

Implicit Stereotyping as Unfair Prejudice in Evidence Law

A Response to Anna Roberts,
Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight against Implicit Stereotyping,
83 U Chi L Rev 835 (2016).

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INTRODUCTION

Evidence law seeks to improve the accuracy of the fact-finding process in jury trials. The system is human and therefore imperfect.¹ Juries sometimes convict the innocent and sometimes acquit the guilty. The goal of evidence law is to minimize these mistakes, at least as much as humanly possible.

Evidence law functions largely through exclusionary rules, which prevent juries from hearing certain information. Exclusionary rules generally reflect jury mistrust. They are based on assumptions that jurors are sometimes irrational and biased, and therefore cannot be trusted with complete information. These assumptions are not always credible, and very often they are not supported by empirical evidence. Some of the resulting exclusionary rules are rank fictions. Other rules are rough compromises that, while not optimal in each individual application, are nonetheless justified on the whole because they reflect a more or less sensible trade-off between competing values.² It is not always easy to distinguish the rank fictions from the rough but sensible compromises.

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¹ David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 Stan L Rev 407, 453–54 (2013).

² See *Michelson v United States*, 335 US 469, 486 (1948):

We concur in the general opinion of courts, textwriters and the profession that much of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counterprivilege to the other. But somehow it has proved a workable even if clumsy system.

In her excellent new article, Professor Anna Roberts attacks existing doctrine regarding the application of Rule 609, which governs admissibility of prior convictions for impeachment.³ She argues that Rule 609, at least as it has been interpreted by courts, has turned into a disaster of evidence law. Resting on fictional assumptions, courts let far too many prior convictions in, especially against criminal defendants. Doing so seriously distorts the accuracy of the fact-finding process, in part by discouraging defendants from testifying. In order to remedy this problem, she proposes that courts should recognize implicit racial bias as a type of unfair prejudice under Rule 609 and therefore exclude more convictions.⁴

Along with the existing literature on Rule 609, Roberts has demonstrated beyond peradventure that the case law is indeed a disaster. She has also added the important new insight that part of the problem with Rule 609 is the implicit racial bias that many jurors bring with them to the courtroom.

Nonetheless, I am not convinced that her proposed remedy—recognizing implicit bias as a source of unfair prejudice—is sound as a matter of evidence law. That remedy, if accepted, cannot be easily cabined to Rule 609. Roberts’s arguments, if taken to their logical conclusion, threaten to disrupt other rules as well. They also threaten to undermine some of the rough compromises that, on the whole, benefit criminal defendants of all races. In short, her arguments may prove too much.

As I describe below, Rule 609 is not a stand-alone provision of evidence law. It inherently works together with other provisions, including Rule 403 and Rule 404. In part as a result, Roberts’s arguments cannot be easily limited to the context of prior convictions admitted against criminal defendants who testify. First, recognizing implicit stereotyping as a type of unfair prejudice would affect Rule 609 in other ways, potentially leading to greater admissibility of convictions in some circumstances. Second, recognizing implicit stereotyping as a type of unfair prejudice would also necessarily affect Rule 403 applications. Third, and most broadly, Roberts’s focus on individuation threatens to undermine the character evidence rule itself.

³ See generally Anna Roberts, *Reclaiming the Importance of the Defendant’s Testimony: Prior Conviction Impeachment and the Fight against Implicit Stereotyping*, 83 U Chi L Rev 835 (2016).

⁴ *Id.* at 879–80.

I. THE OPERATION OF RULE 609

A. Rule 609's Relation to Other Rules of Evidence

Rule 609 does not exist in isolation. It is part of an integrated system of evidence rules. To understand how Professor Roberts's proposal might affect other rules, it is first necessary to understand how Rule 609 functions in the system. Rule 609 is an exception to Rule 404, and it is also a particularized application of Rule 403.

Start with the basics. Rule 402 is the foundational structural rule in the Federal Rules of Evidence. It states that relevant evidence is admissible unless otherwise excluded.⁵ That general rule of admissibility is then subject to numerous exceptions—most of the other important rules of evidence define situations when relevant evidence may be excluded. Rule 403 is the general, catchall rule of exclusion. It states that relevant evidence may be excluded if the potential for unfair prejudice or other dangers substantially outweighs the potential probative value of the evidence.⁶ Rule 403 prescribes a balancing test, a cost-benefit analysis.

One can imagine a simplified system consisting only of Rules 402 and 403 (along with Rule 401, defining relevance). And in fact, at some level, most evidence admitted at trials is governed by that simple system. But for better or worse, the rules get more complicated from there with the addition of other particularized rules of exclusion.

Rule 404 is a more particular and focused rule of exclusion. It states that character evidence is inadmissible unless otherwise allowed.⁷ Rule 609, through the exception contained in Rule 404(a)(3), allows the admission of a certain kind of character evidence—namely, prior crimes to show character for dishonesty.⁸ Rule 609 is thus an exception to Rule 404. More specifically, it is an exception to Rule 404's general prohibition of character evidence, which is itself an exception to Rule 402's general rule of admissibility of all relevant evidence. In other words, Rule 609 is an exception to an exception. It takes evidence that would otherwise be inadmissible under Rule 404 and places it back into admissibility.

⁵ FRE 402.

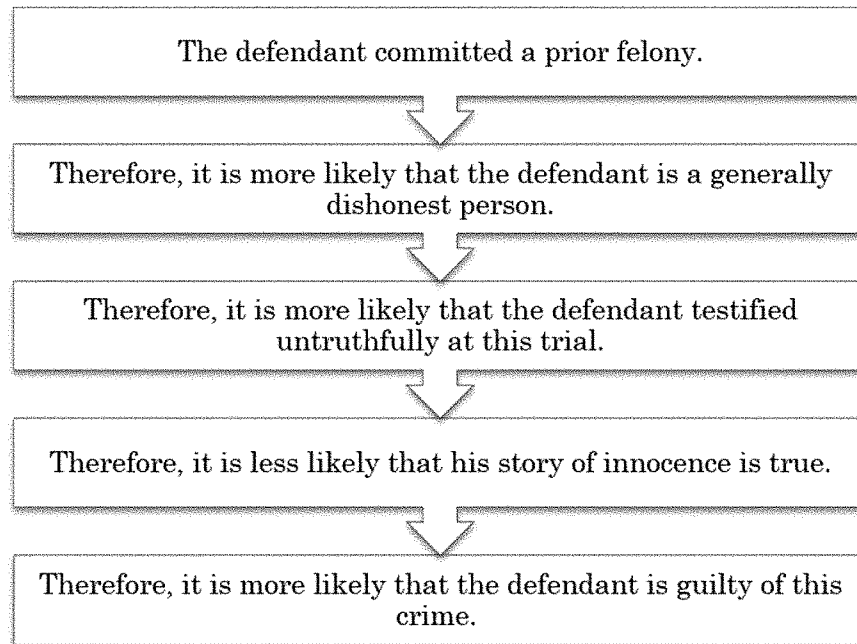
⁶ FRE 403.

⁷ FRE 404.

⁸ FRE 609(a).

The text of Rule 609 mandates a balancing test between probative value and unfair prejudice.⁹ That should sound familiar—it is borrowed from Rule 403.¹⁰ For most witnesses, criminal convictions are admissible subject to a straight Rule 403 test.¹¹ For criminal defendants who take the stand, criminal convictions are admissible subject to a modified Rule 403 test.¹² But fundamentally, what Rule 609 does is mandate a Rule 403–style balancing test for prior convictions. In essence, Rule 609 takes prior convictions out of Rule 404’s exclusionary realm and throws them back into the simple system governed by Rules 402 and 403, the foundational rules. Rule 609 is a particularized application of Rule 403.

In the context of prior convictions, that balancing test takes a usual form, at least when applied to criminal defendant witnesses. The permissible chain of inferences functions like this:



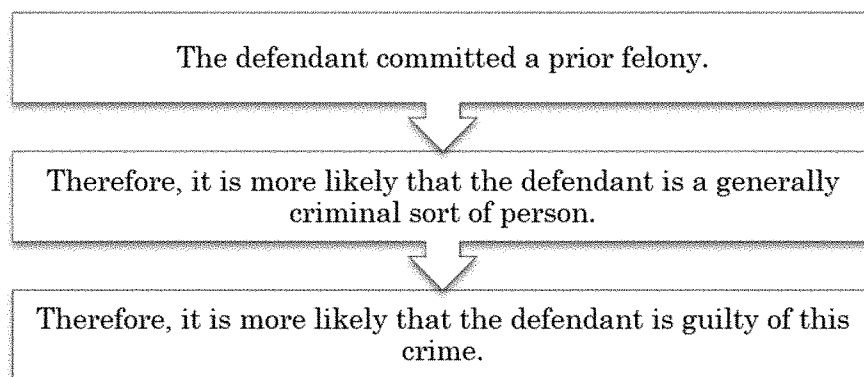
⁹ FRE 609(a)(1)(B) (“[The evidence] must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant.”).

¹⁰ See FRE 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice.”).

¹¹ FRE 609(a)(1)(A) (stating that evidence of certain prior criminal convictions “must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant”).

¹² FRE 609(a)(1)(B).

The impermissible chain of inferences runs like this:



The former chain of inferences is the legitimate probative value of a prior conviction, and the latter chain of inferences is the primary potential for unfair prejudice.¹³ As convoluted as the doctrine surrounding Rule 609 has become, the rule itself simply mandates a balancing test. Judges are supposed to weigh the likelihood that the jury will stick with the permissible inference against the risk that the jury will be tempted by the impermissible inference.¹⁴ While the inquiry does not always yield perfectly clear answers, it is conceptually the same as any other Rule 403 balancing inquiry.

¹³ See *United States v Harding*, 525 F2d 84, 89 (7th Cir 1975).

¹⁴ There is substantial empirical evidence that juries do not follow limiting instructions in this area. See Sally Lloyd-Bostock, *The Effects on Juries of Hearing about the Defendant's Previous Criminal Record: A Simulation Study*, 2000 Crim L Rev 734, 754 ("It seems that the standard judicial instruction is not only hard to understand, but also asks jurors to confine their reasoning to a form that does not come at all naturally."); Edith Greene and Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 L & Hum Behav 67, 76 (1995) (finding that "limiting instructions had little effect on jurors' use" of prior conviction evidence); E. Gil Clary and David R. Shaffer, *Effects of Evidence Withholding and a Defendant's Prior Record on Juridic Decisions*, 112 J Soc Psychology 237, 239 (1980) ("[J]urors often use information about prior legal history for purposes other than establishing the defendant's credibility as a witness."); Valerie P. Hans and Anthony N. Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 Crim L Q 235, 243 (1976). See also *Krulewitch v United States*, 336 US 440, 453 (1949) (Jackson concurring) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury all practicing lawyers know to be unmitigated fiction.") (citation omitted).

B. The *Luck-Gordon* Test

As Roberts details,¹⁵ the operation of Rule 609 has come in practice to be governed by the *Luck-Gordon* test,¹⁶ or some variant thereof, in most American jurisdictions. The *Luck-Gordon* test has unfortunately worked out very badly in practice.¹⁷ This is not entirely the fault of the eponymous opinions.

Then-Judge Warren Burger was very careful to emphasize in his *Gordon v United States*¹⁸ opinion that the factors he noted were simply the factors that mattered in that case, and that in other cases, courts should consider other factors as well.¹⁹ But eventually, in cases like *United States v Mahone*,²⁰ *Luck-Gordon* got hardened into a set multifactor test, typically with five factors.²¹ As a result, the test in operation now fails to consider other critically important factors, such as the availability of other means of impeachment or the relative severity of charged and prior offenses.

Worse yet, as Roberts demonstrates in depressing detail, some courts have inexplicably inverted at least one of the factors.²² These baffling opinions end up counting unfair prejudice as probative value. Such mistakes have led to persistent academic criticism over the years,²³ but only a few courts have taken it to

¹⁵ Roberts, 83 U Chi L Rev at 842–45 (cited in note 3).

¹⁶ See *Luck v United States*, 348 F2d 763, 769 (DC Cir 1965) (proposing a multifactor balancing test); *Gordon v United States*, 383 F2d 936, 939–40 (DC Cir 1967) (reiterating aspects of the *Luck* decision and proposing additional factors).

¹⁷ See Ted Sampsel-Jones, *Making Defendants Speak*, 93 Minn L Rev 1327, 1359–66 (2009).

¹⁸ 383 F2d 936, 939–40 (DC Cir 1967).

¹⁹ *Id.* at 940.

²⁰ 537 F2d 922 (7th Cir 1976).

²¹ *Id.* at 929.

²² Roberts, 83 U Chi L Rev at 845–50 (cited in note 3).

²³ See generally John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J Empirical Legal Stud 477 (2008); Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 Drake L Rev 1 (1999); Richard D. Friedman, *Character Impeachment Evidence: The Asymmetrical Interaction between Personality and Situation*, 43 Duke L J 816 (1994); Abraham P. Ordovery, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b), and 609(a)*, 38 Emory L J 135 (1989).

heart.²⁴ (While some judges criticize law review articles for focusing too much on theory and not enough on doctrine,²⁵ the experience of Rule 609 suggests that even when law review articles point out obvious doctrinal mistakes, judges don't much care to listen.)

The extent of this problem should not be overstated. Law review articles often focus on appellate opinions, but those present a skewed sample, because cases in which prior convictions are not admitted generally do not produce appeals.²⁶ One of the best recent empirical studies found that 60 percent of defendants without priors testified, while only 45 percent of defendants with priors testified.²⁷ While the differential is significant, it also shows that prior convictions are not the only determinative factor. Many defendants with priors testify anyway. Even defendants without priors often choose not to testify for other reasons—because, for example, they do not have a believable story of innocence to tell. Cross-examination itself is probably the greatest deterrent. Moreover, the same study found that for those defendants with prior convictions, the trial court admitted them only half the time.²⁸

In short, while criticism of the current state of the law under Rule 609 should be measured, it is still well deserved. *Luck-Gordon* has turned out to be a dumb test for applying Rule 609. As a result, most courts let in too many prior convictions to impeach defendants. This deters some defendants from testifying, which deprives jurors of critically important information. It distorts the accuracy of the fact-finding process—which is exactly the opposite of what evidence law is supposed to do.

II. IMPLICATIONS OF USING IMPLICIT STEREOTYPING FOR EVIDENCE ARGUMENTS

Professor Roberts proposes that courts should consider implicit racial bias harbored by jurors as part of the *Luck-Gordon*

²⁴ For a rare example of a state court attempting to push the case law in the other direction, see *People v Cox*, 748 NE2d 166, 170 (Ill 2001) (emphasizing courts' duty to do more than "mechanically" apply a balancing test).

²⁵ See Jonathan H. Adler, *Chief Justice Roberts Reads Law Reviews, After All*, (Wash Post, Mar 21, 2015), archived at <http://perma.cc/VT7A-WRZT>.

²⁶ If prosecutors decline to offer a prior conviction, there is nothing to appeal. If a prosecutor offers a prior conviction but it is excluded by the trial judge, there is also usually nothing to appeal. Prosecutors generally cannot appeal anything after a jury acquittal, and prosecutors generally would not appeal anything after a jury conviction.

²⁷ 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, 1356–57 (2009).

²⁸ *Id.*

test. More specifically, she proposes that such bias should be considered as part of the fourth factor, the “importance of the defendant’s testimony.”²⁹ Courts should recognize that if minority defendants do not testify, jurors may rely on implicit stereotyping. To give jurors more individuating information, courts should encourage defendants to testify, and therefore should more readily exclude prior convictions.³⁰

This proposal is worthy of serious consideration, but I see pitfalls as well. At the outset, it is worth noting that while Roberts aims her proposal at the fourth *Luck-Gordon* factor, it would not need to be implemented in precisely that way. To accomplish the same goal, for example, courts could equivalently add a sixth factor focused on considering implicit racial stereotyping. Or, alternatively, courts could simply recognize that implicit racial stereotyping is a type of unfair prejudice to be considered as part of the Rule 609 balancing test.

Put differently, the importance of Roberts’s proposal does not arise specifically from the clunky modern version of the *Luck-Gordon* test. Rather, Roberts’s insight is larger than that. I would frame it this way: minority defendants may be unfairly prejudiced by implicit racial stereotyping, so the rules of evidence should encourage more individuating evidence, including by excluding more prior convictions to encourage more defendants to testify.

That insight, however, has broader potential implications. And it will not always work to the benefit of criminal defendants.

A. Other Potential Uses of Implicit Stereotyping in Rule 609 Arguments

Rule 609 does not apply only to criminal defendant witnesses—rather, it applies to all witnesses. Imagine a prosecutor who plans to call a minority witness to testify against the defendant, and the witness has a prior conviction. In a twist on Roberts’s argument, the prosecutor could argue that jurors are likely to harbor implicit bias against the witness, and therefore that the prior conviction should be excluded, so as not to aggravate the jurors’ preexisting presumptions of minority criminality and dishonesty.

Or prosecutors could turn the argument around against white defendants with priors. Evidence law arguments often have a logical symmetry to them. If evidence of flight from a crime

²⁹ Roberts, 83 U Chi L Rev at 873–83 (cited in note 3).

³⁰ Id at 880–82.

scene is relevant to prove consciousness of guilt,³¹ then evidence of nonflight should logically be relevant to prove consciousness of innocence.³² If jurors mistakenly rely on evidence of delayed reporting as indicative of false accusations in rape cases, then they may also mistakenly rely on evidence of quick reporting as indicative of truthful accusations. Jurors may not give equal weight to symmetric inferences, but as a matter of admissibility, it is hard to find a principled reason for admitting one piece of evidence but excluding its converse.

The same symmetry could appear here. If jurors' implicit stereotyping leads them to overestimate minority criminality, then it is likely that jurors' implicit stereotyping leads them to underestimate white criminality. If the former stereotyping deserves an evidence law response, the latter does, too. Again, a smart prosecutor could present Roberts's argument, with a twist, against a white defendant. That prosecutor should argue that the judge should be more willing to admit a prior conviction against the white defendant, because that defendant does not face negative stereotyping and in fact unfairly benefits from positive stereotyping.

That twist might be a further positive development in the overall project. After all, if the ultimate goal is to reduce racial disparities in the criminal justice system, one way to accomplish that goal would be to convict more white criminals. That is not a strategy commonly endorsed by law professors, many of whom are liberal³³ and thus expected to lean pro-defense. The goals of helping criminal defendants and reducing racial disparities are not always aligned—indeed, as here, they are sometimes in tension.

I suspect that Roberts would reject those twists on her argument. I take it that the intent of her proposal is to help minority defendants without hurting white defendants, relative to the baseline of existing law. But if the experience under *Luck-Gordon*

³¹ See *United States v Myers*, 550 F2d 1036, 1049 (5th Cir 1977); Kenneth S. Broun, ed, 2 *McCormick on Evidence* § 263 (Thomson Reuters 6th ed 2006).

³² See John Henry Wigmore, 1A *Evidence in Trials at Common Law* §56.1 at 1180 (Little, Brown rev ed 1983) (Peter Tillers, ed); *United States v Scheffer*, 523 US 303, 331 (1998) (Stevens dissenting). However, courts have been unaccountably resistant to allowing defendants to make such an argument, or at least to allowing them to receive a jury instruction on the absence of flight. See, for example, *Albarran v State*, 96 S3d 131, 192–93 (Ala Crim App 2011) (noting that states that have addressed this issue have uniformly rejected such a jury instruction).

³³ See Adam S. Chilton and Eric A. Posner, *An Empirical Study of Political Bias in Legal Scholarship*, 44 *J Legal Stud* 277, 287–88, 306 (2015). See also Erin Ann O'Hara, *Victim Participation in the Criminal Process*, 13 *J L & Pol* 229, 229–30 (2005) (discussing how most law school criminal law classes ignore the perspective of the victim).

has revealed anything, it is that baselines have a way of shifting. Both *Luck* and *Gordon* sought to restrict admissibility relative to the then-existing baseline.³⁴ It did not work. When then-Judge Burger wrote in *Gordon* that similar crimes should be admitted sparingly,³⁵ it was only a matter of time before a prosecutor argued, “Conversely, dissimilar crimes should be admitted freely!”³⁶ Over time, the converse arguments won enough support that they blunted or even reversed the original thrust.³⁷ The same could happen here. Convicting more white defendants is not a stated goal of Roberts’s proposal, but it is a possible byproduct.

Even if the baseline does not shift, and even if prosecution twists are rejected, it is nonetheless inherent in Roberts’s argument that prior convictions would be more readily admitted against white defendants than against minority defendants. Accepting this proposal would place evidence law in the somewhat uncomfortable position of stating that Rule 609 applies one way to minority defendants and another way to white defendants.

Nor would this stop with race. Jurors likely harbor stereotypical assumptions that other groups—for example, Muslims, men, and people with tattoos—are more likely to act criminally.³⁸ Trying to sort out all of these implicit biases in the Rule 609 context would not be easy.³⁹ Courts would have to determine which de-

³⁴ At common law, felons were forbidden from testifying at all—they were deemed “incompetent” to testify. Prior to the rules of evidence, this was softened somewhat into a system in which felons could testify, but their convictions were categorically admissible against them. See Lester B. Orfield, *Competency of Witnesses in Federal Criminal Cases*, 46 Marq L Rev 324, 329–331 (1962). The statute that the *Luck* court interpreted was likely intended to reflect that rule of categorical admissibility. *Luck* held that trial judges have discretion to exclude prior felonies. See *Luck*, 348 F2d at 768. Part of the reason that *Luck* is famous is that it represented a shift in the law, and a shift toward admitting fewer convictions as impeachment evidence. 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, 770–73 (1990).

³⁵ *Gordon*, 383 F2d at 940.

³⁶ While the third *Luck-Gordon* factor is properly a measure of unfair prejudice, which should in theory never militate in favor of admissibility, courts have often reasoned that dissimilarity favors admissibility. See *United States v Jackson*, 627 F2d 1198, 1210 (DC Cir 1980); *United States v Hayes*, 553 F2d 824, 828 (2d Cir 1977); *State v Innot*, 575 NW2d 581, 586–87 (Minn 1998); *Robinson v State*, 717 SE2d 694, 697 (Ga App 2011).

³⁷ For examples of this in practice, see note 36.

³⁸ Professor Roberts recognizes this point. See Roberts, 83 U Chi L Rev at 861–62 (cited in note 3).

³⁹ There is yet another layer of complication: not all stereotypes are false. Jurors likely believe that men are more likely to behave violently than women. This stereotype adversely affects male defendants. But the stereotype is also accurate—men commit the

defendants can claim implicit bias as a way to exclude prior convictions and which defendants cannot. Inevitably, there would be some winners and some losers. Some of the losers would be criminal defendants.

Maybe it's worth it. Although race-conscious application of Rule 609 would also be messy and potentially unfair to certain defendants, it might nonetheless be worth it on the whole to reduce disparities in the American criminal justice system. But let us not ignore the mess. While excluding more prior convictions and reducing racial disparities are both goals I support, Roberts's proposal has some less comfortable implications as well. Those implications should be laid bare before proceeding.

B. Potential Uses of Implicit Stereotyping as Unfair Prejudice in Rule 403 Arguments

Nor is this limited to Rule 609. Recall again that the text of Rule 609 simply mandates a Rule 403-style balancing test. And the gist of Roberts's argument is that minority defendants may be unfairly prejudiced by implicit racial stereotyping, so courts should exclude priors to encourage testimony. That argument would apply with equal force in other contexts.

Consider first Rule 608(b), which allows a cross-examiner to inquire about a witness's acts of dishonesty.⁴⁰ It is similar to Rule 609, but it applies to acts that do not result in conviction. Suppose, for example, that a defendant is charged with a crime, and previously he lied on his resume. Ordinarily, if the defendant took the stand, the prosecution could impeach him with that dishonest act.⁴¹ But in line with Roberts's proposal, the defendant could argue for exclusion of any mention of the resume. The argument is no different—the resume might deter him from testifying, and then the jury would be denied individuating information, and then the jury would rely on implicit stereotyping.

vast majority of violent crimes. See *2015 Crime in the United States: Expanded Homicide Data Table 3* (FBI), archived at <http://perma.cc/KW6X-87AN>. See also Jennifer Skeem, John Monahan, and Christopher Lowenkamp, *Gender, Risk Assessment, and Sanctioning: The Cost of Treating Women Like Men*, 40 *L. & Hum. Behav.* 580, 581 (2016) (“[T]hat women participate in crime, particularly violent crime, at much lower rates than do men is a staple in criminology and has been known for as long as official records have been kept.”). If evidence law is to account for implicit stereotyping, it would have to determine whether to account for only *false* implicit stereotyping.

⁴⁰ FRE 608(b).

⁴¹ Christopher B. Mueller and Laird C. Kirkpatrick, 3 *Federal Evidence* § 6:33 at 202–205 (Thomson West 3d ed 2007).

That argument might not sound very persuasive, but that is only because the evidence of the falsified resume does not seem so powerful that it would actually deter him from testifying. The form of the argument—and the use of implicit stereotyping as a kind of unfair prejudice—is the same as in Roberts’s Rule 609 argument. And the same argument could be made for Rule 608(a) evidence, or for that matter any other type of impeachment evidence. “Don’t let the prosecution impeach me,” defendants might say, “because that will discourage me from testifying, and the jury will convict me on bias alone.”

In fact, the same argument could be made against any evidence simply by characterizing implicit stereotyping as unfair prejudice under Rule 403 itself. Imagine a defendant making this argument:

Your honor, I would like to take the stand and testify. My testimony would give the jury a fuller version of events, and it would provide the jury with individuating information. But I do not want to face cross-examination by the prosecution, and in fact, if you allow cross-examination, I will not testify. Lacking my testimony, jurors will rely on their implicit racial stereotypes, which will unfairly prejudice me. Therefore, I request that you exclude all cross-examination under Rule 403.

That argument should sound absurd.⁴² And yet how is it different from the implicit stereotyping argument made under Rule 609 to exclude convictions?

The difference, as I see it, has nothing to do with implicit racial stereotyping. The racial bias portion of the argument is the same in both the Rule 609 prior conviction context as it is in the Rule 403 cross-examination context above. The difference, rather, is in the nature of the contested evidence itself.

Cross-examination is strongly truth enhancing, and so it would be silly and wrong to exclude it based on an argument regarding implicit bias as unfair prejudice. Prior convictions admitted under Rule 609, however, are not at all strongly truth enhancing, so it sounds plausible to exclude them based on an argument regarding implicit bias as unfair prejudice. What this exercise suggests is that implicit bias is not actually doing any of the real work. Bad evidence should be excluded, good evidence should be admitted, and prior convictions admitted under Rule 609 are

⁴² See *Mitchell v United States*, 526 US 314, 321–24 (1999) (“A witness may not pick and choose what aspects of a particular subject to discuss without casting doubt on the trustworthiness of the statements and diminishing the integrity of the factual inquiry.”).

bad—and they are bad in ways that have nothing to do with implicit stereotyping. They are bad for a much more old-fashioned reason: juries use them improperly as evidence of general criminal propensity rather than as evidence of dishonesty.

Rule 609 is dumb, for all races, because it is based on a legal fiction. While implicit racial biases undoubtedly affect the accuracy of the fact-finding process, in the Rule 609 context, they may be epiphenomenal to the real problem.

C. Individuation as an Argument for Admitting All Character Evidence

This brings us at last to the deepest question: What does the possibility of implicit stereotyping mean for the character evidence itself?

Roberts argues that, to combat stereotypes, juries should be given more individuating information.⁴³ Individuating information includes “details about an individual’s acts, for example, or personality.”⁴⁴ But character evidence is itself individuating. Telling a jury about a defendant’s prior criminal history is telling the jury about that individual’s acts and personality—it is telling the jury information about that individual’s history and character.⁴⁵

Roberts’s proposal is based on an implicit trade-off: juries will get more individuating information (a defendant’s testimony) if courts exclude some individuating information (a defendant’s history). She suggests that more restrictive Rule 609 applications will maximize the overall pool of individuating information available to juries. As an empirical matter, it is hard to know whether that is true. After all, as discussed above, many defendants testify even if their priors are admitted, and many defendants decline to testify for reasons having nothing to do with impeachment by priors. The net effect of the trade-off isn’t clear.

But there is an even simpler solution to maximize individuation: *admit all defendants’ prior crimes regardless of whether they testify or not*. Repeal Rule 404 altogether, in other words. That way, jurors would hear a fuller story about the individual defendant’s acts, personality, history, and character. And that way,

⁴³ Roberts, 83 U Chi L Rev at 874–75 (cited in note 3).

⁴⁴ *Id.*

⁴⁵ Evidence of a defendant’s prior crimes is undeniably *relevant* for this purpose. See *Old Chief v United States*, 519 US 172, 181 (1997), quoting *Michelson v United States*, 335 US 469, 475–76 (1948) (“The inquiry [into past crimes] is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury.”).

prior crimes would not function as any disincentive to a defendant's testimony. Because a defendant would know that his priors are coming in regardless, he could make the decision to testify or not based solely on other factors. It's a win-win, at least as far as individuation is concerned.

This would presumably lead to at least a somewhat higher conviction rate overall.⁴⁶ That may be a feature rather than a bug. Law professors and law schools tend to focus on wrongful convictions.⁴⁷ In the actual criminal justice system, however, actual legal actors—judges, juries, prosecutors, people who write the Federal Rules of Evidence—must consider not just wrongful convictions but also wrongful acquittals. The goal is accuracy overall, not just helping defendants. Increasing individuation by admitting all priors might increase overall accuracy.

Moreover, there is substantial empirical evidence that admitting all prior crimes could even help minority defendants. In an astounding and counterintuitive recent article, Professors Amanda Agan and Sonja Starr demonstrate that “ban the box” laws, which are intended in part to decrease racial discrimination in employment, actually *increase* discrimination.⁴⁸ The reason is that when employers are forbidden from asking about an individual's prior criminal history, they simply fill in the information gap with stereotypes. They may assume that minority applicants have criminal convictions and that white applicants do not.⁴⁹ This hurts those minority applicants without convictions and increases hiring disparities overall. By withholding the individuating information of prior criminal records, “ban the box” laws thus aggravate racial disparities.

Rule 404 is the equivalent of “ban the box” in criminal trials. Rule 404 forbids either party from telling the jury, “This defendant has an extensive criminal history,” or, “This defendant has

⁴⁶ See Greene and Dodge, 19 *Law & Hum Behav* at 76 (cited in note 14). But see Larry Laudan and Ronald J. Allen, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 *J Crim L & Crimin* 493, 506–07 (2011) (finding that “conviction rates for non-testifying defendants with unknown priors and for those with known priors are virtually indistinguishable”).

⁴⁷ You have heard of law school classes and clinics called “convicting the innocent,” but have you ever heard of a class on acquitting the guilty?

⁴⁸ Amanda Agan and Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment* *33–34 (University of Michigan Law and Economics Research Paper No 16-012, June 14, 2016), archived at <http://perma.cc/2RZA-47X6>.

⁴⁹ *Id.* at *34.

no criminal history.”⁵⁰ When jurors are forbidden from hearing about an individual’s criminal history, they may simply fill in the information gap with stereotypes.⁵¹ They may assume that minority defendants have criminal histories and that white defendants do not. The character evidence rule itself may thus exacerbate racial disparities in the criminal justice system. Repealing Rule 404 could help to convict more guilty white defendants and also help to acquit more innocent minority defendants. Again, from the perspective of individuation and accuracy, it’s a win-win.

Roberts proposes excluding more prior convictions under Rule 609. But her arguments, if carried through a bit further, may actually support admitting all convictions and repealing the character evidence rule itself.

CONCLUSION

Rule 609 does not exist in isolation. It is in fact part of an elaborate system of rules built on a compromise. The rules say that a defendant’s prior convictions are generally not admissible but also that they are sometimes admissible. That system seeks to achieve a roughly fair balance in the trade-off between a criminal defendant’s rights and the state’s interest in conviction. It seeks to avoid both false convictions and false acquittals.

Professor Roberts seeks to alter the balance a bit, in defendants’ favor, by excluding more priors. But her arguments about racial stereotyping and the need for individuation are not easily cabined. In fact, there is nothing that ties her arguments essentially to Rule 609 or the *Luck-Gordon* test. The implications are far broader. The same arguments could be turned around and used for greater admission of priors in some cases, and for that matter, they could be used for repealing the character evidence rule altogether.

I suspect that if the goal is simply to reduce racial stereotyping in the criminal trials, there may be other reforms that are better suited to the task, such as abolishing peremptories in jury selection.⁵² Alternatively, if Rule 609 itself is truly misguided—

⁵⁰ Defendants may introduce some evidence of their own good character under Rule 404(a)(2)(A), but under Rule 405, such evidence is limited to opinion and reputation evidence.

⁵¹ See Laudan and Allen, 101 *J Crim L & Crimin* at 508 (cited in note 46) (“One possible solution to the conundrum is that jurors, even if never informed of the existence of prior convictions, can fairly readily deduce that information for themselves.”).

⁵² See *Batson v Kentucky*, 476 US 79, 102–03 (1986) (Marshall concurring). See also generally John Paul Stevens, *Foreword*, 78 *Chi Kent L Rev* 907 (2003) (noting that peremptory challenges may do more harm than good for the American legal system).

2017] *Implicit Stereotyping as Unfair Prejudice in Evidence Law* 189

which I believe it is—then we should abolish it entirely, for all races, rather than placing a thumb on the scales for minorities only. Then again, perhaps we should examine the broader implications of Roberts’s article—and let the floodgates open.