testimony will be chilled. *Id.* In addition, what Bellin calls the "retooled" post-*Luce* version of the factor is, in his view, "essentially meaningless as an analytical consideration," since it involves defendant testimony routinely being found important and therefore routinely weighing in favor of permitting prior conviction impeachment. *Id.* at 328. For a response to Bellin's points, see Part IV.A.

<sup>103</sup> Bellin, 42 UC Davis L Rev at 336 (cited in note 101).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 339.

<sup>106</sup> *Id.* at 336–39:

Starting on a clean slate unencumbered by the *Mahone* factors, a trial court, evaluating the admissibility of a defendant's prior convictions as impeachment, could focus on the task at hand: identifying the aspects of each conviction and the facts of the particular case that could potentially justify the counterintuitive conclusion that a prior conviction's "probative value" as impeachment outweighs its "prejudicial effect to the accused."

Professor Victor J. Gold has also given up on the usefulness of the "importance of the defendant's testimony" factor, declaring that consideration of "the need for an accused's testimony should the threat of conviction impeachment deter him from taking the stand"

The relationship between the “importance of the defendant’s testimony” factor and the “centrality of the credibility issue” factor has been of particular concern to commentators. Professor Roderick Surratt has stated that “[w]hen one [of these two factors] increases in importance, the other does also, and there appears to be no principled way to determine which factor should prevail.”<sup>107</sup> In addition, he argues that both factors can make hearings at which the judge decides whether impeachment will be permitted “substantially more complex,” since they require the conscientious judge to learn “something about the substance of the expected testimony.”<sup>108</sup> This places a burden on the court, since “the hearing is more complex and more time-consuming than it otherwise would be,” and on the defendant, who may have to give a detailed “preview” of his or her anticipated trial testimony.<sup>109</sup> Surratt therefore urges the abandonment of both the fourth and fifth factors.<sup>110</sup> More recently, Professor Ted Sampsell-Jones has declared that “[a]t best, the fourth and fifth factors are mostly meaningless. At worst, they confuse courts and distract from the real issues that should be considered.”<sup>111</sup>

4. Lost opportunity even when the factor’s root meaning is preserved.

To be sure, some federal circuit courts,<sup>112</sup> federal district courts,<sup>113</sup> state courts,<sup>114</sup> defense briefs,<sup>115</sup> prosecutors,<sup>116</sup> and

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should “no longer be of consequence.” Charles Alan Wright and Victor J. Gold, 28 *Federal Practice and Procedure* § 6134 at 255 n 77 (Thomson Reuters 2012).

<sup>107</sup> Surratt, 31 Syracuse L Rev at 945 (cited in note 8).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 946.

<sup>110</sup> *Id.* at 942.

<sup>111</sup> Ted Sampsell-Jones, *Making Defendants Speak*, 93 Minn L Rev 1327, 1362 (2009). See also *id.* at 1367–69 (proposing that the five-factor test be replaced with a “two-sided balancing test” involving the balancing of probative value against prejudice).

<sup>112</sup> See, for example, *Caldwell*, 760 F3d at 287–88, quoting McLaughlin, Weinstein, and Berger, 4 *Weinstein’s Federal Evidence* at § 609.05[3][e] at 609-43 to -44 (cited in note 25) (“[T]he fact that a defendant’s testimony is important to demonstrate the validity of his or her defense constitutes a factor weighing against the admission of a prior conviction.”); *Casey*, 9 F3d at 1344 (finding that the fact that the defendant “did not obviously need to testify” weighed in favor of the admission of prior conviction); *Jackson*, 627 F2d at 1209–10 (finding that the importance of the defendant’s testimony “weigh[ed] against admissibility” of a prior conviction).

<sup>113</sup> See text accompanying notes 118–24.

<sup>114</sup> See text accompanying notes 125–30.

<sup>115</sup> See, for example, Reply Brief for Appellant, *United States v Brinkley*, Docket No 96-1911, \*6 (3d Cir filed Mar 11, 1997) (available on Westlaw at 1996 WL 33581528), quoting *Gordon*, 383 F2d at 939 (“[T]he cause of truth would be helped more by letting

commentators<sup>117</sup> do adhere to the root meaning of the “importance of the defendant’s testimony” factor; in other words, they treat the importance of the testimony as a reason to exclude the prior convictions. At least some courts within the Second,<sup>118</sup> Third,<sup>119</sup> Seventh,<sup>120</sup> Ninth,<sup>121</sup> Tenth,<sup>122</sup> Eleventh,<sup>123</sup> and DC Circuits<sup>124</sup> hew to the original sense of this factor. The Oregon Supreme Court has noted that “[i]f the testimony of the accused is crucial to a fair determination of the issues . . . then this [importance of the defendant’s testimony] factor tends to favor exclusion.”<sup>125</sup> Michigan,<sup>126</sup> Minnesota,<sup>127</sup> Mississippi,<sup>128</sup> Utah,<sup>129</sup> and Vermont<sup>130</sup> have taken the same approach. And the judge who literally wrote the book

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the jury hear the defendant’s story than by the defendant’s foregoing that opportunity because of the fear of prejudice.” (quotation marks omitted).

<sup>116</sup> See, for example, Brief of Appellee, *United States v Sindram*, Docket No 97-4039, \*29 (4th Cir filed June 17, 1997) (available on Westlaw at 1997 WL 33492764) (“*Sindram* Government Brief”) (“[A]lthough the defendant’s testimony was important to advance the defendant’s claim, the defendant’s testimony also put the issue of his credibility dead center in the case.”).

<sup>117</sup> See text accompanying note 131.

<sup>118</sup> See, for example, *United States v Brown*, 606 F Supp 2d 306, 320 (EDNY 2009).

<sup>119</sup> See, for example, *United States v Holmes*, 2008 WL 5378276, \*2 (WD Pa), citing McLaughlin, Weinstein, and Berger, 4 *Weinstein’s Federal Evidence* at § 609.05[3][e] at 609-43 to -44 (cited in note 25) (“As the Defendant’s testimony may be the most crucial testimony at trial (should he choose to testify) and possibly the only testimony on behalf of his defense, this factor weighs against admission of the prior convictions.”).

<sup>120</sup> See, for example, *Darr*, 2007 WL 2700064 at \*2; *United States v Piker*, 2006 WL 2524130, \*2 (CD Ill); *United States v Smith*, 181 F Supp 2d 904, 910 (ND Ill 2002).

<sup>121</sup> See, for example, *United States v Chant*, 1997 WL 231105, \*9 (ND Cal).

<sup>122</sup> See, for example, *United States v Reece*, 797 F Supp 843, 848 (D Colo 1992).

<sup>123</sup> See, for example, Brief of Appellant Robert James Collier, *United States v Collier*, Docket No 99-00063, \*9–10 (11th Cir filed July 24, 2000) (available on Westlaw at 2000 WL 34221042).

<sup>124</sup> See, for example, *United States v Coleman*, 1991 WL 277334, \*1 (DDC).

<sup>125</sup> *McClure*, 692 P2d at 585.

<sup>126</sup> See, for example, *People v Snyder*, 835 NW2d 608, 611 (Mich App 2013), quoting *Allen*, 420 NW2d at 522 (“Moreover, the Supreme Court has explained that prejudice . . . escalate[s] with . . . increased importance of the [defendant’s] testimony to the decisional process.”) (quotation marks omitted); *Snyder*, 835 NW2d at 613, quoting *Allen*, 420 NW2d at 524 (“[W]ith regard to the importance of the defendant’s testimony to the decisional process, the *Allen* Court concluded that prejudice increased where, as here, the defendant’s testimony was very important to the decisional process, as he had no other means of presenting his version of events.”) (quotation marks omitted).

<sup>127</sup> See, for example, *State v Gassler*, 505 NW2d 62, 67 (Minn 1993).

<sup>128</sup> See, for example, *Bogard v State*, 624 S2d 1313, 1317 (Miss 1993); *Jordan v State*, 592 S2d 522, 523 (Miss 1991).

<sup>129</sup> See, for example, *Banner*, 717 P2d at 1334–35; *State v Martinez*, 2001 WL 311191, \*2 (Utah App) (“Finally, the credibility of the witness warranted exclusion as defendant’s testimony was of primary import in this case and no decisive nontestimonial evidence was presented.”).

<sup>130</sup> See, for example, *State v Gardner*, 433 A2d 249, 252 (Vt 1981).

on evidence—Judge Jack Weinstein—describes this factor as one that, if satisfied, militates in favor of exclusion of the proffered conviction:

A defendant's decision about whether to testify may be based in part on whether prior convictions will be admitted for impeachment. Thus, the fact that a defendant's testimony is important to demonstrate the validity of his or her defense constitutes a factor weighing against the admission of a prior conviction. If, on the other hand, the defense can establish the subject matter of the defendant's testimony by other means, the defendant's testimony is less necessary, so a prior conviction is more likely to be admitted.<sup>131</sup>

Even when these participants in the interpretive process adopt the understanding that when the defendant's testimony is important, care should be taken lest it be kept from the fact finder, none of them has yet proclaimed the potential usefulness of this factor that this Article brings to light. None of them has suggested the use of this factor to discuss the importance of the defendant's testimony as a way to combat implicit stereotyping,<sup>132</sup> a topic that is introduced in Part II.

#### D. The Consequences for Defendant Testimony and Trial

Thanks to the distortions mentioned above, as well as other doctrinal trends discussed below, the ease with which proffered convictions are admitted for impeachment creates consequences that are harmful for both defendants and fact finders.

Admission of prior convictions for impeachment has become the default.<sup>133</sup> Prosecutors frequently proffer them,<sup>134</sup> and judges

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<sup>131</sup> McLaughlin, Weinstein, and Berger, 4 *Weinstein's Federal Evidence* at § 609.05[3][e] at 609-43 to -44 (cited in note 25) (citations omitted).

<sup>132</sup> A review of all state and federal briefs available on Westlaw as of November 20, 2015, revealed that there were no examples of attorneys arguing that the possible dilution of implicit stereotypes or other implicit biases could constitute part of what makes defendant testimony important.

<sup>133</sup> See Blume, 5 *J Empirical Legal Stud* at 484 (cited in note 1) (“[When] judges are supposed to permit impeachment only if the probative value outweighs the risk of unfairness to the accused, the balance is routinely struck in favor of impeachment.”); *id.* at 490–91:

In every single case in which a defendant with a prior record testified, the trial court permitted the prosecution to impeach the defendant with his or her prior convictions. Although some of the prior convictions involved “false statement” crimes that were automatically admissible impeachment material, in most cases, the trial court made the determination that the probative value of the evidence

generally permit them.<sup>135</sup> The dispute is typically less about whether prior convictions will be admitted and more about how many of their details will be admitted.<sup>136</sup>

The distortions mentioned above, which prevent the “importance of the defendant’s testimony” factor from providing a meaningful check on impeachment by prior conviction, are mirrored by other ways in which doctrine has shifted toward the admissibility of these convictions. With respect to the third factor—the “similarity between the past crime and the charged crime”<sup>137</sup>—the case law from which the *Mahone* test developed viewed similarity as something that militated *against* admissibility,<sup>138</sup> because it increased the risk that the conviction would be interpreted as relevant to a defendant’s propensity to commit that crime, rather than to a defendant’s credibility.<sup>139</sup> Some courts, however, have interpreted similarity as a reason to *favor* admissibility.<sup>140</sup> Similarly, with respect to the fifth factor—the

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was not outweighed by prejudice to the accused; this was true even when the defendant’s prior conviction was for the same or a very similar offense.

(citations omitted). See also Kenneth S. Broun, ed, 1 *McCormick on Evidence* § 42 at 276 (Thomson Reuters 7th ed 2013) (“Most prosecutors argue forcefully that it is misleading to permit the accused to implicitly portray himself as having led a blameless life, and this argument has prevailed widely.”); *Pettiford*, 238 FRD at 42 (referring to “the general trend towards admissibility under Rule 609(a)”).

<sup>134</sup> See Blume, 5 J Empirical Legal Stud at 486 (cited in note 1).

<sup>135</sup> See *id* at 484.

<sup>136</sup> FRE 609 itself does not prescribe the type or amount of evidence to be admitted. FRE 609(a) (referring only to “evidence of a criminal conviction”). Typically, federal courts permit the name of the crime, the date of the crime, and the sentence imposed. See, for example, *United States v Smith*, 454 F3d 707, 716 (7th Cir 2006) (stating that a proponent is limited to “identify[ing] the particular felony charged, the date, and the disposition of a prior conviction”).

<sup>137</sup> *Mahone*, 537 F2d at 929.

<sup>138</sup> See Ed Gainor, Note, *Character Evidence by Any Other Name . . . : A Proposal to Limit Impeachment by Prior Conviction under Rule 609*, 58 Geo Wash L Rev 762, 772 (1990); McLaughlin, Weinstein, and Berger, 4 *Weinstein’s Federal Evidence* at § 609.05[3][d] at 609-42 (cited in note 25) (“When a prior crime committed by an accused criminal defendant is similar to the one with which the defendant is charged, the prejudicial effect of a prior conviction admitted for impeachment may well outweigh its probative value. Consequently, prior convictions for the same or similar crimes are admitted sparingly.”).

<sup>139</sup> See Sampsell-Jones, 2010 Utah L Rev at 734 (cited in note 24) (noting that one of the primary modern rationales for character evidence rules is “based on a concern that juries will find the defendant guilty of the discrete charged act, but that they will do so relying too heavily on the inference that because he did something bad in the past, he probably did this as well”).

<sup>140</sup> See, for example, *United States v Wallace*, 848 F2d 1464, 1473 (9th Cir 1988) (finding that the district court’s analysis, which, *inter alia*, treated similarity as a factor

“centrality of the credibility issue”<sup>141</sup>—some courts have transformed it into a factor that automatically favors the prosecution, by concluding that credibility is a central issue in every case in which a defendant testifies.<sup>142</sup>

The widespread admission of proffered convictions, paired with the apparent ineffectiveness of limiting instructions,<sup>143</sup> means that many defendants—even those with stories of innocence to tell—remain silent rather than risk being impeached by criminal convictions that might otherwise be kept private.<sup>144</sup> This silence may take the form either of a plea bargain in lieu of a trial that appears hopeless, or of a trial in which the defendant does not exercise his or her right to testify.<sup>145</sup> This problem affects a great many cases, because a large proportion of defendants have prior felony convictions.<sup>146</sup>

The silence of criminal defendants has a number of harmful consequences.<sup>147</sup> Governmental conduct and evidence may go unchecked.<sup>148</sup> Fact finders may assume guilt based on their desire

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favoring impeachment, was an abuse of discretion). See also Gainor, Note, 58 Geo Wash L Rev at 780–81 & n 112 (cited in note 138).

<sup>141</sup> *Mahone*, 537 F2d at 929.

<sup>142</sup> See Gainor, Note, 58 Geo Wash L Rev at 782–83 & nn 124–25 (cited in note 138). See also, for example, *United States v Sanders*, 2006 WL 3531462, \*2 (ED Pa) (stating that if the defendant “testifies at trial, his testimony—like that of all defendants who make this decidedly serious and fundamental voluntary choice—will be important, and his credibility instantly will become a central issue at trial”); *United States v Graves*, 2006 WL 1997378, \*3 (ED Pa) (“When a defendant testifies, he places his credibility directly at issue.”) (quotation marks omitted); *Jackson*, 668 A2d at 20 n 5 (Bell dissenting) (“[F]actor (5) almost always will favor the admissibility of the prior convictions.”).

<sup>143</sup> See Blume, 5 J Empirical Legal Stud at 488 & n 44 (cited in note 1).

<sup>144</sup> One recent study of more than three hundred trials in four large counties revealed statistically significant associations between “the defendant’s testifying at trial and the jury’s learning about the defendant’s prior record.” Theodore Eisenberg and Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 Cornell L Rev 1353, 1357, 1367–69 (2009).

<sup>145</sup> See Natapoff, 80 NYU L Rev at 1450 (cited in note 88).

<sup>146</sup> See Thomas H. Cohen and Tracey Kyckelhahn, *Felony Defendants in Large Urban Counties, 2006* \*1–2 (DOJ, July 15, 2010), archived at <http://perma.cc/E9HK-JCS4> (finding that of state felony defendants in the seventy-five largest counties in the country, 43 percent had a felony-conviction record in 2006).

<sup>147</sup> For a more thorough analysis of the prevalence of defendant silence, see generally Natapoff, 80 NYU L Rev 1449 (cited in note 88); Sampsell-Jones, 93 Minn L Rev 1327 (cited in note 111); Jeffrey Bellin, *Improving the Reliability of Criminal Trials through Legal Rules That Encourage Defendants to Testify*, 76 U Cin L Rev 851 (2008).

<sup>148</sup> See Natapoff, 80 NYU L Rev at 1499 (cited in note 88) (noting that if defendants could speak freely, “[t]he system would [] obtain more information about law enforcement and how police behave”); Darryl K. Brown, *American Prosecutors’ Powers and Obligations in the Era of Plea Bargaining*, in Erik Luna and Marianne L. Wade, eds, *The Prosecutor in Transnational Perspective* 200, 204 (Oxford 2012) (“[W]hen pleas replace



to hear both sides<sup>149</sup> and their suspicion—despite instructions to the contrary<sup>150</sup>—that silence implies guilt.<sup>151</sup> As one court has put it, this silence places a “burden [ ] upon truth-finding”:<sup>152</sup> it deprives the fact finders of information whose importance has been repeatedly emphasized by the Supreme Court<sup>153</sup> and by lower court judges.<sup>154</sup> The lost testimony may constitute a narrative of innocence, as demonstrated by Professor John Blume’s recent study of exonerees who sat silently through the trials at which they were wrongfully convicted<sup>155</sup>—the most common reason that their attorneys gave for their clients’ silence was their fear of

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trials, most of the systemic components of public adjudication that serve the objectives of factual reliability and accurate normative judgment are missing—the jury, evidentiary disclosure, rules of evidence, formal adversarial challenges to state evidence, and so on.”)

<sup>149</sup> See Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 NC L Rev 501, 518 n 102 (1986), citing David Kairys, Jay Schulman, and Sid Harring, eds, *The Jury System: New Methods for Reducing Prejudice; A Manual for Lawyers, Legal Workers, and Social Scientists 2* (National Jury Project 1975) (noting studies suggesting that 60 percent of prospective jurors reject the presumption of innocence); James E. Beaver and Steven L. Marques, *A Proposal to Modify the Rule on Criminal Conviction Impeachment*, 58 Temple L Q 585, 609 (1985) (“Jurors expect innocent defendants to respond to false criminal accusations. From silence jurors draw an inference of guilt. The defendant who appears to withhold relevant information is likely to be viewed as guilty.”) (citation omitted).

<sup>150</sup> See Blume, 5 J Empirical Legal Stud at 488 (cited in note 1) (“The jury is likely to disregard an instruction that this inference is not permissible.”).

<sup>151</sup> See Lauren Cusick, *Serial’s Big Confession* (For the Love of Podcast, Nov 15, 2014), archived at <http://perma.cc/HJR5-A3NQ> (reporting a juror’s answer to the question whether it bothered the jury that the defendant did not take the stand: “Yes, it did. That was huge. Yeah, that was huge. . . . Why not, if you’re a defendant, why would you not get up there and defend yourself and try to prove that the State is wrong, that you weren’t there, that you’re not guilty?”); Andrew E. Taslitz, *Trying Not to Be Like Sisyphus: Can Defense Counsel Overcome Pervasive Status Quo Bias in the Criminal Justice System?*, 45 Tex Tech L Rev 315, 358 (2012) (citing empirical evidence that “despite the presumption of innocence, most jurors believe that those accused of crime are probably guilty, ought to testify if they are not, and bear the burden of proving their innocence”).

<sup>152</sup> *Allen*, 420 NW2d at 521.

<sup>153</sup> See, for example, *Rock v Arkansas*, 483 US 44, 52 (1987) (“[T]he most important witness for the defense in many criminal cases is the defendant himself.”); *Ferguson v Georgia*, 365 US 570, 582 (1961) (noting that the defendant “above all others may be in a position to meet the prosecution’s case”); *Green v United States*, 365 US 301, 304 (1961) (“The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.”).

<sup>154</sup> See, for example, *United States v Walker*, 772 F2d 1172, 1179 (5th Cir 1985) (“Where the very point of a trial is to determine whether an individual was involved in criminal activity, the testimony of the individual himself must be considered of prime importance.”); Eisenberg and Hans, 94 Cornell L Rev at 1370 (cited in note 144) (“In the cases in which defendants testified, judges reported that, on average, defendant testimony was more important than that of the police, of informants, of co-defendants, and of expert witnesses.”).

<sup>155</sup> Blume, 5 J Empirical Legal Stud at 477 (cited in note 1).

prior conviction impeachment.<sup>156</sup> The lost testimony may also help to bridge the considerable gulf of experience between the average juror and the average defendant.<sup>157</sup> If so, it brings a number of advantages: it gets closer to the ideal of a jury of one's peers, it enhances fact-finding, and it increases the ability of the juror (and all others in the courtroom who hear the testimony) to participate in civic discourse in an informed manner.<sup>158</sup>

Thus, the loss of the opportunity contained within the "importance of the defendant's testimony" factor matters, and the broader silencing effect of widespread impeachment matters. Part III discusses the possibility that the factor could be revived, with the effect of lessening this silencing. First, however, Part II introduces a phenomenon that defendant testimony might help combat: implicit racial stereotyping in the courtroom.

## II. IMPLICIT STEREOTYPES THAT THREATEN TO FILL THE SILENCE

Part I laid out the ways in which the "importance of the defendant's testimony" factor has lost its root meaning, and the silencing of the defendant to which this loss has contributed. It also introduced a variety of harms that result from this silencing. This Part elaborates on one of those harms. Part II.A describes the implicit racial stereotyping that fills the silence when fact finders hear nothing from African American defendants; Part II.B explains that this stereotyping has no easy solution. Part III then introduces the notion that urging the importance of the defendant's testimony as a possible means of combating this kind of stereotyping could bring new and useful life back to the "importance of the defendant's testimony" factor.

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<sup>156</sup> *Id.* at 491.

<sup>157</sup> See Natapoff, 80 NYU L Rev at 1498–99 (cited in note 88) ("[T]he criminal system never gets to know defendants—their voices, identities, motivations, or experiences."); Rob Walters, Michael Marin, and Mark Curriden, *Are We Getting a Jury of Our Peers?*, 68 Tex Bar J 144, 145–46 (2005) (noting the underrepresentation of several demographic groups in the Texas jury system and similar trends in court systems across the country). For additional discussion of this gulf, see text accompanying notes 197–202.

<sup>158</sup> See Natapoff, 80 NYU L Rev at 1499 (cited in note 88) ("If the system was intended to keep society substantially clueless about the people it incarcerates, it could not have been better designed.").

### A. Implicit Stereotypes Targeting Criminal Defendants

One of the dangers of silencing defendant testimony is that when defendants remain silent, implicit—or unconscious<sup>159</sup>—stereotypes on the part of the fact finders may spring up to fill the silence. It does not appear to be the case, in other words, that when faced with a defendant who exercises his or her right not to testify, jurors reserve judgment and hold fast to the presumption of innocence while they await the remaining evidence. Rather, their minds seethe with premature assumptions that, in the absence of defendant testimony, the defense may have little chance to dispel.

Stereotypes can be defined as “well-learned sets of associations between some trait and a social group,”<sup>160</sup> and implicit stereotypes can be defined as unconscious associations between particular groups and particular traits.<sup>161</sup> Along with implicit attitudes, which are unconscious feelings of warmth or hostility toward particular groups,<sup>162</sup> they fall under the heading of implicit bias,<sup>163</sup> which is a type of implicit social cognition.<sup>164</sup> Implicit bias is entirely compatible with explicit commitments to equality.<sup>165</sup> Thus, even while explicit expressions of prejudice

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<sup>159</sup> The meaning of “implicit” in this context is that “we are either unaware of or mistaken about the source of the thought or feeling.” Jerry Kang, *Implicit Bias: A Primer for Courts* \*8 (National Center for State Courts, Aug 2009), archived at <http://perma.cc/4NUK-BHXN>. “Implicit stereotypes are the introspectively unidentified (or inaccurately identified) traces of past experience that mediate attributions of qualities to members of a social category. Generally, we are unaware of our implicit stereotypes and may not endorse them upon self-reflection.” *Id.* (quotation marks and citation omitted).

<sup>160</sup> Elizabeth N. Chapman, Anna Kaatz, and Molly Carnes, *Physicians and Implicit Bias: How Doctors May Unwittingly Perpetuate Health Care Disparities*, 28 *J Gen Int Med* 1504, 1504 (2013).

<sup>161</sup> See Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 *Conn L Rev* 827, 833 (2012) (“Implicit biases’ are discriminatory biases based on either implicit attitudes—feelings that one has about a particular group—or implicit stereotypes—traits that one associates with a particular group. They are so subtle that those who hold them may not realize that they do.”) (emphasis and citation omitted).

<sup>162</sup> See Kang, *Implicit Bias* at \*8 (cited in note 159) (“Implicit attitudes are introspectively unidentified (or inaccurately identified) traces of past experience that mediate favorable or unfavorable feeling, thought, or action toward social objects. Generally, we are unaware of our implicit attitudes and may not endorse them upon self-reflection.”) (quotation marks and citation omitted).

<sup>163</sup> See Roberts, 44 *Conn L Rev* at 833 (cited in note 161).

<sup>164</sup> See Kang, *Implicit Bias* at \*1–2 (cited in note 159).

<sup>165</sup> See Sophie Lebrecht, et al, *Perceptual Other-Race Training Reduces Implicit Racial Bias*, 4 *PLOS ONE* 1, 1 (2009) (“Critically, this sort of implicit [racial] bias *does not* correlate with explicit judgments of race—what we say we believe.”); Russell H. Fazio and Michael A. Olson, *Implicit Measures in Social Cognition Research: Their Meaning*

have generally declined,<sup>166</sup> implicit bias has been shown both to exist in a large proportion of the population<sup>167</sup> (and in people from all walks of life<sup>168</sup>) and to involve negative attitudes and stereotypes that are based on ethnicity, gender, sexuality, age, religion, political affiliation, and numerous other categories.<sup>169</sup>

Both jurors and judges appear to be as susceptible to implicit bias as others are. As Professor Jerry Kang and his coauthors put it, the assumption made as to jurors is one of “unexceptionalism”:<sup>170</sup> there is no reason why they should be any different from the rest of the population, which exhibits significant levels of implicit bias.<sup>171</sup> This assumption is supported by findings of implicit bias among mock jurors<sup>172</sup> and among real trial judges.<sup>173</sup> Nor is it easy to detect or weed out those fact finders who are most affected by implicit bias. Since implicit biases are not easily accessible to the conscious mind, voir dire is unequal to the task of identifying those potential jurors who harbor particularly high levels of implicit bias.<sup>174</sup> In addition, trial judges may have

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*and Use*, 54 *Ann Rev Psychology* 297, 303 (2003) (“Within the domain of prejudice and stereotypes, the correlations [between implicit and explicit measures] tend to be quite low.”).

<sup>166</sup> See Mary E. Wheeler and Susan T. Fiske, *Controlling Racial Prejudice: Social-Cognitive Goals Affect Amygdala and Stereotype Activation*, 16 *Psychological Sci* 56, 57 (2005).

<sup>167</sup> See Roberts, 44 *Conn L Rev* at 850 n 170 (cited in note 161).

<sup>168</sup> See *id* at 834.

<sup>169</sup> See *id* at 848–49.

<sup>170</sup> Jerry Kang, et al, *Implicit Bias in the Courtroom*, 59 *UCLA L Rev* 1124, 1144 (2012) (“Our default assumption is juror unexceptionalism—given that implicit biases generally influence decisionmaking, there is no reason to presume that citizens become immune to the effects of these biases when they serve in the role of jurors.”).

<sup>171</sup> See John Tyler Clemons, Note, *Blind Injustice: The Supreme Court, Implicit Racial Bias, and the Racial Disparity in the Criminal Justice System*, 51 *Am Crim L Rev* 689, 698–99 (2014):

Research has demonstrated that jurors drawn from the general population do not shed their implicit racial bias at the doors of the courtroom. Specifically, research has repeatedly shown that . . . jurors treat members of “outgroups,” such as those of a different race, more harshly than those jurors perceive to be substantially like them. Because the majority of juries continue to be all or predominantly white, such outgroup bias disproportionately disadvantages minority defendants.

(citations omitted).

<sup>172</sup> See Kang, et al, 59 *UCLA L Rev* at 1142–43 (cited in note 170), citing Tara L. Mitchell, et al, *Racial Bias in Mock Juror Decision-Making: A Meta-analytic Review of Defendant Treatment*, 29 *L & Hum Behav* 621, 627–28 (2005).

<sup>173</sup> See Jeffrey J. Rachlinski, et al, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 *Notre Dame L Rev* 1195, 1225 (2009) (“[I]mplicit biases are widespread among judges.”).

<sup>174</sup> See Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 *Conn L Rev* 1023, 1030 (2008), quoting Charles R. Lawrence III, *Forbidden Conversations: On*

an inflated sense of their own fairness and therefore may be particularly ill-suited to the task of detecting their own implicit biases.<sup>175</sup> Finally, aspects of the courtroom setting may enhance the influence of implicit bias.<sup>176</sup>

As described in this Section, implicit stereotypes are of particular concern in the context of fact-finding at trial—especially in a criminal trial. First, they permit prejudgment of a case, or certain aspects of a case, thus potentially threatening the presumption of innocence.<sup>177</sup> Second, they take the most troubling form—that is, they are the most threatening to the presumption of innocence—when targeted against a population that is already overrepresented in the criminal-justice system, namely, people of color (and, in particular, African Americans).<sup>178</sup> Third, implicit biases such as these can affect the very tasks that we call on fact finders to perform.<sup>179</sup> Finally, implicit bias may have contributed to racial disparities in conviction rates, and the fear

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*Race, Privacy, and Community (a Continuing Conversation with John Ely on Racism and Democracy)*, 114 Yale L J 1353, 1391 (2005):

[T]he harsh reality for judges conducting voir dire aimed at seating only fair and impartial jurors is that the jurors themselves may not be able to assist because, as Professor Lawrence has said, “we restrict our own speech because we cannot bear admitting our own racism.” If true, how can judges posing such questions, as I have, expect to get valid responses, particularly where an honest response about one’s operative biases requires conscious insight into one’s unconscious?

(citation omitted).

<sup>175</sup> See Rachlinski, et al, 84 Notre Dame L Rev at 1225–26 (cited in note 173) (“[W]e asked a group of judges . . . to rate their ability to ‘avoid racial prejudice in decision-making’ relative to other judges. . . . Ninety-seven percent (thirty-five out of thirty-six) of the judges placed themselves in the top half and fifty percent (eighteen out of thirty-six) placed themselves in the top quartile.”).

<sup>176</sup> See Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L J 345, 380–81 (2007) (noting that judges and juries may be particularly prone to “stereotype-consistent memory errors” due to “cognitive depletion,” causing them to remember facts through a racially biased filter); Justin D. Levinson, *Suppressing the Expression of Community Values in Juries: How “Legal Priming” Systematically Alters the Way People Think*, 73 U Cin L Rev 1059, 1068–69 (2005) (describing how jury members are primed by the cultural norms of the legal system); id at 1073–74 (suggesting that jurors may be influenced by other jurors’ stereotypes, beliefs, and majoritarian thinking).

<sup>177</sup> See Patricia G. Devine and Lindsay B. Sharp, *Automaticity and Control in Stereotyping and Prejudice*, in Todd D. Nelson, ed, *Handbook of Prejudice, Stereotyping, and Discrimination* 61, 61 (Psychology 2009) (“[T]he research literature is replete with evidence that stereotypes often result in biased judgments of and behaviors toward targets of stereotypes.”).

<sup>178</sup> See text accompanying notes 181–202.

<sup>179</sup> See text accompanying notes 203–10.

of implicit bias at trial may be contributing to the astonishingly high rate at which cases are resolved by plea bargains.<sup>180</sup>

The implicit stereotypes that have been shown to be commonly associated with African Americans are ugly.<sup>181</sup> When, as is often the case, these stereotypes threaten to cause fact finders to prejudge an entire criminal case, or even just part of a criminal case, they are not just ugly but deeply challenging to the ideal of a fair trial.<sup>182</sup> Research suggests the existence of implicit stereotypes connecting African Americans with violence,<sup>183</sup> weaponry,<sup>184</sup> hostility,<sup>185</sup> aggression,<sup>186</sup> and immorality.<sup>187</sup> These findings

<sup>180</sup> See text accompanying notes 211–12. Roughly 95 percent of felony convictions in the seventy-five largest counties are the result of guilty pleas. Cohen and Kyckelhahn, *Felony Defendants at \*1* (cited in note 146). See also Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 NYU J Legis & Pub Pol 999, 1007 (2013):

[E]ven where people of color exercise their right to go to trial, there is a greater chance that the fact-finder—whether a jury or a judge—will interpret the facts in a manner consistent with guilt because of the defendant’s skin color. Therefore, defendants of color are more likely to plead guilty and to be found guilty at trial due to forces independent of their own culpability or the merits of the case.

(citation omitted).

<sup>181</sup> See notes 183–87 and accompanying text.

<sup>182</sup> The presumption of innocence “is a basic component of a fair trial under our system of criminal justice.” *Estelle v Williams*, 425 US 501, 503 (1976).

<sup>183</sup> See Ziva Kunda, *Social Cognition: Making Sense of People* 322 (MIT 1999) (“Subliminal exposure to the word *Black* can prime negative aspects of the African American stereotype such as poor, lazy, and violent in the minds [of] non-African Americans.”).

<sup>184</sup> See Jennifer L. Eberhardt, et al, *Seeing Black: Race, Crime, and Visual Processing*, 87 J Personality & Soc Psychology 876, 881 (2004) (noting that participants who saw a black face were quicker to identify “crime-relevant objects” than those who saw a white face).

<sup>185</sup> See Jerry Kang and Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action”*, 94 Cal L Rev 1063, 1085 n 113 (2006) (noting that shoves and bumps are far more likely to be interpreted as aggressive or hostile when committed by African Americans than when committed by Caucasians); Ziva Kunda and Paul Thagard, *Forming Impressions from Stereotypes, Traits, and Behaviors: A Parallel-Constraint-Satisfaction Theory*, 103 Psychological Rev 284, 290 (1996).

<sup>186</sup> See Justin D. Levinson, Robert J. Smith, and Danielle M. Young, *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 NYU L Rev 513, 563–64 (2014) (reporting that a sample of jury-eligible citizens displayed moderate to strong implicit racial stereotypes of black Americans, including aggression); Kang and Banaji, 94 Cal L Rev at 1085 n 113 (cited in note 185); Kunda, *Social Cognition* at 347 (cited in note 183) (“[E]xposure to an African American individual may spontaneously bring to mind traits such as *aggressive* or *criminal* which then influence the interpretation of ambiguous behaviors. A disturbing aspect of this process is that perceivers, from their own perspective, may not realize that they are being prejudiced.”) (citation omitted).

<sup>187</sup> See Paul F. Secord, William Bevan, and Brenda Katz, *The Negro Stereotype and Perceptual Accentuation*, 53 J Abnormal Psychology 78, 79 (1956) (reporting the results

threaten the notion of fair fact-finding not only in cases involving allegations of violence but also, given implicit and explicit associations between violence and drugs,<sup>188</sup> in the very large number of cases that involve drug allegations.<sup>189</sup> They may also threaten the notion of fair fact-finding in any case in which concerns about the safety implications of a not guilty verdict influence a fact finder's decision.<sup>190</sup> More broadly, researchers have demonstrated the presence of implicit stereotypes linking African Americans to criminal guilt.<sup>191</sup> These findings have devastating implications for the fairness of *all* types of criminal cases, assuming that these stereotypes are not dispelled.

The implicit stereotypes targeted at African Americans are particularly troubling because they threaten to compound existing racial disparities within the criminal-justice system. It is of course no coincidence that the population whose rate of criminalization is most grossly inflated—African Americans<sup>192</sup>—is also the population against whom the implicit stereotypes most threatening to the presumption of innocence are directed. The same historical and contemporary disparities underlie both phenomena.<sup>193</sup> But compounded injustices result: First, as commentators have noted, merely existing as an African American may mean being

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of a study in which African Americans portrayed in photographs were viewed as more immoral than Caucasians portrayed in similar photographs).

<sup>188</sup> See, for example, *Ingram v City of Columbus*, 185 F3d 579, 588 n 7 (6th Cir 1999).

<sup>189</sup> See Sean Rosenmerkel, Matthew Durose, and Donald Farole Jr, *Felony Sentences in State Courts, 2006 – Statistical Tables* \*3 (DOJ, Nov 22, 2010), archived at <http://perma.cc/XQM5-3PVT> (indicating that 33.4 percent of convictions in state courts in 2006 were for drug offenses).

<sup>190</sup> See Sampsell-Jones, 2010 Utah L Rev at 734 (cited in note 24) (discussing concerns about juries engaging in “preventive detention”).

<sup>191</sup> See Eberhardt, et al, 87 J Personality & Soc Psychology at 889–91 (cited in note 184) (discussing multiple experiments finding a strong “association between blackness and criminality”); Justin D. Levinson, Huajian Cai, and Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 Ohio St J Crim L 187, 190, 207–08 (2010) (demonstrating that mock jurors “held strong associations between Black and Guilty, relative to White and Guilty, and [that] these implicit associations predicted the way mock jurors evaluated ambiguous evidence”).

<sup>192</sup> See Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 Stan L & Pol Rev 355, 361 (2011) (“African Americans are 12.7% of the general population, but are 41.3% of the federal and state prison population.”); Taja-Nia Y. Henderson, Note, *New Frontiers in Fair Lending: Confronting Lending Discrimination against Ex-Offenders*, 80 NYU L Rev 1237, 1258–59 (2005) (“[P]eople of color—especially African-Americans—are disproportionately arrested and convicted.”).

<sup>193</sup> See, for example, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan L Rev 317, 370–72 (1987) (discussing the historical framework of the relationship between black communities and the police).

deprived of the protection of the layperson's presumption of innocence and instead being viewed as if on some kind of probation.<sup>194</sup> In other words, assumptions of guilt may well have led to the courtroom presence of a disproportionate number of people of color.<sup>195</sup> Second, layered on that disparity is a phenomenon that occurs once inside the courtroom: the implicit stereotypes of the fact finders threaten the courtroom presumption of innocence.<sup>196</sup> Third, while criminal defendants are disproportionately people of color,<sup>197</sup> juries and judges are disproportionately white,<sup>198</sup> and a great deal of implicit bias involves bias against “out-groups”<sup>199</sup>—that is, groups that are not one's own.<sup>200</sup> Thus the common defendant–fact finder pairing of black–white creates particularly fertile ground

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<sup>194</sup> See Tracy Jan, *Q&A: Charles Ogletree on Gates' Arrest, One Year Later* (Boston Globe, June 30, 2010), archived at <http://perma.cc/J8EG-W9PF>; Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 Minn L Rev 367, 413 (1996), quoting Ellis Cose, *The Rage of a Privileged Class* 72 (HarperCollins 1993) (mentioning the “oft-unstated assumption that blacks are still on probation—that . . . blacks are not necessarily granted a presumption of innocence, competence, or even complete humanity”).

<sup>195</sup> See Naomi Murakawa and Katherine Beckett, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 L & Socy Rev 695, 701 (2010) (“[R]acial power is not the sole province of white bigots to which people of color are subject, but rather a systemic and institutional phenomenon that reproduces racial inequality and the presumption of black and brown criminality.”).

<sup>196</sup> See text accompanying notes 203–10.

<sup>197</sup> Smith, 10 Ohio St J Crim L at 287 (cited in note 11).

<sup>198</sup> For the racial composition of juries, see William J. Bowers, Benjamin D. Steiner, and Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U Pa J Const L 171, 190–91 & n 99 (2001) (noting that approximately 25 percent of juries in a sample of death penalty cases had no black members and nearly 70 percent had two or fewer). For the racial composition of the judiciary, see Nicole E. Negowetti, *Judicial Decisionmaking, Empathy, and the Limits of Perception*, 47 Akron L Rev 693, 702 (2014) (“As of 2010, federal judges were . . . more than 80 percent white. . . . In state high courts, 87 percent of judges are white. In state trial courts, 86 percent of judges are white.”).

<sup>199</sup> Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 Cornell L Rev 934, 951 (1984) (“[W]hen the evidence is sparse, jurors are more likely to attribute guilt to defendants of a different race. Jurors are also more likely to convict when the victim is of their own race.”) (citation omitted); Kunda, *Social Cognition* at 348 (cited in note 183) (“The same negative act may be attributed less to the actor's underlying personality and more to situational forces when the actor belongs to one's own group than to an out-group.”).

<sup>200</sup> See Lebrecht, et al, 4 PLOS ONE at 1 (cited in note 165) (“People show a negative implicit association with members of a racial group other than their own.”); Samuel R. Sommers and Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 Personality & Soc Psychology Bull 1367, 1368 (2000).



for the operation of implicit stereotypes<sup>201</sup> and forms a third layer of unfairness.<sup>202</sup>

Implicit biases are not harmless mental quirks. Rather, they affect the key tasks that we rely on fact finders to perform: evaluation of evidence;<sup>203</sup> recall of facts;<sup>204</sup> and the forming of decisions and judgments,<sup>205</sup> including judgments of guilt.<sup>206</sup> In addition, stereotypes can affect whether one can envision an individual (such as a defendant) engaging in certain behavior.<sup>207</sup>

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<sup>201</sup> See Rachlinski, et al, 84 Notre Dame L Rev at 1222 (cited in note 173) (“Jurors are drawn from randomly selected adults, and a majority of white jurors will harbor implicit white preferences.”).

<sup>202</sup> This is not intended as a complete accounting of the multiple layers of racial unfairness at play in contemporary America.

<sup>203</sup> See Levinson, Cai, and Young, 8 Ohio St J Crim L at 190, 207 (cited in note 191); Justin D. Levinson and Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W Va L Rev 307, 309–10 (2010) (“[E]ven the simplest of racial cues introduced into a trial might automatically and unintentionally evoke racial stereotypes, thus affecting the way jurors evaluate evidence.”).

<sup>204</sup> See Bertram Gawronski, et al, *It's in the Mind of the Beholder: The Impact of Stereotypic Associations on Category-Based and Individuating Impression Formation*, 39 J Experimental Soc Psychology 16, 17, 22–23, 26–27 (2003) (finding that, in a study concerning the strength of association between “gender” and “career” versus “household,” implicit-association test scores related to memory performance); Levinson, 57 Duke L J at 398–401 (cited in note 176) (finding that mock jurors remembered aggression-related case facts more accurately when faced with an aggressive black actor than when faced with an aggressive white actor, and that mock jurors sometimes developed false memories of nonexistent facts when those facts were consistent with stereotypes of black men).

<sup>205</sup> See Fazio and Olson, 54 Ann Rev Psychology at 305 (cited in note 165) (“[B]oth implicit and explicit measures can be predictive of judgments and behavior.”); Eugene Borgida, Laurie A. Rudman, and Laurie L. Manteufel, *On the Courtroom Use and Misuse of Gender Stereotyping Research*, 51 J Soc Issues 181, 184 (1995) (noting that “the evidence is compelling that gender stereotypes influence social judgments”); Kang, *Implicit Bias* at \*4 (cited in note 159) (“[I]mplicit bias predicts how we read the friendliness of facial expressions . . . [and] predicts more negative evaluations of ambiguous actions by an African American, which could influence decisionmaking in hard cases.”) (citation omitted); Rachlinski, et al, 84 Notre Dame L Rev at 1225 (cited in note 173) (“First, implicit biases are widespread among judges. Second, these biases can influence their judgment.”).

<sup>206</sup> See Justin D. Levinson, *Race, Death, and the Complicitous Mind*, 58 DePaul L Rev 599, 600–01 (2009) (noting that many Americans have biases that manifest themselves when they “categorize information, remember facts, and make decisions”) (citations omitted); Levinson, Smith, and Young, 89 NYU L Rev at 521 (cited in note 186) (finding that the higher the levels of implicit racial bias in mock jurors, “the more likely they were to convict a Black defendant relative to a White defendant”); Levinson and Young, 112 W Va L Rev at 337 (cited in note 203) (discussing the tendency of mock jurors to find ambiguous facts about a black suspect more indicative of guilt than similar facts about a lighter-skinned suspect, and confirming that “participants’ evidence judgments also predicted their guilty/not guilty verdicts”).

<sup>207</sup> Ziva Kunda and Bonnie Sherman-Williams, *Stereotypes and the Construal of Individuating Information*, 19 Personality & Soc Psychology Bull 90, 97 (1993) (noting that

Even if it is established that a stereotyped individual did engage in a particular act, stereotypes “may affect [the act’s] perceived meaning, antecedents, and causal determinants.”<sup>208</sup> Thus, studies have indicated that participants are more likely to view an individual’s behavior as caused by his or her internal disposition (as opposed to being caused by external factors) when the behavior is consistent with a stereotype.<sup>209</sup> Weak academic credentials, for example, seem to be attributed more to a lack of ability when an African American person is being assessed than when a Caucasian person is.<sup>210</sup>

Given the impact of implicit bias on all of the key functions of fact finders—including the ultimate function of resolving a case—it is unsurprising that commentators have pointed to implicit bias as a possible factor contributing to disparities in conviction rates.<sup>211</sup> Nor is it only conviction rates at trial that are implicated. The predominant method of criminal-case resolution—the plea—occurs in the shadow of the trial, and it appears that the threat of implicit fact finder bias at trial helps to maintain the plea’s predominance.<sup>212</sup>

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stereotypes can lead people to “envision [ ] different targets as engaging in different behaviors”).

<sup>208</sup> *Id.* (giving the example of test failure, which, thanks to ethnic stereotypes, may be attributed to laziness in the case of an Asian individual or to low ability in the case of a black individual). See also Margo J. Monteith, Jeffrey W. Sherman, and Patricia G. Devine, *Suppression as a Stereotype Control Strategy*, 2 *Personality & Soc Psychology Rev* 63, 64 (1998) (“Stereotypes often exert undue influence on evaluations, judgments, and behaviors. For example, ambiguous behaviors are likely to be interpreted in stereotypic ways.”) (citation omitted); Kunda and Sherman-Williams, 19 *Personality & Soc Psychology Bull* at 97 (cited in note 207) (noting that stereotypes influence the “perceived meaning of the act to the actor”).

<sup>209</sup> See Kunda and Thagard, 103 *Psychological Rev* at 295 (cited in note 185).

<sup>210</sup> See *id.*

<sup>211</sup> See Nazgol Ghandnoosh, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies* \*15 (The Sentencing Project, 2014), archived at <http://perma.cc/UB68-WHCB> (“[S]tudies of mock jurors have found that a defendant’s race has some impact on verdicts and sentencing.”); Levinson, Smith, and Young, 89 *NYU L Rev* at 563–65 (cited in note 186) (suggesting that implicit bias among capital juries could be responsible for disparities in capital conviction rates).

<sup>212</sup> See Andrew Cohen, *Confessing While Black: When the Threat of a White Jury Is an Interrogation Tool* (The Marshall Project, Dec 12, 2014), archived at <http://perma.cc/M7S4-SFCH> (exposing the extent to which suspects are pressured into making a “confession” because of the fear that they will not be given a fair jury); Otis B. Grant, *Rational Choice or Wrongful Discrimination? The Law and Economics of Jury Nullification*, 14 *Geo Mason U CR L J* 145, 175 (2004) (noting that in most criminal cases, “the defendant evaluates the information and pleads guilty” and that “[f]or blacks this information includes the racial makeup of the jury, which is usually predominantly white, and the fact that members of the jury will almost assuredly react negatively upon the stereotype of the dreaded ‘black male criminal’”) (citation omitted); *id.* at 166–67 (noting that,

## B. Efforts to Remedy Courtroom Fairness

This Section lays out the ways in which—despite interest in addressing implicit stereotypes in the courtroom and despite the launch of several initiatives having that aim—severe obstacles stand in the way of progress, including hesitation about creating new structures. There is nothing approaching a panacea; rather, multifaceted efforts, including those that work within existing structures, are required.

The research findings that indicate the existence of implicit bias—including implicit fact finder bias—have moved judges, judicial administrators, scholars, and others to look for ways in which its threat might be lessened.<sup>213</sup> Judicial education has incorporated aspects of implicit-bias research,<sup>214</sup> and various task forces have been formed to develop additional reform proposals.<sup>215</sup> Judge Mark Bennett has been a noteworthy pioneer, introducing a raft of reforms into his courtroom, including a discussion of implicit bias in voir dire, jury instructions on the topic, and a pledge that all jurors must sign, affirming that they will not decide the case based on biases.<sup>216</sup> Another federal judge,

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in large part because of negative black stereotypes, “many African-American defendants know that the public often considers them guilty even though they may not have committed a crime” and that “[c]onsequently, many choose to plea[d] to a lesser offense rather than face a jury that is often overwhelmingly white and hostile”).

<sup>213</sup> See, for example, Pamela M. Casey, et al, *Helping Courts Address Implicit Bias: Resources for Education* \*i, 2 (National Center for State Courts, 2012), archived at <http://perma.cc/EBZ2-HBLA> (describing the results of the two-phase National Campaign to Ensure the Racial and Ethnic Fairness of America’s State Courts, launched in 2006, the second phase of which focused on implicit bias, including “the development and delivery of judicial education programs on implicit bias in three states”).

<sup>214</sup> See *id.* The National Judicial College’s model curriculum also has introductory course materials that are “designed to experientially bring to the consciousness of attendees how their thoughts and actions are based on their culture and background.” Mary Kreiner Ramirez, *Into the Twilight Zone: Informing Judicial Discretion in Federal Sentencing*, 57 Drake L Rev 591, 630–31 (2009) (quotation marks omitted).

<sup>215</sup> The American Bar Association’s Criminal Justice Section has assembled a task force to develop jury instructions addressing implicit bias. See Jennifer K. Elek and Paula Hannaford-Agor, *Can Explicit Instructions Reduce Expressions of Implicit Bias? New Questions following a Test of a Specialized Jury Instruction* \*6 n 1 (National Center for State Courts, Apr 2014), archived at <http://perma.cc/ZZD4-XD73>. See also generally *Implicit Bias Initiative* (ABA), archived at <http://perma.cc/YRG3-DJSJ>. The National Center for State Courts has also compiled a collection of court studies with the aim of educating judges and court administrators about implicit biases. See *Gender and Racial Fairness: Resource Guide* (National Center for State Courts), archived at <http://perma.cc/X83C-U2V6>.

<sup>216</sup> See Kang, et al, 59 UCLA L Rev at 1181–83 (cited in note 170) (“I pledge . . . [that] I will not decide this case based on biases. This includes gut feelings, prejudices, stereotypes, personal likes or dislikes, sympathies or generalizations.”).

Judge Janet Bond Arterton, has described her attempts to address racial bias during voir dire, having concluded that if African American defendants do not testify, the jurors will “have no firsthand measure of the men on trial beyond their appearances.”<sup>217</sup> At the state court level, one judge in North Carolina—Judge Louis Trosch Jr—has developed a practice of scheduling difficult hearings for early in the morning, because of research suggesting that stress and a lack of time can increase cognitive errors such as implicit bias.<sup>218</sup> Judge Milton Souter, in Alaska, agreed to give jurors an instruction, proffered by the defense and based on implicit-bias scholarship, which asked the jurors to attempt a technique called “race switching” before finalizing their verdict.<sup>219</sup> Race switching aims to raise awareness of implicit stereotyping and involves mentally switching the races of the parties to probe whether a change in race might lead to a change in verdict.<sup>220</sup> In the case in question, that meant taking the races of the parties—an African American man was claiming self-defense in response to an allegation that he assaulted a white man with a hammer—and switching them, to see whether one’s intended verdict would remain unchanged.<sup>221</sup>

These kinds of efforts face huge obstacles. First, implicit bias is a deep-rooted and complex problem,<sup>222</sup> to which quick fixes will always be inapposite. The kinds of racial disparities that

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<sup>217</sup> Arterton, 40 Conn L Rev at 1029 (cited in note 174). See also id:

I fashioned voir dire questions that emphasized the importance of a trial free from any racial bias of any form. I asked the jurors to seriously consider the question of whether they could really carry out their duty to be entirely fair and impartial to these black defendants or whether they had any inkling of doubt about their ability to be racially fair and unbiased.

<sup>218</sup> See wlaw, *Implicit Bias: MLK Day Speaker Judge Louis A. Trosch '88* 1:23:07–1:23:51 (Jan 22, 2013), online at <http://www.youtube.com/watch?v=8xTXnkqQ-OQ#t=1h23m07s> (visited Nov 9, 2015) (Perma archive unavailable) (showing Trosch discussing his efforts to address implicit racial bias).

<sup>219</sup> See James McComas and Cynthia Strout, *Combating the Effects of Racial Stereotyping in Criminal Cases*, 23 *Champion* 22, 24 (Aug 1999) (stating that Souter, in that case, in agreeing to give the instruction, noted that “he personally engaged in a race-switching exercise whenever he was called upon to impose a sentence on a member of a minority race, to insure that he was not being influenced by racial stereotypes”). For the model jury instruction that inspired the defense’s proposal, see Lee, 81 Minn L Rev at 482 (cited in note 194).

<sup>220</sup> See Cynthia Lee, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* 258 (NYU 2003).

<sup>221</sup> See id at 256–58. The defendant in this case was acquitted. Id at 258.

<sup>222</sup> See Casey, et al, *Helping Courts Address Implicit Bias* at \*B-2 to -3 (cited in note 213) (discussing sources of implicit bias that include developmental history, affective experience, culture, and the self).

contribute to implicit racial stereotyping are centuries old.<sup>223</sup> Indications of implicit bias have been detected in children as young as six years old,<sup>224</sup> and this bias is reinforced in a widespread and daily fashion.<sup>225</sup> In addition, stereotypes may be hard to abandon if they help to justify an unequal distribution of resources<sup>226</sup> or, indeed, an unequal application of the criminal

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<sup>223</sup> Erik Olin Wright and Joel Rogers, *American Society: How It Really Works* 316–30 (W.W. Norton 2d ed 2015) (citing genocide and geographic displacement, slavery, second-class citizenship, noncitizen labor, and diffuse racial discrimination as forms of racial oppression that have occurred in America and that help illuminate modern racial inequality in America).

<sup>224</sup> Casey, et al, *Helping Courts Address Implicit Bias* at \*B-2 (cited in note 213). See also Devine and Sharp, *Automaticity and Control in Stereotyping and Prejudice* at 62 (cited in note 177) (mentioning a suggestion in the literature that “during socialization, a culture’s beliefs about various social groups are frequently activated and become well learned” and that, as a result, “these deep-rooted stereotypes and evaluative biases are automatically activated, without conscious awareness or intention, in the presence of members of stereotyped groups (or their symbolic equivalent) and can consequently influence social thought and behavior”); Monteith, Sherman, and Devine, 2 *Personality & Soc Psychology Rev* at 64 (cited in note 208) (“The explicit and implicit teachings of social agents such as parents, peers, or the media ensure that stereotypes will be transmitted to children at a young age, before they have had opportunities to develop their own personal beliefs based on their own personal experiences.”).

<sup>225</sup> See Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-racial Society*, 91 *NC L Rev* 1555, 1560–61 (2013) (“Americans are constantly exposed to negative stereotypes about Blacks. These stereotypes include the idea that Blacks are lazy people who would rather live on or cheat welfare than work and that Blacks are often involved in criminal activity.”) (citation omitted); id at 1561 n 33 (“The media frequently depicts young Black and Brown men as the ones who are mugging other people, scamming people, burglarizing homes, selling drugs, and engaging in drive-by shootings.”); Robert J. Smith and Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 *Seattle U L Rev* 795, 823 (2012) (“The associations that are triggered when people view a person of a particular race are likely the product of extensive cultural and social learning.”); I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 *Harv CR–CL L Rev* 1, 26 (2011) (“[P]olice profiling . . . adds legitimacy to private discrimination.”); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 *J Crim L & Crimin* 775, 810 (1999) (“[R]ace-based policing tells the community that Blacks are presumed to be lawless and are entitled to fewer liberties.”). A coalition of more than fifteen organizations committed to ending racism “within our lifetime,” including Everyday Democracy and the Southern Poverty Law Center, has included a list of methods to tackle implicit bias on its website. Given the size of the problem, however, it seems a long life would be needed to accomplish this goal. See *To Uproot the Racial Hierarchy Now (TURHN): A Campaign of the Within Our Lifetime Network to Combat the Impact of Implicit Bias* (Within Our Lifetime), archived at <http://perma.cc/NR6U-CWQ2>.

<sup>226</sup> See Monteith, Sherman, and Devine, 2 *Personality & Soc Psychology Rev* at 64 (cited in note 208) (“The unequal distribution of resources can be twisted into a picture of fairness by applying negative stereotypes to disadvantaged groups that serve to justify the inequality.”).

laws.<sup>227</sup> Second, even judges or court administrators who are eager to address implicit stereotypes may fear that attempting any sort of solution would make things worse. This is the reason given by Bennett for the failure of his colleagues to adopt his innovations.<sup>228</sup> These fears may be bolstered by strands of case law that suggest that bias should not be discussed in the courtroom, lest discussion draw attention to it in ways that are unhelpful.<sup>229</sup> These fears also receive some support from research finding that, if handled inappropriately, bias-reduction efforts can backfire.<sup>230</sup> Third, in a time of fiscal straitening, the effects of which have been evident in the court system as elsewhere, innovations that are anything other than resource neutral are particularly hard to sell.<sup>231</sup> Finally, judicial innovators are not yet able to

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<sup>227</sup> See Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 Wm & Mary Bill Rts J 395, 408 (2009), quoting David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* 178–79 (Chicago 2001) (“[T]he offender is rendered more and more abstract, more and more stereotypical, more and more a projected image rather than an individuated person.”).

<sup>228</sup> See Roberts, 44 Conn L Rev at 859 (cited in note 161).

<sup>229</sup> Some courts have barred attorneys from discussing their concerns about bias with the juries in their cases. See, for example, *Daniels v Burke*, 83 F3d 760, 766 (6th Cir 1996) (upholding the denial of voir dire questioning related to racial bias); *Stanton v Astra Pharmaceutical Products, Inc.*, 718 F2d 553, 578–79 (3d Cir 1983) (criticizing an attorney for saying to the jury that he was “concerned about the effect of having black people come to an area where there are not many black people and expecting to get justice from a jury which is mostly white people”). See also Deborah L. Forman, *What Difference Does It Make? Gender and Jury Selection*, 2 UCLA Women’s L J 35, 70 (1992) (“Many judges refuse to allow probing into sensitive areas that are inevitably the most crucial to the case, such as racism or sexism.”).

<sup>230</sup> See, for example, Katja Corcoran, Tanja Hundhammer, and Thomas Mussweiler, *A Tool for Thought! When Comparative Thinking Reduces Stereotyping Effects*, 45 J Experimental Soc Psychology 1008, 1008 (2009) (“[S]ocial perceivers who try to suppress a stereotype may later be troubled by rebound-effects that make stereotypic content even more accessible and consequently influence their judgment and behavior in subsequent tasks.”); Thomas E. Nelson, Michele Acker, and Melvin Manis, *Irrepressible Stereotypes*, 32 J Experimental Soc Psychology 13, 31 (1996) (“Conscious attempts at thought regulation may [ ] backfire, leading to exaggerated stereotyping under conditions of diminished capacity, or when self-regulation efforts are relaxed.”).

<sup>231</sup> See Jennifer K. Elek and Paula Hannaford-Agor, *First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making*, 49 Ct Rev 190, 195 (2013) (discussing proposals to address implicit juror bias, including administration of the Implicit Association Test (IAT) to jurors and the addition of race-relevant voir dire questioning, and concluding that the “[c]osts associated with these techniques”—including the “printing and processing of questionnaires at a time when states are facing new and significant budgetary challenges” as well as the “limited existing court resources (e.g., computer access for potential jurors to take the IAT, or trained staff to code and process a paper-and-pencil version of the test)”—will “preclude these options from consideration in many jurisdictions”).

point their hesitant colleagues to empirical work that validates their efforts. Indeed, the first published study to investigate the effects of jury instructions like those used by Bennett failed to demonstrate any significant influence of the instructions on jurors' verdict preferences.<sup>232</sup>

Thus, there exists a desire to alleviate the threats to fairness that implicit bias presents in the courtroom, but no panacea. Those who wish to ameliorate this problem need to channel their energy in multiple and creative directions<sup>233</sup> and must pay particular attention to those methods that require no new structures and no additional resources.

### III. THE IMPORTANCE OF THE DEFENDANT'S TESTIMONY AS A WAY TO COMBAT IMPLICIT STEREOTYPING

This Part brings together Part I's analysis of the lost opportunity within the impeachment context and Part II's description of the threat to the presumption of innocence created by implicit racial stereotyping. It does so by suggesting that one of the unfortunate consequences of the phenomenon described in Part I is the lack of a forum for arguments that the defendant's testimony is important because it has the potential to combat the implicit stereotyping threatening the right to a fair trial. This Part draws on a concept from the field of social cognition—individuation—to suggest that defendant testimony might further this goal as part of a multipart strategy to combat implicit stereotyping in the courtroom.

Part III.A introduces individuation as a method of combating implicit stereotyping. Part III.B explores the aspects of

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<sup>232</sup> See Elek and Hannaford-Agor, *Can Explicit Instructions Reduce Expressions of Implicit Bias?* at \*8, 14 (cited in note 215) (finding “no significant effects . . . on judgments of guilt, confidence, strength of the prosecution's evidence, or sentence length” when testing a specialized implicit-bias jury instruction “[b]ased loosely on [the] jury instruction developed and used by Judge Mark Bennett”).

<sup>233</sup> For endorsements of these kinds of multipronged strategies, see, for example, Lee, 91 NC L Rev at 1590–1601 (cited in note 225) (providing a variety of suggestions as to how prosecutors and criminal defense attorneys can attempt to combat implicit bias by making race salient); Patricia G. Devine, et al, *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J Experimental Soc Psychology 1267, 1276 (2012) (describing “compelling and encouraging evidence for the effectiveness of our multifaceted intervention in promoting enduring reductions in implicit bias”); id at 1277 (noting that it is “likely that there is no single ‘magic bullet’ that, by itself, prompts the regulation of implicit bias and the multifarious changes in concern and awareness such self-regulation brings,” and that “[i]nstead, several components likely work in combination to prompt situational awareness of one's bias and translate that awareness into chronic awareness, concern, and self-regulatory effort”).

individuation research that make this concept particularly applicable to defendant testimony. Part III.C conducts that application, laying out the ways in which arguments about individuation might be made under a revived “importance of the defendant’s testimony” heading and the advantages that such an approach might bring.

#### A. Introduction to Individuation as a Method of Combating Bias

Two main categories of information shape one’s impressions of an individual.<sup>234</sup> The first is stereotypes—associations between particular groups and particular traits.<sup>235</sup> The second is individuating information, which encompasses everything else—details about an individual’s acts, for example, or personality, or life circumstances.<sup>236</sup> It is all too easy for stereotypes to dominate the process of forming impressions about an individual:<sup>237</sup> automatic associations between particular groups and particular traits offer cognitive shortcuts in the immensely complex task of processing information.<sup>238</sup> Thus, for example, upon encountering an African American—even for mere milliseconds<sup>239</sup>—stereotypes that have accrued in an individual since infancy might come to mind.<sup>240</sup> They might include traits such as violence, weaponry, hostility,

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<sup>234</sup> See Kunda and Thagard, 103 *Psychological Rev* at 284 (cited in note 185).

<sup>235</sup> See *id.*

<sup>236</sup> See *id.*

<sup>237</sup> See Peter Glick, Cari Zion, and Cynthia Nelson, *What Mediates Sex Discrimination in Hiring Decisions?*, 55 *J Personality & Soc Psychology* 178, 179 (1988) (“[P]erceivers seem to prefer to fit others into a category, if possible, rather than process information about them in a piecemeal fashion.”).

<sup>238</sup> See Nelson, Acker, and Manis, 32 *J Experimental Soc Psychology* at 13 (cited in note 230) (“As a standard component of our cognitive repertoire, stereotypes reward their user with speed and efficiency in perception, inference, and decision-making.”); Casey, et al, *Helping Courts Address Implicit Bias* at \*1 (cited in note 213) (noting that implicit-social-cognition research “shows that individuals develop implicit attitudes and stereotypes as a routine process of sorting and categorizing the vast amounts of sensory information they encounter on an ongoing basis”).

<sup>239</sup> See Patrick S. Forscher and Patricia G. Devine, *Breaking the Prejudice Habit: Automaticity and Control in the Context of a Long-Term Goal*, in Jeffrey W. Sherman, Bertram Gawronski, and Yaacov Trope, eds, *Dual-Process Theories of the Social Mind* 468, 469 (Guilford 2014) (“Once acquired, the biases are [ ] frequently activated due to the saturation of stereotypic information within the social environment. These biases then become overlearned to the point that, even if they are not perfectly automatic, they are activated as quickly as 300–600 milliseconds after cue onset.”) (citation omitted).

<sup>240</sup> See Ziva Kunda, et al, *The Dynamic Time Course of Stereotype Activation: Activation, Dissipation, and Resurrection*, 82 *J Personality & Soc Psychology* 283, 295 (2002).



aggression, immorality, or guilt.<sup>241</sup> In a two-step process, stereotypes that have come to mind (or that have been *activated*) may be *applied* to individuals and thus play a part in forming impressions.<sup>242</sup> A lack of individuating information about an individual makes it particularly easy for stereotypes to dominate the process of forming impressions.<sup>243</sup>

Individuation is a strategy that “relies on preventing stereotypic inferences by obtaining specific information about group members.”<sup>244</sup> A variety of studies have suggested that individuating information, such as information about an individual’s background,<sup>245</sup> can reduce the influence of stereotypes on the formation of impressions.<sup>246</sup>

## B. Applicability of Individuation to Defendants’ Testimony

Various aspects of research into individuation suggest its potential applicability to the context of defendant testimony and its potential as a means of attempting to combat the threat of implicit fact finder stereotypes.

First, individuation research has produced promising findings regarding the ability of individuating information to combat

<sup>241</sup> See text accompanying notes 183–87, 191.

<sup>242</sup> See Kunda, et al, 82 *J Personality & Soc Psychology* at 290–91 (cited in note 240).

<sup>243</sup> See Kang, et al, 59 *UCLA L Rev* at 1160 (cited in note 170) (“When we lack sufficient individuating information . . . we have no choice but to rely more heavily on our schemas.”); Wayne Chan and Gerald A. Mendelsohn, *Disentangling Stereotype and Person Effects: Do Social Stereotypes Bias Observer Judgment of Personality?*, 44 *J Rsrch Personality* 251, 251 (2010) (“When there is no or minimal individuating information about the target, i.e., when group identification constitutes the only differentiating information available, it will necessarily be determining.”); Borgida, Rudman, and Manteufel, 51 *J Soc Issues* at 182 (cited in note 205) (“The research to date suggests that stereotypes are more likely to influence impressions and evaluations when perceivers have either minimal or ambiguous individuating information about a particular person.”).

<sup>244</sup> Devine, et al, 48 *J Experimental Soc Psychology* at 1271 (cited in note 233). See also id (“Using this strategy helps people evaluate members of the target group based on personal, rather than group-based, attributes.”).

<sup>245</sup> See, for example, Kunda, et al, 82 *J Personality & Soc Psychology* at 284 (cited in note 240).

<sup>246</sup> See, for example, Chan and Mendelsohn, 44 *J Rsrch Personality* at 255 (cited in note 243) (finding that individuating information had a strong influence on the study participants’ descriptions of individuals, even when those individuals were labeled according to their ethnicity and their gender); id at 256 (noting that when details of individuals’ behavior were provided to study participants, stereotypes were attenuated and participants “anchor[ed] on the individual in making their judgments”); Kunda and Thagard, 103 *Psychological Rev* at 291–92 (cited in note 185) (reporting that stereotypes that otherwise affect study participants’ impressions of an individual’s traits “typically have no such effects when the individual is [ ] known to have engaged in an unambiguous behavior that is clearly” relevant to the judgment in question).

the implicit stereotyping of African Americans.<sup>247</sup> It is the implicit stereotyping of African Americans that appears most threatening to the presumption of innocence, in light of cognitive associations between African Americans and violence, weaponry, hostility, aggression, immorality, and guilt.<sup>248</sup>

Second, individuation research has included studies of individuals engaged in the same basic task that defendants perform on the stand: talking about themselves and their experiences.<sup>249</sup> For example, in one study, researchers assessed the extent to which African American stereotypes held by one group of study participants had been brought to mind—or “activated”—after just fifteen seconds of exposure to an African American student.<sup>250</sup> The other group of study participants listened to the African American student talk about her experiences for twelve minutes before their levels of stereotype activation were assessed.<sup>251</sup> Stereotypes had been activated after just fifteen seconds, but after twelve minutes there was no evidence of stereotype activation.<sup>252</sup> As the study’s authors described their results, “[t]he initially activated stereotype had dissipated over time.”<sup>253</sup> In another study, participants read a five-page transcript of a telephone conversation in which the stereotyped individual described his or her experiences and actions in three situations.<sup>254</sup> Having read the conversation, the study participants relied on the details about the individual’s behavior in evaluating his or her traits, rather than on stereotypes.<sup>255</sup>

Third, the process of supplying individuating information is particularly vital when the stereotyped individual is a member

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<sup>247</sup> See, for example, Kunda, et al, 82 *J Personality & Soc Psychology* at 295 (cited in note 240).

<sup>248</sup> See text accompanying notes 184–91.

<sup>249</sup> See, for example, Kunda, et al, 82 *J Personality & Soc Psychology* at 285 (cited in note 240).

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 286.

<sup>253</sup> Kunda, et al, 82 *J Personality & Soc Psychology* at 286 (cited in note 240). See also *id.* at 295 (suggesting that “as the encounter with the stereotyped individual unfolded, participants shifted their attention from this individual’s membership in a stereotyped group to other aspects of this individual or to the task at hand”).

<sup>254</sup> Anne Locksley, et al, *Sex Stereotypes and Social Judgment*, 39 *J Personality & Soc Psychology* 821, 822 (1980).

<sup>255</sup> See *id.* at 825–26 (noting that there were “no effects of sex stereotypic beliefs on subjects’ predictions about the target’s personality characteristics”).

of an out-group vis-à-vis those harboring the stereotypes<sup>256</sup>—in other words, when those harboring the stereotype do not belong to the stereotyped group.<sup>257</sup> The process of forming an impression of someone from a different racial group is particularly likely to involve a surfeit of attention to stereotypes and a lack of attention to unique characteristics.<sup>258</sup> As discussed above, disparities in both the fact finder pool and the defendant pool mean that fact finder judgments of criminal defendants frequently involve an in-group/out-group dynamic and thus an enhanced need for individuating information.<sup>259</sup>

Fourth, there is some indication that people pay more attention to individuating information about a stereotyped person when they are motivated to form an accurate impression of that person.<sup>260</sup> Research into jurors indicates that, in general, they arrive at the courthouse eager to perform their duties well<sup>261</sup> and thus are likely to feel such motivation.

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<sup>256</sup> See Justin Murray, *Reimagining Criminal Prosecution: Toward a Color-Conscious Professional Ethic for Prosecutors*, 49 Am Crim L Rev 1541, 1559 (2012):

Race-based out-grouping has predictable implications . . . (such as whites perceiving blacks as presumptively dangerous and culpable), but also some less well-recognized consequences. For instance, people tend to notice the unique and individual characteristics of familiar, in-group members, whereas they are prone to focus on the stereotypical, group-based characteristics of out-group individuals. When a white person encounters another white, he or she does not focus on the other's race, but instead processes the unique, individuating attributes (both physical and personal) of the other person. By contrast, when a white interacts with a black stranger (or vice versa), psychological processing of the other is much more likely to emphasize race and attributes that are implicitly associated with race (such as "threat"), and to downplay personal traits that do not conform to racial stereotypes.

(citations omitted).

<sup>257</sup> See *id.*

<sup>258</sup> See *id.*

<sup>259</sup> See text accompanying notes 197–202. See also Levinson, Smith, and Young, 89 NYU L Rev at 565 (cited in note 186) ("One of the social groups for which people show the strongest and most consistent preferences is the racial in-group."); *id.* ("[I]n-group members . . . receive the cognitive benefit of the doubt in a range of [ ] situations, simply by virtue of their group membership.");

<sup>260</sup> See Kunda, *Social Cognition* at 366 (cited in note 183).

<sup>261</sup> See Phoebe C. Ellsworth, *One Inspiring Jury*, 101 Mich L Rev 1387, 1390 (2003) ("When people are chosen to serve on a jury, they are generally anxious to perform their task well, and eager for guidance on how to be a good jury."); Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 L & Contemp Probs 205, 208, 223 (Autumn 1989) (describing a study in which mock jurors "t[ook] the law seriously").

### C. Applying Individuation to the Impeachment Context

This Section proposes that arguments about individuation could be made under the “importance of the defendant’s testimony” factor of the impeachment analysis, and it explores the potential benefits of this opportunity.

While fact finders and criminal defendants would ideally live in a world where impeachment of criminal defendants with their prior convictions had been abolished, that is unlikely to happen in the near future. Many commentators have advocated its abolition,<sup>262</sup> but to no avail.<sup>263</sup> So, too, the *Mahone* factors are unlikely to be supplanted as the leading means by which courts resolve the question whether prior conviction impeachment should be permitted. These factors survived the enactment of the FRE,<sup>264</sup> have been adopted by all but two of the federal circuits,<sup>265</sup> have been used even in arguments and decisions in the two circuits that have not adopted them,<sup>266</sup> and have survived

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<sup>262</sup> See generally, for example, Anna Roberts, *Conviction by Prior Impeachment*, 96 BU L Rev (forthcoming 2016), archived at <http://perma.cc/9XH6-L79Q>. See also, for example, Alex Kozinski, *Criminal Law 2.0*, 44 Georgetown L J Ann Rev Crim Proc iii, xliii (2015) (“I’d amend Federal Rule of Evidence 609(a) . . . to preclude impeachment of a criminal defendant . . . with evidence of his past criminal convictions.”); Bellin, 76 U Cin L Rev at 882–83 (cited in note 147) (proposing the prohibition of “impeachment-only evidence,” such as illegally obtained evidence and prior convictions, in most circumstances); Richard D. Friedman, *Character Impeachment Evidence: The Asymmetrical Interaction between Personality and Situation*, 43 Duke L J 816, 825 (1994) (advocating a “simple rule against character impeachment evidence of a criminal defendant”).

<sup>263</sup> See McLaughlin, Weinstein, and Berger, 4 *Weinstein’s Federal Evidence* at § 609App.100 at 609App.-20 (cited in note 25) (“[T]here appears no substantial support for entirely eliminating proof of all convictions in attacking credibility.”); Surratt, 31 Syracuse L Rev at 914 (cited in note 8) (noting that the “adoption by most other American jurisdictions” of the Hawaiian ban on prior conviction impeachment, “at least in the near future, seems unlikely”).

<sup>264</sup> See text accompanying notes 46–49.

<sup>265</sup> See text accompanying note 51.

<sup>266</sup> See, for example, *United States v Kieffer*, 2009 WL 973350, \*2 (D ND) (considering the factors in balancing probative value and prejudicial effect); Brief of Appellant, *United States v Hammond*, Docket No 99-4167, \*15–16 (4th Cir filed May 25, 1999) (available on Westlaw at 1999 WL 33616112) (showing the defendant urging the court to use the factors in balancing probative value and prejudicial effect); *Sindram* Government Brief at \*29 (cited in note 116) (showing the Government urging the court to use the factors in balancing probative value and prejudicial effect); Appellee’s Brief, *United States v Hamilton*, Docket No 93-5393, \*30–31 (4th Cir filed Sept 24, 1993) (available on Westlaw at 1993 WL 13037357) (same); Appellee’s Brief, *United States v Stotler*, Docket No 93-5054, \*20 (4th Cir filed July 12, 1993) (available on Westlaw at 1993 WL 13119772) (same).

the arguments of commentators and advocates that some or all of them should be abandoned.<sup>267</sup>

As described above, one portion of the case law underlying *Mahone* currently lies dormant. It used to offer protection to the defendant—and to the fact-finding process—by cautioning against impeachment, even in the face of the results of the probative/prejudicial balancing test, *if* the defendant's testimony would be important to the process of getting to the truth.<sup>268</sup> In courtrooms where components of criminal charges—and even the very question of criminal guilt—are being prejudged by fact finders because of implicit stereotypes, the fact-finding process risks straying very far from the truth and very far from the presumption of innocence.<sup>269</sup> This appears to be the case in the disproportionately large group of trials that involve African American defendants, a group whose disproportionate representation in the courthouse already poses a fairness problem.<sup>270</sup>

The possibility of clearing a path for arguments about the importance of individuating testimony within the impeachment context offers something that appears to be vital in combating implicit stereotypes, namely, finding methods that do not require additional resources or new structures.<sup>271</sup> Revivifying the “importance of the defendant's testimony” factor as one that is available for the defense—and as one that is not viewed as a distraction

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<sup>267</sup> See text accompanying notes 99–111.

<sup>268</sup> See Part I.B.

<sup>269</sup> See John F. Dovidio and Samuel L. Gaertner, *Intergroup Bias*, in Susan T. Fiske, Daniel T. Gilbert, and Gardner Lindzey, eds, 2 *Handbook of Social Psychology* 1084, 1085 (Wiley 5th ed 2010) (“In general, stereotypes produce a readiness to perceive behaviors or characteristics associated with the stereotype; when stereotypes are activated, individual group members are judged in terms of group-based expectations or standards.”); Levinson, Cai, and Young, 8 Ohio St J Crim L at 190, 207–08 (cited in note 191). See also Part II.A.

<sup>270</sup> See, for example, Rapping, 16 NYU J Legis & Pub Pol at 1006 (cited in note 180):

African-Americans are arrested for drug offenses at an alarmingly higher rate than their white counterparts, despite similar rates of involvement. . . . Once in the system, the disparate treatment continues. Prosecutors have ultimate discretion to determine whether to charge an arrestee and, if so, with what charge. Studies suggest both factors are influenced by the race of the accused.

See also Brad Heath, *Racial Gap in U.S. Arrest Rates: 'Staggering Disparity'* (USA Today, Nov 19, 2014), archived at <http://perma.cc/252R-GDEN> (describing how African Americans are “more likely to be arrested than any other racial group in the USA”); Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—on the Social Construction of Threat*, 80 Va L Rev 503, 530 (1994) (mentioning the disproportionate number of African Americans on death row, convicted by juries, and in jail). See also text accompanying notes 192–202.

<sup>271</sup> See text accompanying notes 230–31.

from “the real issues that should be considered”<sup>272</sup> or as one that merely gets balanced out by the “centrality of the credibility issue” factor<sup>273</sup>—would both use and help restore meaning to an existing structure.

This Article therefore proposes that the “importance of the defendant’s testimony” factor be reclaimed by the defense, and be taken seriously by the judiciary, as a vehicle for arguments that have the potential to tackle one of our most pressing courthouse problems. Specifically, this Article proposes that defense attorneys make creative use of the opportunity to explain that implicit stereotyping threatens the presumption of innocence, as well as the accurate determination of the truth.<sup>274</sup> It proposes that in determining, under *Mahone*, whether permitting impeachment might chill defendant testimony, courts should consider the possibility that defendant testimony would offer the kind of individuating information that has the potential to combat stereotyping, and courts should weigh this possibility as a factor militating against allowing impeachment.

This proposal offers additional advantages beyond the restoration of meaning and sense to the *Mahone* framework and the countering of implicit stereotyping. For example, even if defense arguments fail to persuade the court that the individuating potential of the defendant’s testimony should militate against permitting impeachment, they have significant potential to educate the court about the dangers of implicit stereotyping on the part of the fact finder. Two of the most prominent members of the criminal defense bar—Professors Jonathan Rapping and Bryan Stevenson—have recently advocated the importance of

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<sup>272</sup> Sampsell-Jones, 93 Minn L Rev at 1362 (cited in note 111).

<sup>273</sup> See text accompanying notes 67–68, 73, 107.

<sup>274</sup> This Article is restricted to the consideration of implicit racial stereotypes, and particularly those targeting African Americans, but its arguments have potential applicability for other stereotyped groups. See, for example, Mary D. Fan, *Decentralizing STD Surveillance: Toward Better Informed Sexual Consent*, 12 Yale J Health Pol, L & Ethics 1, 29–30 (2012):

Increased availability of information might shift decisionmakers away from relying on troubling group-based stereotypes, permitting them to make more accurate information-assisted individuated judgments. More reliable information has the double effect of facilitating more accurate, and less biased, decisionmaking. Judgments are based on individualized assessments, rather than group stereotypes.

(citation omitted).

educating courts about implicit bias<sup>275</sup> through methods that include motions practice.<sup>276</sup> Rapping points out that even if a motion on such a subject were unsuccessful, “the process of making this request would serve to [ ] educate the court” about implicit racial bias “and the potentially destructive role it plays in the fair administration of justice.”<sup>277</sup> Stevenson reaches a similar conclusion.<sup>278</sup>

A second set of advantages would result if this revivifying of the “importance of the defendant’s testimony” factor were to lead to a greater proportion of defendants testifying, whether they would otherwise have resolved their cases through guilty pleas or through trials at which they sat mute. Decreasing the huge proportion of cases that are resolved through guilty pleas in favor of an increased proportion of cases that go to trial would help to ensure that the government’s evidence and conduct are subjected to a greater level of scrutiny.<sup>279</sup> Decreasing the large proportion of trials at which defendants sit mute, in favor of an increased proportion of trials at which they offer narratives, offers a number of advantages. First, despite instructions to the contrary,

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<sup>275</sup> See Rapping, 16 NYU J Legis & Pub Pol at 1022–23 (cited in note 180); Ronald J. Tabak, *The Continuing Role of Race in Capital Cases, Notwithstanding President Obama's Election*, 37 N Ky L Rev 243, 268–69 (2010) (describing suggestions by Stevenson that “counsel should make change of venue motions based on studies . . . which find that certain types of people are likely to view African Americans as prone to engage in criminal conduct; automatic but implicit associations of African Americans with other negative characteristics; and polling data,” and noting that, for example, “defense counsel could argue that the defendant would have to overcome a presumption of guilt for young men of color”).

<sup>276</sup> See Rapping, 16 NYU J Legis & Pub Pol at 1023 (cited in note 180) (“[E]ven if trial courts are reluctant in the short term to allow defense counsel to pursue all of these strategies, through the process of demanding and litigating these requests, counsel can begin to educate the court and raise awareness of this concept.”); id (“While the Supreme Court has made it difficult to raise the issue of race in the litigation of criminal procedure, [implicit-racial-bias] studies may provide a new avenue through which to do so.”) (citation omitted); id at 1027 (urging defenders to “look for openings to raise [implicit racial bias] broadly in their motions practice”).

<sup>277</sup> Id at 1029–30 (discussing the example of motions asking that potential jurors take the IAT, a computerized tool designed to raise awareness of implicit bias).

<sup>278</sup> Tabak, 37 N Ky L Rev at 269 (cited in note 275) (describing Stevenson’s argument that “even if such a motion loses, by making and litigating the motion you may affect the dynamics and the postures, attitudes, and thinking of everybody involved, including the District Attorney and the judge”). The University of North Carolina at Chapel Hill School of Government has created a manual for comprehensive litigation of racial-bias issues in North Carolina. See generally Alyson A. Grine and Emily Coward, *Raising Issues of Race in North Carolina Criminal Cases* (UNC School of Government, 2014), archived at <http://perma.cc/FL9P-B46A>.

<sup>279</sup> See text accompanying note 148.

invocations of the right to silence appear to lead to assumptions of guilt.<sup>280</sup> Second, as Professor Blume's research into exonerees shows, stories of innocence are currently being kept from fact finders.<sup>281</sup> Third, whether or not defendants have stories of innocence to offer, they have details of their lives to offer that may be essential to a fair resolution of the case and that may be a useful part of the jurors' education.<sup>282</sup> The life experiences of those who are able to sit on a jury may well be far removed from those whose fates they determine.<sup>283</sup> A failure to understand the life experiences of others may destroy both the ideal of a jury of one's peers and the reality of a fair judgment.<sup>284</sup> One of the leading scholars of the law of evidence—Judge Weinstein<sup>285</sup>—concluded that he would be more likely to bring a fair resolution to a conspiracy case if he visited the housing project at which the conspiracy was alleged to have occurred.<sup>286</sup> Defendant testimony can offer analogous glimpses of a different life that may assist fact finders—not only as they make their decisions in the courthouse but also as they play their parts in the broader citizenry, offering their contributions to policy debates.<sup>287</sup>

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<sup>280</sup> See text accompanying notes 149–51.

<sup>281</sup> See text accompanying notes 155–56.

<sup>282</sup> See Nancy S. Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 Fordham L Rev 1683, 1717 (2006).

<sup>283</sup> See text accompanying notes 197–98.

<sup>284</sup> See Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 Minn L Rev 592, 644–45 (2013).

<sup>285</sup> See Joseph M. McLaughlin, Jack B. Weinstein, and Margaret A. Berger, 1 *Weinstein's Federal Evidence: Commentary on Rules of Evidence for the United States Courts* xxvii (Matthew Bender 2d ed 2014).

<sup>286</sup> This was a case resolved by plea and thus without defendant testimony. See Tom Hays, *Veteran Federal Judge Visits Drug Gang's NYC Turf* (USA Today, Mar 5, 2011), archived at <http://perma.cc/7C37-KCV4> (“Weinstein, who’s overseeing the case against the crack cocaine crew, had decided it was important to leave his chambers, don his dark overcoat and fedora and visit the defendants’ former turf.”); *id.* (containing the comment that Weinstein is “unusual”).

<sup>287</sup> See Ghandnoosh, *Race and Punishment* at \*6 (cited in note 211) (“Black Americans’ negative encounters with the criminal justice system and greater recognition of the root causes of crime temper their preference for punitive policies. White Americans, by contrast, have less frequent and more positive criminal justice contact, [and] endorse more individualistic causal explanations of crime.”). These gaps in experiences and resulting attitudes could, in some circumstances, be addressed by defendant testimony. See Roberts, 98 Minn L Rev at 644 (cited in note 284) (“Making social realities understood is a step toward their reform.”).



## IV. RESPONSES TO POTENTIAL OBJECTIONS

This Part addresses four potential objections to this Article's proposals. The first is that developments in the doctrine have made the "importance of the defendant's testimony" factor moot, and thus that it is not available as a heading under which individuation arguments can be made. The other three objections all assume that the factor is available for such arguments, but they question whether its use for such arguments is worthwhile. Specifically, they ask whether there are other means of providing individuating information that would be just as effective as defendant narratives, whether the proposal's benefits are outweighed by the risks, and whether this change would affect so many cases as to place an undue burden on the prosecution.

## A. Case Law Has Not Mooted the Factor

Some commentators and judges are likely to resist the notion that content can be reinserted into the "importance of the defendant's testimony" factor, since they view that factor as having become moot in light of the Supreme Court's 1984 decision in *Luce*. They point out that as a result of *Luce*, a defendant has no right to bring an appeal based on improper impeachment unless the defendant testifies.<sup>288</sup> They argue that since the defendant will already have testified by the time a viable appeal is mounted, the "importance of the defendant's testimony" factor can no longer encompass the question whether permitting impeachment will chill testimony.<sup>289</sup>

The claims of mootness are misguided. First, several states do not follow *Luce*.<sup>290</sup> Second, even in those that do, and in the federal system, trial judges can still ask the question that this

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<sup>288</sup> *Luce*, 469 US at 43.

<sup>289</sup> See text accompanying note 102.

<sup>290</sup> See, for example, *Wallace v State*, 160 S3d 1184, 1187 (Miss App 2014); *State v Swanson*, 707 NW2d 645, 654 (Minn 2006); *State v Whitehead*, 517 A2d 373, 377 (NJ 1986); *People v Contreras*, 108 AD2d 627, 628 (NY App 1985); *Commonwealth v Richardson*, 500 A2d 1200, 1203–04 (Pa Super 1985); *State v McClure*, 692 P2d 579, 584 n 4 (Or 1984) ("We respectfully disagree [with *Luce*]. We prefer the motion in limine practice suggested in our opinion."). States that do follow *Luce* include Alaska, Arizona, Connecticut, Delaware, Iowa, Michigan, North Carolina, Rhode Island, South Carolina, and Utah. See, for example, *State v Wickham*, 796 P2d 1354, 1357 (Alaska 1990); *State v Allie*, 710 P2d 430, 437 (Ariz 1985); *State v Harrell*, 506 A2d 1041, 1046 (Conn 1986); *Fennell v State*, 691 A2d 624, 626 (Del 1997); *State v Derby*, 800 NW2d 52, 58–60 (Iowa 2011); *People v Finley*, 431 NW2d 19, 25 (Mich 1988); *State v Hunt*, 475 SE2d 722, 726–27 (NC App 1996); *State v Silvia*, 898 A2d 707, 720 (RI 2006); *State v Glenn*, 330 SE2d 285, 286 (SC 1985); *State v Gentry*, 747 P2d 1032, 1036 (Utah 1987).

Article urges should be asked: Would permitting impeachment chill defendant testimony that is important for the fact finder to hear?

It is certainly true that one could read the language of *Luce*—“We hold that to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify”<sup>291</sup>—as prohibiting any sort of objection to impeachment before defendant testimony has begun. Indeed, one district court has settled on this interpretation, refusing to make an in limine ruling about prior conviction impeachment.<sup>292</sup> This interpretation is flawed, however, and it has not won out: *Luce* itself permitted the *making* of an in limine motion, but it simply denied that there was a right to appellate review when the defendant did not testify.<sup>293</sup> The district court in *United States v LaTray*<sup>294</sup> considered, but rightly rejected, a reading of *Luce* that would mean that no motion on impeachment could be made in advance of defendant testimony,<sup>295</sup> and numerous other decisions are in accord. Some courts do not require that the defendant testify before they will issue a final ruling on whether impeachment will be permitted,<sup>296</sup> and some go as far as to *favor* pretrial resolution of this issue, stating that to delay a ruling would unfairly prejudice the defendant.<sup>297</sup> Judge Weinstein recommends

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<sup>291</sup> *Luce*, 469 US at 43.

<sup>292</sup> *United States v Chew*, 1993 WL 38400, \*2 (ED Pa) (citing *Luce* in support of a pretrial decision to refuse to rule on the admissibility of the defendant’s prior convictions under FRE 609(a) when the defendant had not yet taken the stand). See also *United States v Campbell*, 2009 WL 595980, \*5 (ED Tenn) (“[A]ny ruling on the admissibility of such evidence, [must] necessarily await its attempted admission, if any, at trial and arguments at that time.”).

<sup>293</sup> *Luce*, 469 US at 41 & n 4. See also *United States v LaTray*, 1989 WL 143355, \*3 (NDNY).

<sup>294</sup> 1989 WL 143355 (NDNY).

<sup>295</sup> *Id* at \*3.

<sup>296</sup> See, for example, *United States v Smith*, 2006 WL 618843, \*3 (ED Pa) (granting a pretrial motion to preclude impeachment by prior conviction); *United States v Coleman*, 2011 WL 2619543, \*10 (D NJ) (deferring a ruling on the admissibility of prior convictions until the defendant “either announce[d] he intend[ed] to testify, or actually testifie[d]”).

<sup>297</sup> See, for example, *United States v Savoy*, 889 F Supp 2d 78, 118 (DDC 2012) (“Pre-trial determination of impeachment questions is generally preferable so that the parties may make strategic decisions accordingly.”); *United States v Gatto*, 746 F Supp 432, 474 (D NJ 1990), *revd* on other grounds, 924 F2d 491 (3d Cir 1991) (noting that “under Rule 12(e) of the Federal Rules of Criminal Procedure, this court must determine [the defendant’s] pretrial motion before trial, unless the court, for good cause, orders that it be deferred for determination at the trial,” and finding no good cause) (quotation marks omitted); *United States v D’Agata*, 646 F Supp 390, 393 (ED Pa 1986):

Weighing these factors, I cannot bring myself to deny D’Agata a fair opportunity to defend himself by testifying, if he wishes to do so. That would be the practical

that a pretrial determination about the admissibility of prior convictions for impeachment be made “whenever possible.”<sup>298</sup> In addition, even if trial judges are unwilling to declare a defendant’s testimony important before they know its content,<sup>299</sup> this Article’s proposal is that, regardless of content, defendants can argue that their testimony is important as a means of combating implicit stereotyping. Thus, the factor would become easier to assess, even in advance of testimony.

#### B. The Use of This Factor for Individuation Arguments Is Worthwhile

Even once it is shown that this factor is available for the purpose laid out in this Article, various arguments could be made that its use for this purpose is not worthwhile. This Section responds to three variants of this objection.

##### 1. Defendant testimony is one of several important ways of attempting individuation.

Even if one accepts the potential benefits of individuation as a means of combating implicit stereotyping, the argument might be made that individuation can be accomplished just as effectively through means other than defendant testimony, and therefore that no adjustments need to be made to the impeachment analysis. Perhaps, for example, testimony about the defendant from other witnesses, or the defendant’s own alleged statements, could serve the purpose equally well.

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effect of allowing this impeachment. . . . While I could probably wait until D’Agata testified to decide this issue, it would be unfair to do so. The uncertainty would chill his exercising the right to testify.

See also *United States v Graves*, 2006 WL 1997378, \*2 (ED Pa) (“Although the Court cannot anticipate what the substance of this testimony might be, the Court concludes that [the importance] factor weighs strongly against admitting the 1993 conviction.”); *United States v O’Driscoll*, 2003 WL 1401891, \*2 (MD Pa) (“We cannot determine at this time the importance of O’Driscoll’s testimony. However, we assume that O’Driscoll and his counsel consider it important that he testify. That factor weighs in favor of exclusion.”).

<sup>298</sup> McLaughlin, Weinstein, and Berger, 4 *Weinstein’s Federal Evidence* at § 609.22 at 609-67 (cited in note 25) (“The admissibility of convictions should be determined before trial whenever possible. An advance ruling will assist counsel presenting the witness whose conviction will be introduced to make appropriate tactical decisions, including, for example, how to handle the opening statement or whether the witness should testify.”) (citation omitted).

<sup>299</sup> See, for example, *Campbell*, 2009 WL 595980 at \*5. See also text accompanying notes 106–09.

This Article is not asserting that in every case—or even in every case in which implicit stereotypes threaten the presumption of innocence—defendants should testify. It is certainly true that, at least according to conventional wisdom, nothing brings the defendant to life as an individual as effectively as his or her testimony,<sup>300</sup> and individuating information other than defendant testimony may struggle to meet the relevance requirement.<sup>301</sup> But defense attorneys do and should seek other means of bringing their clients to life as individuals in the courtroom,<sup>302</sup> whether through voir dire,<sup>303</sup> through evidence other than defendant testimony,<sup>304</sup> or through their interactions with their clients.<sup>305</sup> And social-cognition research supports the idea that individuation can be accomplished through means other than an individual narrative from a stereotyped individual. In some studies, for example, an individual narrative *about*, rather than *from*, a stereotyped individual helped to lessen the effects of stereotypes on the participants' judgments of that individual.<sup>306</sup> Thus,

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<sup>300</sup> See Natapoff, 80 NYU L Rev at 1451–52 (cited in note 88).

<sup>301</sup> See FRE 401.

<sup>302</sup> See, for example, Rapping, 16 NYU J Legis & Pub Pol at 1023–42 (cited in note 180) (offering examples of ways in which creative defense lawyers can address implicit racial bias, including “motions practice, voir dire, use of experts, narrative, jury instructions, and sentencing advocacy”).

<sup>303</sup> See H. Mitchell Caldwell and Adrienne M. Hewitt, *Shades of Guilt: Combating the Continuing Influence upon Jury Selection of Racial Stereotyping in Post-Batson Trials*, 38 Am J Trial Advoc 67, 103–16 (2014) (offering techniques available during voir dire, the opening statement, and the direct examination of the defendant that can be used to combat racial stereotypes, in light of the fact that “the optimal method of breaking down a stereotypic view of an outgroup member by members of an ingroup, is to identify individual aspects of the outgroup member’s character that exist beyond racial identification”); *id.* at 112–13 (providing a sample direct examination that aims “to identify individual aspects of the outgroup member’s character beyond any [ ] racial identification” and, specifically, that “probes aspects of [the] client’s life that help identify [him] as an individual rather than just as a black male”).

<sup>304</sup> See Josephine Ross, “*He Looks Guilty*”: *Reforming Good Character Evidence to Undercut the Presumption of Guilt*, 65 U Pitt L Rev 227, 257–58 (2004) (discussing the value of character evidence introduced through other witnesses).

<sup>305</sup> See *id.* at 257.

<sup>306</sup> See, for example, Kenneth R. Chapman, Donald P. Tashkin, and David J. Pye, *Gender Bias in the Diagnosis of COPD*, 119 Chest 1691, 1692–93 (2001) (finding that gender differences in the diagnosis of chronic obstructive pulmonary disease, a disease more commonly diagnosed in men, were greatly decreased when physicians were provided with objective spirometry data in addition to patient-reported symptoms); Locksley, et al., 39 J Personality & Soc Psychology at 826–31 (cited in note 254) (describing a study in which participants were provided with a brief description of a single behavioral event, and in which the effect of sex stereotypes on trait attributions virtually disappeared when that brief description contained relevant information).

defendant testimony is not the only way of attempting individuation but is an important tool in an important tool set.

## 2. The risks do not outweigh the benefits.

Another possible objection is that this proposal offers only limited benefit, and that the benefit is outweighed by the risk. To start with the limited benefit, it is undeniable that neither this proposal nor any other can be a panacea. Stereotypes are enforced daily, in a variety of ways: as Professor Kang puts it, they “come from our experiences with other people, some of them direct (i.e., real-world encounters) but most of them vicarious (i.e., relayed to us through stories, books, movies, media, and culture).”<sup>307</sup> They run rampant in the criminal courtroom.<sup>308</sup> The proposals in this Article are envisaged as part of a multifaceted strategy to combat implicit stereotypes in criminal trials.<sup>309</sup> For example, the provision of individuating information is most likely to succeed in combating implicit stereotyping when it is combined with other techniques, such as the provision of information about implicit bias<sup>310</sup> and efforts to inspire internal motivation to combat it.<sup>311</sup> An earlier article by this author laid out a possible method by which juror education might both impart information about implicit bias and inspire internal motivation to address it,<sup>312</sup> and the proposals in this Article are presented as a complement to—rather than a substitute for—that educational proposal.<sup>313</sup>

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<sup>307</sup> Kang, *Implicit Bias* at \*1 (cited in note 159).

<sup>308</sup> See, for example, Roberts, 44 Conn L Rev at 835–38 (cited in note 161) (describing how judges, defense lawyers, prosecutors, and jury members harbor implicit biases).

<sup>309</sup> See Rapping, 16 NYU J Legis & Pub Pol at 1042 (cited in note 180) (“Educating people in the system about their implicit biases and hoping they will be motivated to address them is a long term strategy, and only one part of a badly needed, comprehensive solution.”).

<sup>310</sup> See Fazio and Olson, 54 Ann Rev Psychology at 319 (cited in note 165) (“[M]odels of correction processes require that individuals be aware of a potential bias in order to engage in effortful correction.”) (citation omitted).

<sup>311</sup> See Monteith, Sherman, and Devine, 2 Personality & Soc Psychology Rev at 72 (cited in note 208) (“One factor that strongly influences the likelihood of individuation is the perceiver’s degree of motivation to form accurate, nonstereotypical impressions.”); Borgida, Rudman, and Manteufel, 51 J Soc Issues at 187 (cited in note 205) (“[U]nless perceivers are especially motivated to attend carefully to target persons, stereotypes seem to have priority over individuating information in forming impressions of other people.”).

<sup>312</sup> Roberts, 44 Conn L Rev at 857–75 (cited in note 161).

<sup>313</sup> For a discussion of similarly complementary proposals, see Devine, et al, 48 J Experimental Soc Psychology at 1270–71 (cited in note 233) (exploring a multifaceted

As for risk, skeptics may worry that even though stereotypes affect assessments of silent defendants, they may wreak still more havoc if defendants talk: everything that defendants say, and the ways in which they say it, could potentially inspire or confirm stereotypes.<sup>314</sup> It is certainly true that individuating information is not the uncomplicated cure-all that some of the literature has suggested.<sup>315</sup> Research does indeed indicate that stereotypes can affect assessments of individuating information just as they affect assessments of individuals<sup>316</sup> and that this is particularly true when the individuating information is ambiguous.<sup>317</sup> In addition, if individuating information about a stereotyped individual reveals areas of disagreement between that individual and the audience, stereotypes can return to mind and may shape

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intervention to help people reduce implicit biases, in which the various strategies, including individuation, are “mutually reinforcing”). See also Nelson, Acker, and Manis, 32 *J Experimental Soc Psychology* at 35–36 (cited in note 230) (“We suspect that extensive exposure to vivid and diagnostic individuating information may eventually weaken the effect of a stereotype. This transformation may be encouraged if the social perceiver is aware of the potential power of stereotypes to guide his or her thinking in undesirable ways.”).

<sup>314</sup> See Glick, Zion, and Nelson, 55 *J Personality & Soc Psychology* at 179 (cited in note 237) (noting that “[i]ndividuating information that is consistent with stereotypes about the social group to which an [individual] belongs may lead others to perceive that individual as a prototypical representative” of that group and that, since the prototype “may be a more extreme version” of the general stereotype, “[t]his type of individuating information may be counter-productive”).

<sup>315</sup> See, for example, Laurie A. Rudman, Peter Glick, and Julie E. Phelan, *From the Laboratory to the Bench: Gender Stereotyping Research in the Courtroom*, in Eugene Borgida and Susan T. Fiske, eds, *Beyond Common Sense: Psychological Science in the Courtroom* 83, 95 (Blackwell 2008) (“[T]argets are seldom ‘purely’ personalized (i.e., judged without reference to stereotypes), in part because gender categories influence how perceivers elicit, interpret, and recall individuating information.”); Borgida, Rudman, and Manteufel, 51 *J Soc Issues* at 184 (cited in note 205) (describing research that “disputes the earlier view that stereotypes are eliminated in the face of *any* individuating information”) (emphasis added).

<sup>316</sup> See Borgida, Rudman, and Manteufel, 51 *J Soc Issues* at 185 (cited in note 205) (“The heuristic approach [ ] predicts that categorical information will automatically, perhaps even unintentionally, influence social judgments despite the presence of individuating information because the personal data available will be interpreted differently, depending on the stereotype evoked.”). See also Kunda and Sherman-Williams, 19 *Personality & Soc Psychology Bull* at 91 (cited in note 207) (“Even the unconscious activation of a negative stereotype of Blacks may affect the subsequent interpretation of ambiguously aggressive behavior.”); *id* at 98 (“The fact that impressions of individuals are often based solely on individuating information does not necessarily mean that, in such cases, inaccurate stereotypes will have no impact on judgment. They may still affect impressions through the construal of individuating information.”).

<sup>317</sup> See Kunda and Sherman-Williams, 19 *Personality & Soc Psychology Bull* at 97 (cited in note 207) (“Subjects given ambiguous information, whose impressions were affected by stereotypes, [ ] relied only on the individuating information. But the individuating information that they had in mind was construed differently depending on the stereotype.”).

impressions.<sup>318</sup> This Article does not argue that defendants should testify in every case in which they are the target of stereotypes that threaten the presumption of innocence or the right to a fair trial. Rather, it proposes that the “importance of the defendant’s testimony” factor be restored as an avenue for arguments that defendant testimony can aid truth-finding, and it offers individuation as one topic that such arguments could address. Potential benefits in this context will always be partial, but they outweigh the risks.

3. This proposal does not impose an unfair burden on the prosecution.

A final objection that might be made is that even though the change proposed is a modest one in terms of its operability—no new structures or factors need to be implemented—it has excessive reach in that too many trials will be affected. First, a large proportion of criminal defendants have felony records.<sup>319</sup> Second, prosecutors strive to use defendants’ prior convictions as impeachment material in the vast bulk of cases that offer them that opportunity.<sup>320</sup> Third, defendants will be able to argue in a great many cases that they are likely to be the targets of negative implicit stereotypes.<sup>321</sup> It might be argued that making it easier for a large proportion of defendants to testify, and thus, potentially, to be acquitted,<sup>322</sup> would impose an unfair burden on the prosecution.

First, it is no bad thing if a more robust set of arguments opposing impeachment by prior conviction gives prosecutors pause before they proffer prior convictions for this purpose. Prosecutors tend to take every opportunity that they can to seek

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<sup>318</sup> See Kunda, et al, 82 *J Personality & Soc Psychology* at 289 (cited in note 240) (“[T]he Black stereotype was activated for participants who had disagreed with the Black person but not for participants who had agreed with him.”).

<sup>319</sup> See Cohen and Kyckelhahn, *Felony Defendants* at \*1 (cited in note 146) (indicating that in 2006, 43 percent of state felony defendants in the seventy-five largest counties in the country had a felony-conviction record).

<sup>320</sup> See Natapoff, 80 *NYU L Rev* at 1461 (cited in note 88) (noting that over 70 percent of defendants who testify are subjected to prior conviction impeachment).

<sup>321</sup> As stated earlier, implicit biases exist along multiple dimensions. See notes 18, 274; Roberts, 44 *Conn L Rev* at 849 (cited in note 161).

<sup>322</sup> See Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 *UCLA L Rev* 637, 666 (1991) (discussing a subset of cases in which “failure to take the stand is utterly disastrous, spelling the difference between conviction and acquittal”).

impeachment by prior conviction.<sup>323</sup> Some have even suggested that prosecutors may hope that the fact finder will use such convictions for improper purposes.<sup>324</sup> As explored in prior work by this author, the use of prior convictions to impeach criminal defendants brings more harm than benefit to the fact-finding process, and the harm should lead prosecutors to inquire whether the frequent proffering of prior convictions is in accord with their ethical duty to do justice.<sup>325</sup>

Second, it is also no bad thing if this Article's proposal disrupts the ease with which those who are the targets of implicit racial stereotypes are convicted. Convictions are viewed as the benchmark of successful prosecution,<sup>326</sup> and obstacles in the path to conviction can help shift prosecutorial incentives, or at least raise prosecutorial awareness.<sup>327</sup> It is no bad thing, in other words, that a proposal such as this may heighten awareness of the fact that current patterns of prosecution track the historical lines of subordination that lie at the root of implicit racial stereotypes.<sup>328</sup> It is no bad thing that a proposal such as this may play a part in helping to shift the incentives operating on prosecutors, the most powerful participants in the criminal-justice system,<sup>329</sup> as they make decisions about who will be prosecuted and

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<sup>323</sup> See text accompanying notes 133–34, 320.

<sup>324</sup> See, for example, Sherry F. Colb, "Whodunit" versus "What Was Done": When to Admit Character Evidence in Criminal Cases, 79 NC L Rev 939, 961–62 (2001) ("It may indeed be the hope of unfair prejudice that motivates the prosecution to introduce such evidence."); Bellin, 42 UC Davis L Rev at 296 (cited in note 101) (discussing scholarship asserting that prosecutors intend that the evidence be used for propensity purposes).

<sup>325</sup> See Roberts, 55 BC L Rev at 600–03 (cited in note 87). See also *Berger v United States*, 295 US 78, 88 (1935) (stating that the interest of the government in a criminal prosecution "is not that it shall win a case, but that justice shall be done").

<sup>326</sup> See Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 Cardozo L Rev 2089, 2091 (2010) ("[C]onvictions are the lodestar by which prosecutors tend to be judged."); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 Vand L Rev 45, 58–59 (1991) ("[B]ecause [a prosecutor's] success is measured by her conviction rate, she may be tempted to ignore the rights of defendants, victims, or the community in order to obtain pleas or guilty verdicts.") (citation omitted); Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 Tex L Rev 629, 647 (1972) ("[A]lthough it has often been contended that policemen 'count' arrests and not convictions, the same thing cannot be said of prosecutors.").

<sup>327</sup> For an exploration of the influence of litigation costs on prosecutorial behavior, see Alschuler, 50 Tex L Rev at 646–47 (cited in note 326). See also Roberts, 98 Minn L Rev at 637–38 (cited in note 284) (discussing proposals to adjust prosecutorial incentives in an effort to bring about reform and increase awareness).

<sup>328</sup> See Roberts, 98 Minn L Rev at 637–38 (cited in note 284).

<sup>329</sup> See Alexandra Natapoff, Gideon *Skepticism*, 70 Wash & Lee L Rev 1049, 1078–79 (2013) (noting that the prosecutor "holds many if not most of the cards, and that



brought to trial. If a blossoming of persuasive arguments about how the testimony of criminal defendants is vitally important in all those many cases in which the defendants are stereotyped as criminally inclined adds a little impetus to the urgency of addressing the causes of disparity in prosecution,<sup>330</sup> then so much the better.

### CONCLUSION

Prior conviction impeachment analysis has lost sight of one of its foundational factors: the importance of the defendant's testimony as a means of enhancing the truth-finding function of a trial. Confusion in this factor's application has left it, in the eyes of many, a distraction from the real issues at trial. This factor, however, is more central than ever. Fact finders are now known to harbor implicit racial stereotypes that in many instances threaten the presumption of innocence and that individuating information offers some hope of ameliorating. Rather than allowing the factor to remain dormant and allowing defendants to sit mute because of fears of the impeachment that has become the default, this Article urges that the factor be revived. If courts consider the importance of the defendant's testimony as a means of combating implicit stereotypes, both truth-finding and the presumption of innocence become a little more achievable.

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therefore it makes sense to impose on those powerful players greater responsibilities for the overall integrity of the system”).

<sup>330</sup> See Besiki Kutateladze, Whitney Tymas, and Mary Crowley, *Race and Prosecution in Manhattan* \*3 (Vera Institute of Justice, July 2014), archived at <http://perma.cc/RCU6-ZFXN> (finding race to be a factor in case outcomes). Note also the influence that prosecutors can exercise over arrest patterns, with a goal of reducing the racial disparity that currently exists therein. See Ghandnoosh, *Race and Punishment* at \*38 (cited in note 211) (recommending more-equitable enforcement policies, particularly for drug crimes); Heath, *Racial Gap in U.S. Arrest Rates* (cited in note 270); NYU School of Law, *New Frontiers in Race and Criminal Justice—Panel 2: Race and Prosecution* 29:58–31:07 (Apr 17, 2012), online at [http://www.youtube.com/watch?v=qUtgqDaJN\\_g#t=29m58s](http://www.youtube.com/watch?v=qUtgqDaJN_g#t=29m58s) (visited Nov 21, 2015) (Perma archive unavailable) (showing Whitney Tymas saying: “Prosecutors need to understand the real leadership that they can exercise when it comes to not endorsing all police action. . . . [I]t’s really OK to tell a police officer, ‘I’m not . . . prosecuting this case.’ . . . [P]rosecutors can say no, and . . . not just be case processors—really be leaders.”); Delgado, 80 Va L Rev at 530 (cited in note 270) (describing racial disparities in the criminal-justice system).