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Defense Counsel's Cross Purposes: Prior Conviction Impeachment of Prosecution Witnesses

Anna Roberts

Defense Counsel's Cross Purposes

PRIOR CONVICTION IMPEACHMENT OF PROSECUTION WITNESSES

Anna Roberts†

INTRODUCTION

The fact that our law permits, and our lawyers pursue, impeachment of witnesses with their prior convictions has provoked widespread and intense criticism. This practice exists in the federal system and all but one of the states,[1] and involves the use of qualifying convictions for the ostensible purpose of attacking witnesses' "character for truthfulness."[2] Its many critics raise several concerns, challenging not only the assumption that convictions shed meaningful light on truthfulness but also the effects of this practice, including the compounding of racial bias, the deterrence of testimony, and the inevitable misuse by jurors of these convictions. On that final point, empirical evidence supports the concern that jurors use this evidence to make forbidden inferences about

† Anna Roberts is a Professor of Law at St. John's University School of Law. Thanks to Amber Baylor, Jeffrey Bellin, Teneille Brown, Bennett Capers, Jenny Carroll, Mia Eisner-Grynberg, Andrew Ferguson, Richard Friedman, Cynthia Godsoe, Lauryn Gouldin, Bruce Green, Lisa Kern Griffin, Eisha Jain, Len Kamdang, Alexis Karteron, Tamara Lave, Benjamin Levin, Kate Levine, Colin Miller, Kate Mogulescu, Janet Moore, Jamelia Morgan, Ngozi Okidegbe, William Ortman, Claire Pollicino, Gustavo Ribeiro, Julia Simon-Kerr, Jocelyn Simonson, Ji Seon Song, Maggie Wittlin, and Steve Zeidman. This piece has benefited from feedback at Crimfest!, the Decarceration/Abolition Works-in-Progress Workshop, a faculty workshop at Brooklyn Law School, and the Evidence Summer Workshop. I am also grateful to Premal Dharia, Julia Simon-Kerr, and the late Judge Weinstein for forming part of the inspiration for this piece, to the organizers of the *Brooklyn Law Review* symposium on "The Role of the 'Victim' in the Criminal Legal System," and to my wonderful research assistants, Alex Araya, Nadia Balkaran, Jenna Codignotto, and Nick Lynaugh. Finally, my thanks to the staff of the *Brooklyn Law Review* for their careful, thoughtful, and dedicated editorial work.

[1] FED. R. EVID. 609; Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 2027 (2016) (explaining that Montana is the only state to ban impeachment of all witnesses by conviction).

[2] FED. R. EVID. 609(a).

witnesses' perceived propensity to commit crimes, or their general badness.[3]

These critiques have been leveled with most intensity at the ability (and tendency) of prosecutors to engage in this form of attack on testifying defendants.[4] After all, it is only defendant-witnesses for whom this practice can constitute an expressway to prison. As a result, while some scholars have called for abolition of this practice across the board (as has been done in Montana[5]), several others recommend abolishing it only as regards defendant-witnesses (as Hawai'i[6] and Kansas[7] have done).

This article makes the case for careful attention to a neglected phenomenon within this topic:[8] the opportunity given to, and taken by, defense attorneys to impeach prosecution witnesses. Grappling with what to permit with this kind of witness is a necessary component of the reform initiatives currently gaining momentum,[9] and grappling with the defense role vis-à-vis this practice helps illuminate the complexities of reformist or even abolitionist roles for defenders.

As is perhaps to be expected with the most controversial of the rules of evidence,[10] reform possibilities are fraught. On the one hand, the Montana model of across-the-board abolition raises concerns, constitutional and otherwise, about removing a tool (however problematic) from the defense. On the other hand, its continuing availability for the defense brings the same kinds of concerns as its availability for the prosecution—albeit in less intense form. Similarly, if one thinks about the defense role in contemplating the use of this potentially potent tool, refusing to deploy it seems incompatible with the duty of zealous advocacy. But an increasing number of individual and institutional

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[3] *See* John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record-Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 477, 488–92 (2008).

[4] *See* Daniel R. Tilly, *Victims Under Attack: North Carolina's Flawed Rule 609*, 97 N.C. L. REV. 1553, 1555–57 (2019).

[5] MONT. CODE ANN. § 26-10-609 (West, Westlaw through the 2021 Sess.).

[6] HAW. REV. STAT. § 626-1-609(a) (West, Westlaw through Act 19 of the 2022 Reg. Sess.).

[7] KAN. STAT. ANN. § 60-421 (West, Westlaw through the 2022 Reg. Sess.).

[8] For two recent articles highlighting aspects of this practice, see Tilly, *supra* note 4; and Aníbal Rosario-Lebrón, *Evidence's #MeToo Moment*, 74 U. MIA. L. REV. 1 (2019).

[9] *See* Ass'n of Am. L. Schs., Call for Participation in a Discussion Group on *Critical Evidence Reform: How Do We Change Prior Conviction Impeachment in the U.S?*, AALS 2022 ANN. MEETING [hereinafter AALS Call for Participation: *Critical Evidence Reform*], https://am.aals.org/wp-content/uploads/sites/4/2021/07/Critical-Evidence-Reform-CFP.pdf [https://perma.cc/C3M3-VMPH].

[10] *See* Montré D. Carodine, *"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 524 (2009) (discussing the federal version).

defenders champion a role that goes beyond individual zealous advocacy and pursues broader reform, or indeed abolitionist visions.[11] The use of a tool that reifies the conviction as a meaningful character brand and that—like others in the defense arsenal—pounds stereotypes into our law and broader life suggests limits to these visions.

The complexity of these issues does not lend itself to easy resolution. Indeed, the conflict is in part the point. Prior conviction impeachment reminds us that the criminal system is called upon to do potentially incompatible things: to protect the rights of those charged with crimes but also to accord respect and dignity to complainants. It reminds us that defense attorneys are increasingly compelled to do incompatible things: to use tools that rely on regressive stereotypes but also to fight regressive stereotypes. This topic thus illuminates, and is illuminated by, abolitionist efforts to push away from a system that risks reinforcing the shared subordination of complainant and defendant, and toward efforts to offer respect and dignity to all.

Part I describes the contours of prior conviction impeachment and the critiques that it has inspired, particularly when the impeachment of those charged with crimes is being considered. Part II demonstrates the need for increased attention to prosecution witnesses (whether complainants, cooperating witnesses, or others), explaining the relevance of this focus to three contemporary inquiries.

The first of these inquiries, addressed in Section II.A, is how and whether to regulate the prior conviction impeachment of prosecution witnesses, given the conflicting values at stake. A provocative decision by the late Judge Jack Weinstein crystallizes the issue. The second inquiry, addressed in Section II.B, uses this phenomenon to illuminate tensions within the defense role. Section II.C builds on the suggestions that there are intractable tensions within the regulation of prior conviction impeachment, and that there are intractable tensions within the defense role, to suggest that one might approach these tensions not (just)

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[11] *See, e.g.*, *Racial Equity Action Plan—Phase 1*, S.F. PUB. DEF'S. OFF. (Feb. 5, 2021), https://sfpublicdefender.org/wp-content/uploads/sites/2/2021/02/PDR-Racial-Equity-Action-Plan-Phase-I-updated-2-5-2021.pdf [https://perma.cc/2WDV-CLVB] (quoting San Francisco Public Defender Manohar Raju as saying that "[p]ublic defenders have always played an active and important role in combatting racial and social injustice in the criminal legal system, both inside and outside the courtroom. Fighting for racial justice is a core part of our work, and together with my committed team, I spend every day examining the criminal legal system and our role as advocates through this lens."); Nicole Smith Futrell, *The Practice and Pedagogy of Carceral Abolition in a Criminal Defense Clinic*, 45 N.Y.U. REV. L. & SOC. CHANGE 159, 164 (2021) (mentioning that many new public defenders are "pronouncing themselves to be abolitionists").

with the goal of resolving them as effectively as possible, but with the goal of understanding their breadth and depth and the resulting appeal of abolitionist thinking. The system and those who work within it are being asked to serve conflicting goals, and a system that strives toward values that run headlong into each other may be a system that needs to be rethought.

I. PRIOR CONVICTION IMPEACHMENT: LEGAL AND SCHOLARLY LANDSCAPE

This Part will introduce the relevant aspects of prior conviction impeachment. It will also introduce the main strands of critique that it has inspired.

Federal Rule of Evidence 609 (FRE 609) lays out the federal framework for prior conviction impeachment. While there is a great deal of state variation, the federal rule has proved influential in a number of states.[12] It denotes this practice as one that permits attacks on a witness's "character for truthfulness," and establishes two main types of conviction that may be admissible for this purpose.[13] The first category involves convictions that are punishable by death or more than a year in prison (these will be referred to as "qualifying felony convictions"); the second category involves convictions that required proof or admission of a "dishonest act or false statement"[14] (these will be referred to as *crimina falsi*). The qualifying felony convictions are admissible only if the applicable test weighing probative value and prejudice is met,[15] and according to the language of the rule, the balancing test is more hostile to the evidence if the witness in question is charged with a crime.[16] The *crimina falsi* are mandatorily admissible once offered: unusually within the Federal Rules of Evidence, judges have no opportunity to exclude them because of the risk of unfair prejudice.[17]

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[12] *See* Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 1987 (2016) ("Forty-seven states, along with the District of Columbia, follow the federal government in permitting impeachment of criminal defendants with their criminal records, but of those only seventeen states follow FRE 609 either exactly or very closely.").

[13] FED. R. EVID. 609(a).

[14] *Id.* at 609(a)(2).

[15] *Id.* at 609(a)(1). Note that under FRE 609(a)(1)(A), the FRE 403 risks other than unfair prejudice may also be weighed.

[16] *Compare* FED. R. EVID. 609(a)(1)(A) (stating that a conviction of this sort "must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant"), *with* 609(a)(1)(B) (stating that a conviction of this sort "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").

[17] FED. R. EVID. 609(a)(2).

This configuration was the product of compromise rather than a unified vision,[18] and there is a corresponding lack of clarity in the justifications offered for it. With respect to the qualifying felony convictions, courts often assert that such a conviction reveals willful violation of laws and norms and that this indicates an increased likelihood of willful violation of the prohibition on perjury.[19] This sounds less like a rationale based on "character for truthfulness," as FRE 609's language would seem to require, and more like a rationale based on asserted character for willful rules violation.[20] The *crimina falsi* justification is easier to understand and involves the notion that a prior conviction for a "crime of dishonesty" reveals a character that makes it more likely than otherwise that one will be dishonest on the witness stand.[21]

The remainder of FRE 609 gives additional details about the circumstances under which this kind of evidence can, and cannot, be admitted.[22] For example, FRE 609(b) indicates that after ten years it becomes harder—but not impossible—to admit these convictions.[23]

There is considerable state variation on all of the issues mentioned above: which (if any) convictions are admissible; whether their admission is discretionary or mandatory; what period of time (if any) is flagged by the relevant rule as salient; and whether that period of time brings about an absolute cut-off.[24] The three states whose approaches differ most dramatically from the federal rules are Hawai'i and Kansas, each of which bars this kind of impeachment as regards criminal defendants—provided that they are not found to have "opened the door" by introducing evidence to support their credibility[25]—and Montana, which (alone among the

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[18] *See* Roberts, *supra* note 1, at 1982–83 ("The FRE 609 rules on impeachment of criminal defendants represented a political compromise: the House of Representatives wanted only convictions involving dishonesty or false statements to be admissible, while the Senate wanted felony convictions to be admissible as well.").

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

[20] *Id.* at 587 ("[D]efendants with convictions are said to have 'sinned,' to have 'transgressed society's norms,' or to have shown a 'willingness to ignore the law.'").

[21] *See id.* at 564.

[22] FED. R. EVID. 609(b)–(e).

[23] *See id.* at 609(b) (stating that evidence of the prior conviction is admissible after ten years only if: "(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use").

[24] *See* Roberts, *supra* note 1, at 1980–81.

[25] *Id.* at 1981 nn.21–22, 2022.

states) has barred this form of impeachment as regards witnesses of all sorts.[26]

Generally speaking, scholarly analyses of prior conviction impeachment have concentrated on the federal scheme,[27] have been critical, and have focused their criticism on the use or threat of this practice against criminal defendants. I shall review their main themes relatively briefly in what follows.

A. Tenuous Connection to Veracity

First is the argument that some or all of the convictions routinely admitted do not shed meaningful light on the likelihood of truthful testimony.[28] Investigation of the assumptions underlying this practice has led some to conclude that it rests on "'junk science' at its worst."[29] Scholars have pointed out that the concept that this evidence is said to illuminate—one's "character for truthfulness"[30]—rests on assumptions that are complicated by contemporary psychological research.[31] They point to the sidelining of the "trait theory" that underlies the rule.[32] They emphasize the influence of contextual factors on truthfulness, and the failure of the rule to take such factors into account.[33]

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[26] *Id.* at 2027; MONT. CODE ANN. § 26-10-609 (West, Westlaw through the 2021 Sess.) ("For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible.").

[27] *See* Roberts, *supra* note 1, at 1987–90.

[28] This was the reason named as most important by the Montana Commission responsible for drafting Montana's provision on this matter: the commission did "not accept as valid the [FRE drafters'] theory that a person's willingness to break the law can automatically be translated into willingness to give false testimony." MONT. R. EVID. 609 commission's cmt.

[29] *See* Dannye W. Holley, *Federalism Gone Far Astray from Policy and Constitutional Concerns: The Admission of Convictions to Impeach by State's Rules—1990–2004*, 2:2 TENN. J.L. & POL'Y 239, 304–05 (2005) (arguing that the assumption "that disobedience to law is logical evidence of a greater propensity to lie—is 'junk science' at its worst"); *id.* at 295 ("[S]tate supreme courts . . . interpret [their] diverse standards based on judicially crafted junk science heuristics, with an apparent eye to sanctioning admission of a vast array of convictions against persons accused of crimes.").

[30] FED. R. EVID. 609(a).

[31] *See, e.g.*, Robert D. Okun, *Character and Credibility: A Proposal to Realign Federal Rules of Evidence 608 and 609*, 37 VILL. L. REV. 533, 547 (1992) ("[P]sychological research . . . has generally discredited this 'trait theory' of personality, and has replaced it with theories that view behavior as a 'learned response to specific contextual factors' (situationism) or as the interaction between specific character traits and specific contextual factors (interactionism). In fact, numerous studies have cast substantial doubt on the proposition that personality is determined by 'traits' that produce consistent behavior in different situations.").

[32] *Id.*; *see also* Lisa Kern Griffin, *Honesty Without Truth: Lies, Accuracy, and the Criminal Justice Process*, 104 CORNELL L. REV. ONLINE 22, 29–30 (2018) ("Social psychology long ago moved beyond the trait theory on which the rule's rationale depends and recognized the influence of situational pressures.").

[33] *See* Okun, *supra* note 31, at 547; *see also* Griffin, *supra* note 32, at 29–30; Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 646–47 (1991); Jonathan D. Kurland, *Character*

B. Tenuous Connection to Guilt

A fundamental assumption at the root of this use of convictions—namely that a conviction reliably conveys commission of a particular type of crime[34]—is a questionable one in our criminal system.[35] The drafters of the Federal Rules of Evidence gave weight to distinctions between prison-eligible convictions and others,[36] and between convictions requiring particular factual findings or admissions and others.[37] The meaning attributed to these distinctions is undermined by the rough-and-ready way in which criminal convictions are handed out in many of this nation's courts.[38] Whether one winds up with a felony conviction, a misdemeanor conviction, or no conviction at all, or whether one winds up with a conviction for crime X rather than crime Y, is often not the product of precise calibration.[39] It is the product, among other things, of fear, of trading, of compromise.[40] And even putting aside these dividing lines, one needs to think more generally about the existence of a conviction and whether it speaks in a reliable way to guilt, and thus whether one can merge, as this practice does, crime conviction with crime commission. In the views of the scholars advancing this critique, one cannot.[41] Ours is a system marked, for example, by inadequate provision of defense counsel and overwhelming pressure to plead guilty, and by racism that permits both those things.[42] This helps to create a situation where convictions may have more to say about subordination and disadvantage than about guilt.

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as a Process in Judgment and Decision-Making and Its Implications for the Character Evidence Prohibition in Anglo-American Law, 38 LAW & PSYCH. REV. 135, 148 (2014) (describing consensus among psychological researchers that behavior is a function of "mutual interaction between situation and an individual's 'psychic structure'").

[34] *See* FED. R. EVID. 609(a) advisory committee's note ("As a means of impeachment, evidence of conviction of crime is significant only because it stands as proof of the commission of the underlying criminal act.").

[35] *See* Roberts, *supra* note 19, at 587; *see also* John D. King, *The Meaning of a Misdemeanor in a Post-Ferguson World: Evaluating the Reliability of Prior Conviction Evidence*, 54 GA. L. REV. 927, 933–47 (2020); Blume, *supra* note 3, at 477.

[36] FED. R. EVID. 609(a)(1).

[37] *Id.* at 609(a)(2).

[38] *See* Anna Roberts, *Convictions as Guilt*, 88 FORDHAM L. REV. 2501, 2504 (2020).

[39] *See United States v. Lipscomb*, 702 F.2d 1049, 1062 (D.C. Cir. 1983).

[40] *See* Roberts, *supra* note 38, at 2510–27.

[41] *See* King, *supra* note 35, at 927; *see also* Blume, *supra* note 3, at 477; Roberts, *supra* note 19, at 563.

[42] *See* Roberts, *supra* note 38, at 2512–14, 2529.

C. Risk of Unfair Prejudice

Next, there is the concern about unfair prejudice. Many scholars think it unrealistic to instruct the jury to use these convictions only for the permitted purpose of assessing a witness's "character for truthfulness."[43] Indeed, some have attempted to bolster this intuition with empirical research, adding force to the argument that jurors use this evidence in forbidden ways.[44] Their arguments are strengthened by an examination of the kinds of convictions that are routinely admitted. Under the *crimina falsi* umbrella, however prejudicial convictions may be, they are mandatorily admissible if the prosecutor proffers them.[45] Under the qualifying felony conviction provision, judges frequently admit convictions when potential prejudice is obvious, whether the prejudice stems from their similarity to the charge against the defendant,[46] from their numerosity,[47] or from their stigmatizing nature.[48]

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[43] *See, e.g.*, Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 323–24 (2013) (mentioning data that indicates that limiting jury instructions are ineffective in the context of "highly salient or emotionally charged" content); Roberts, *supra* note 1, at 2015 (Jury instructions justified as a means to keep jurors on track in this regard "have been called 'little more than a judicial placebo,' a 'judicial lie,' a 'hollow[ ] . . . pretense,' 'illogical,' and 'mere legal sophistry.'" (footnotes omitted)).

[44] *See, e.g.*, Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1388 (2009) ("If, as our results and experimental results suggest, prior record affects case outcomes but not credibility, the historical justification for allowing the use of criminal records is unfounded."); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37, 47 (1985) (finding that defendants' criminal records increased likelihood of conviction but not because they affected assessments of their credibility); Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 300 (2008) ("[E]mpirical studies and common sense suggest that a limiting instruction offers little protection against the prejudice inherent in prior conviction impeachment."); Teree E. Foster, *Rule 609(a) in the Civil Context: A Recommendation for Reform*, 57 FORDHAM L. REV. 1, 32–33 nn.150–52 (1988) (discussing "[s]ocial psychology data reflect[ing] the conclusion that prior convictions have virtually no probative value as a predictor for determining a witness' in-court veracity"); Griffin, *supra* note 43, at 323–24 ("The available social science indicates that limiting instructions fall short when it comes to any highly salient or emotionally charged content, and that improving them will require broader correction of their flawed premise."); Sally Lloyd-Bostock, *The Effects on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study*, 2000 CRIM. L. REV. 734, 738 (2000) ("What is clear is that it cannot be assumed that jurors will follow an instruction on the use of evidence of previous convictions.").

[45] For example, a conviction could be for precisely the same offense as the one charged. *See, e.g.*, United States v. Johnson, No. 08 CR 466, 2011 WL 809194, at *1 (N.D. Ill. Mar. 2, 2011) (denying a motion to bar the introduction of wire fraud conviction in wire fraud trial).

[46] *See* Bellin, *supra* note 44, at 331–32.

[47] *See* Dannye R. Holley, *Judicial Anarchy: The Admission of Convictions to Impeach: State Supreme Courts' Interpretive Standards, 1990-2004*, 2007 MICH. ST. L. REV. 307, 342, 379 (2007).

[48] *See, e.g.*, Julia T. Rickert, *Denying Defendants the Benefit of a Reasonable Doubt: Federal Rule of Evidence 609 and Past Sex Crime Convictions*, 100 J. CRIM. L. & CRIMINOLOGY

This is a critique that applies with most force in the context of impeachment of criminal defendants, because there are a variety of forbidden uses of the evidence that can lead straight to the prison cell:[49] use of the conviction to conclude that, because of it, the person is more likely to have committed the charged crime,[50] or is worthless, or ought to be locked up, and so on. Indeed, much of the empirical data was gathered from mock jurors who were instructed to use the records of criminal defendants to assess their credibility as witnesses, but who apparently used them for other purposes.[51]

D. Racial Bias

Scholars have explored a variety of ways in which this practice deepens the racial inequities of our criminal system and the broader social structures of which it is a part. Arrests are made unequally;[52] convictions are imposed unequally;[53] sentences are crafted unequally.[54] Prior conviction impeachment compounds all of this. While prior conviction impeachment frames the conviction as being about the witness, and about—in the words of one court—her portrayal as something other than a "normal citizen,"[55] the imposition of law enforcement contact and criminal records is a governmental act, and one that may be routine in low-income communities of color.[56]

Scholars point out that this practice is the child of, and an obedient child of, earlier laws that kept witnesses off the stand completely, including laws that prohibited Black witnesses from testifying.[57] Scholars highlight the disproportionate likelihood that Black witnesses will have convictions with which they can be impeached.[58] They identify

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213, 241 (2010) ("[T]he strength of jurors' 'personal revulsion for sex offenses' is frequently ignored when the witness is the defendant.").

[49] Eisenberg & Hans, *supra* note 44, at 1389 ("The enhanced conviction probability that prior record evidence supplies in close cases may well contribute to erroneous convictions.").

[50] *See* Blume, *supra* note 3, at 493 ("[T]hreatening a defendant with the introduction of his . . . prior record contributes to wrongful convictions either directly—in cases where the defendant is impeached with the prior record and the jury draws the propensity inference—or indirectly—by keeping the defendant off the stand.").

[51] *See* Eisenberg & Hans, *supra* note 44, at 1358–61 (summarizing studies).

[52] Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 1026 (2019).

[53] Roberts, *supra* note 38, at 2546.

[54] Roberts, *supra* note 19, at 596 (noting that sentence length is a detail that impeaching attorneys are often permitted to bring out).

[55] Mills v. Estelle, 552 F.2d 119, 120 (5th Cir. 1977).

[56] *See, e.g.*, King, *supra* note 35, at 930.

[57] *See* Julia Simon-Kerr, *Credibility by Proxy*, 85 GEO. WASH. L. REV. 152, 165 (2017).

[58] *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 7 (2010) ("[I]n major cities wracked by the drug war, as

multiple layers of racial bias wrapped up inside, then redoubled by, convictions. This concern is particularly intense in regard to criminal defendants, but it is not restricted to them. Think, for example, of a complainant in a prosecution alleging excessive police force—or excessive force of any sort.[59] If the complainant has a conviction, it may be used to destroy their testimony.[60] Given the fact that convictions fall with disparate racial impact, the use of this practice throws racially biased obstacles in the path of those who seek to have their claims of harm believed. This same phenomenon affects the state's allocation of "victim compensation," which in several states is denied to those with criminal records,[61] thus again tying worth to conviction status and often to race.

E. Deterrence

The threat of this form of impeachment has also incurred criticism because of its potential to deter testimony, and often trial.[62] There is empirical support, for example, for the power of this form of impeachment to chill defendants' testimony.[63] One study examined a group of people facing serious charges of which they were later exonerated; they frequently waived their right to testify, and their attorneys gave as the primary reason their fear of prior conviction impeachment.[64] They were convicted, and indeed there is empirical support for the notion that jurors—despite constitutional protections and instructions that prohibit this—do indeed want to hear both sides of the story,[65] and penalize,[66] or are

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many as 80 percent of young African American men now have criminal records and are thus subject to legalized discrimination for the rest of their lives.").

[59] *See* Bennett Capers, *Crime, Legitimacy, Our Criminal Network, and the Wire*, 8 OHIO ST. J. CRIM. L. 459, 465–67 (2011) (discussing claims of excessive force used in low-income and minority communities); *see also* Tamara F. Lawson, *Powerless Against Police Brutality: A Felon's Story*, 25 ST. THOMAS L. REV. 218, 219–20, 238–43 (2013) (discussing civil claims).

[60] *See, e.g.*, Lawson, *supra* note 59, at 219–20.

[61] Alysia Santo, *Seven States Ban Victim Aid to People with Criminal Records*, MARSHALL PROJECT (Sept. 13, 2018, 7:00 AM), https://www.themarshall project.org/2018/09/13/the-victims-who-don-t-count [https://perma.cc/49AH-VMGJ]; *see also* Anna Roberts, *Victims, Right?*, 42 CARDOZO L. REV. 1449, 1479–80 (2021).

[62] Griffin, *supra* note 32, at 23, 28–29.

[63] Bellin, *supra* note 44, at 301 n.40 (explaining that the fear of impeachment is the most powerful incentive not to testify); *see also id.* at 335 n.168; Blume, *supra* note 3, at 490–91.

[64] Blume, *supra* note 3, at 477.

[65] *See* Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 518 n.102 (1986); *see also* James E. Beaver & Steven L. Marques, *A Proposal to Modify the Rule on Criminal Conviction Impeachment*, 58 TEMP. L.Q. 585, 609 (1985).

[66] *See* Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 399 (2018).

suspicious of,[67] those who do not provide the same.[68] Indeed, some scholars argue that we should all want to hear defendants' testimony, given its potential to aid jurors in moving beyond stereotypes to individuating information,[69] and given its potential more generally to enhance fact-finding,[70] societal understanding,[71] and the scrutiny of governmental conduct and evidence.[72]

F. Lasting Impact

Finally, this form of impeachment contributes to assumptions of permanency—and the concrete array of permanent reminders—relating to criminal convictions. In this context, a conviction is not something that the state does to you, but something that you are, and can never—or hardly ever—shake.[73] The federal system may make it harder to introduce these convictions after ten years, but it is not impossible, and this provision is not shared among all states.[74] In addition, ten years is a significant period of time.

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[67] Lauren Cusitello, *Serial's Big Confession,* MEDIUM: FOR THE LOVE OF PODCAST (Nov 15, 2014), https://medium.com/for-the-love-of-podcast/serials-big-confession-10611ff75c13 [https://perma.cc/99AH-DKDC] (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?").

[68] *See* Barbara Allen Babcock, *Introduction: Taking the Stand*, 35 WM. & MARY L. REV. 1, 13 (1993) ("Jurors believe that an innocent person proclaims it from the rooftops."); *see also* Bellin, *supra* note 44, at 335; George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 977–78 (2000) ("'[T]he jurors all know, . . . that the defendant has the privilege (as it is called) of making himself a witness if he sees fit; and they also know that he would if he dared.' Therefore, his silence 'will, and inevitably must, create a presumption against him, even if every page of the statute-book contained a provision that it should not. The statutes might as well prohibit the tide from rising . . . .'" (quoting Judge Seth Ames)).

[69] *See* 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, 835 (2016); Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1114 (2006) ("[S]tereotype effects recede as people learn more about each other as individuals, with individuating information often overwhelming stereotype information.").

[70] Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules That Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851, 853 (2008) (claiming that defendant testimony increases the reliability of criminal trial outcomes).

[71] *See id.* at 858; Montré D. Carodine, *"Street Cred,"* 46 U.C. DAVIS. L. REV. 1583, 1590 (2013); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1461 (2005) (critiquing the silencing of the criminal defendant through impeachment, as at many other stages of the criminal process); *id.* at 1499 ("If the system was intended to keep society substantially clueless about the people it incarcerates, it could not have been better designed.").

[72] *See* Natapoff, *supra* note 71, at 1499 (noting that if defendants could speak freely, "[t]he system would . . . obtain more information about law enforcement and how police behave").

[73] Roberts, *supra* note 1, at 2008.

[74] *Id.* at 1985.

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These critiques have led some to suggest abolition of this practice across the board,[75] and others to suggest it as regards criminal defendants only.[76] The implications for prosecution witnesses are less well-explored. Because of important contemporary questions about reform, abolition, and the role of the defense attorney in both, it is time to give more prominence to the question of what to do about witnesses for the government.

II. THREE SALIENT QUESTIONS

This Part will highlight three inquiries—starting relatively narrow but getting progressively broader—that are illuminated by a focus on the impeachment of prosecution witnesses. Each of these questions is hard to resolve, but the aim here is to highlight their importance, suggest potential lines of investigation, and indeed draw attention to the difficulty of resolution.

A. What Should Reform Look Like?

The first question is how to reform prior conviction impeachment. The overwhelming weight of the scholarly conversation tends toward the need for change. Scholars have made reform proposals to the Federal Rules Advisory Committee,[77] and have recently banded together with the goal of investigating change at the state and federal level.[78] But if there is to be a renewed push for change, where should that push be aimed? Abolition of the practice solely as it pertains to criminal defendants, for example, or across the board? One cannot make that choice without examining the impeachment of prosecution witnesses.

Whereas the weight of the scholarly conversation might suggest that the concerns are severe only as regards criminal

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[75] *See, e.g.*, Brian J. Foley, *Until We Fix the Labs and Fund Criminal Defendants: Fighting Bad Science with Storytelling*, 43 TULSA L. REV. 397, 413 (2007).

[76] *See, e.g.*, Carodine, *supra* note 10, at 582.

[77] ADVISORY COMM. ON RULES OF EVIDENCE, SPRING 2018 MEETING AGENDA BOOK 6 (Apr. 26–27, 2018), https://www.uscourts.gov/sites/default/files/agenda_book_advisory_committee_on_rules_of_evidence_-_final.pdf [https://perma.cc/Z2F2-U9UQ] (describing a proposal from Magistrate Judge Tim Rice to "bar impeachment with prior convictions that do not involve dishonesty or false statement"); ADVISORY COMM. ON RULES OF EVIDENCE, FALL 2018 MEETING AGENDA BOOK 440, 442 (Oct. 19, 2018), https://www.uscourts.gov/sites/default/files/2018-10-evidence-agenda-book_0.pdf [https://perma.cc/ZQX4-F433] (mentioning a proposal by Ric Simmons and a suggestion by Jeff Bellin).

[78] *See* AALS Call for Participation: *Critical Evidence Reform*, *supra* note 9.

defendants, a closer examination complicates that view. A recent opinion by the late Judge Weinstein provides a useful focal point.[79] In a federal prosecution alleging the armed robbery of a Brooklyn bodega, the government moved for the exclusion of the criminal convictions of a government witness. That witness, Bazel Almontaser, was a bodega clerk alleged to have seen the incident, and indeed to have escaped a bullet's path.[80] Mr. Almontaser had "two prior convictions for domestic violence—one for felony attempted assault and one for misdemeanor attempted assault."[81] But the jury never heard about them. Judge Weinstein granted the motion to prohibit their use, and in explaining his reasoning, he worked his way through each of the types of scholarly argument mentioned above—tenuous connection to veracity, tenuous connection to guilt, risk of unfair prejudice, racial bias, deterrence, and lasting impact. And he ended with a citation to scholarship that had raised all these issues in connection with the impeachment of those charged with crimes, and had made not a mention of other witnesses. The relevant portion of his opinion follows:

> It is dubious whether the convictions are relevant, since assault does not shed light on veracity. The defense argues that the fact that the witness denied committing one or both assaults to the police, and later entered guilty pleas for both, shows that his words cannot be trusted. Defense counsel is undoubtedly aware, however, that in light of the significant risks and emotional toll of going to trial, many defendants plead guilty to crimes they did not commit.
>
> Nonetheless, even assuming defendant's [sic][82] guilty pleas are relevant, their introduction at trial cannot be permitted under Rule 403.[83] Domestic violence is a disturbing issue that would undoubtedly prejudice the jury's view of Almontaser and his testimony at trial. Were the court to allow cross-examination of the witness on these convictions, it would fail to afford protection to a large population of minorities in New York State who have had contact with the criminal justice system. *See, e.g.*, *Utah v. Strieff*, 2016 WL 3369419, at *15 (2016) (Sotomayor, J., dissenting) ("[I]t is no secret that people of color are disproportionate victims of [law enforcement] scrutiny." (citing M. ALEXANDER, THE NEW JIM CROW 95–136 (2010))). Members of these communities should not be discouraged from coming forward to testify about serious threats to public safety in the areas where

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[79] United States v. Walker, 315 F.R.D. 154, 156 (E.D.N.Y. 2016), *as amended* (Aug. 2, 2016), *opinion amended and superseded*, 15-CR-388, 2016 WL 4091250 (E.D.N.Y. Aug. 2, 2016).

[80] United States v. Walker, 314 F. Supp. 3d 400, 405 (E.D.N.Y. 2018) ("During the robbery of a bodega in Brooklyn, New York, Shameke Walker ('Walker') fired at a store clerk with a revolver. The bullet missed the clerk, but pierced the leg of an uninvolved security guard standing across the street."); *see also Walker*, 315 F.R.D. at 155.

[81] United States v. Walker, 974 F.3d 193, 207 (2d Cir. 2020).

[82] It is interesting to note the typo and hypothesize about how it came about and went unnoticed.

[83] *See* FED. R. EVID. 403 (permitting a judge to exclude relevant evidence if its probative value is substantially outweighed by the risk of, for example, unfair prejudice).

> they live and work. Whether Almontaser's convictions were justified is not for this court to decide. What it can decide, however, is to limit the constant reminder of these past acts. The witness is already burdened by the collateral consequences of a felony conviction and need not be subjected to further scrutiny. *Cf.* 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).[84]

Judge Weinstein was not opining on the desirability of prohibiting such impeachment across the board (though some of his points seem to have rather broad applicability), but his opinion is an interesting reminder that while one does not have to worry about this form of impeachment prompting the jurors to *convict* a prosecution witness, prior conviction impeachment raises many concerns that are not limited to attacks on defendant-witnesses.

One might therefore be tempted to consider the option of abolishing this practice across the board. If it does indeed compound racial bias, rest on and endorse stereotyped thinking,[85] and rely on junk science, why keep it around? This path has been taken by Montana, which abolished the practice for all witnesses in 1976.[86] And as regards an analogous tool—the peremptory challenge, known to be used for prohibited purposes and in a way that endorses stereotypes and compounds racial bias[87]—many scholars have called for its abolition across the board to free the legal system of this scourge.[88]

But one of course needs to recall the fact that the sides in a criminal prosecution are not in symmetrical positions.[89] Pushes for abolition of the peremptory challenge have been countered by suggestions that it be abolished—or reduced in number—for the

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[84] *Walker*, 315 F.R.D. at 156 (citations omitted).

[85] *See* Griffin, *supra* note 32, at 31 (noting that the rule "codifies a stereotype about felons").

[86] Note that it is possible for defendants to open the door to admissions of convictions if they are found to have made false statements about them. *See* State v. Bingman, 61 P.3d 153, 160 (Mont. 2002). For an examination of the implementation of the Montana rules, see Roberts, *supra* note 1, at 2027–23.

[87] *See* Anna Roberts, *Asymmetry as Fairness*, 92 WASH. U. L. REV. 1503, 1524 (2015).

[88] *See, e.g.*, Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1182 (1995) (arguing peremptory challenges should be eliminated because they allow attorneys "to manipulate demographics and chisel an unrepresentative panel out of a cross-sectional venire"); Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 199–211 (1989) ("Few peremptory challenges could survive even rational basis scrutiny under the Equal Protection Clause."). Note that Arizona just took this step. *See* Ian Millhiser, *Arizona Launches a Bold New Experiment to Limit Racist Convictions*, VOX (Aug. 31, 2021, 8:00 AM), https://www.vox.com/22648651/arizona-jury-race-batson-kentucky-peremptory-strikes-challenges-thurgood-marshall [https://perma.cc/RL6V-CNLR].

[89] *See* Roberts, *supra* note 87, at 1506; People v. Hayes, 301 N.W.2d 828, 830 (Mich. 1981) ("[C]onsiderations relating to the propriety of impeaching defendants and other witnesses . . . are not identical.").

prosecution only;[90] that the defense has a greater need for it (including a debiasing need[91]); and that this is a rare opportunity for the defense to screen out biased criminal system decision-makers.[92] Similarly, Hawai'i and Kansas have concluded that prior conviction impeachment should be abolished as regards criminal defendant-witnesses only,[93] and that it should remain available as a tool for criminal defense counsel.[94] Even given all the concerns about prior conviction impeachment highlighted by Judge Weinstein, one should hesitate before proposing a ban that impacts criminal defendants, both for constitutional reasons and for reasons that do not necessarily have constitutional bases.

The right to confront is the most obvious constitutional basis for objection to a ban on impeachment of prosecution witnesses. Montana's ban on impeachment across the board has survived, despite constitutional objections to the regime,[95] and "[s]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials,"[96] but the possibility of successful defense challenges to abolition remains. In *Davis v. Alaska*, the Supreme Court proclaimed that the right to confront includes the right to cross-examine and overturned the denial of defense impeachment using a prosecution witness's juvenile record.[97] Some courts have drawn authority from *Davis* and other cases to find for the defense on the issue of whether a denial of prior conviction impeachment constituted a violation of the right to confront.[98]

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[90] *See, e.g.*, *Hayes*, 301 N.W.2d at 830; Abbe Smith, *A Call to Abolish Peremptory Challenges by Prosecutors*, 27 GEO. J. LEGAL ETHICS 1163, 1164 (2014); Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1148 (1994).

[91] *See* Roberts, *supra* note 87, at 1524–32.

[92] *See id.* at 1527–28.

[93] Note that in both states the defense can be found to have opened the door to this form of impeachment by introducing evidence supporting their credibility. *See* Roberts, *supra* note 1, at 1981 nn.21–22.

[94] And, one could argue, again for a potential debiasing purpose.

[95] *See* State v. Doyle, 160 P.3d 516, 526–27 (Mont. 2007) (resolving state and federal confrontation right objection to Montana regime by finding that the right to confront was not violated by the court's limitation of cross-examination based on Montana's Rule 609); *see also* State v. Gollehon, 864 P.2d 249, 259 (Mont. 1993).

[96] Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (quoting United States v. Scheffer, 523 U.S. 303, 308 (1998)); *id.* (noting that the right to present a complete defense is abridged by evidence rules that "'infring[e] upon a weighty interest of the accused' and are 'arbitrary' or 'disproportionate to the purposes they are designed to serve'" (quoting *Scheffer*, 523 U.S. at 308)).

[97] Davis v. Alaska, 415 U.S. 308, 315–17, 320 (1974).

[98] *See, e.g.*, People v. Redmon, 315 N.W.2d 909, 914 (Mich. Ct. App. 1982) (finding that a state restriction on prior conviction impeachment "must yield to the Sixth Amendment right to confrontation so fundamental to our system of criminal justice"); Vasquez v. Jones, 496 F.3d 564, 574 (6th Cir. 2007) ("[T]he state courts' failure to recognize that the exclusion of Vasquez's past-crimes impeachment evidence violated his Confrontation Clause rights

Even if there were no constitutional bar to broader adoption of the Montana model, there are a variety of other reasons why one should hesitate to say that the defense should be deprived of this potential tool (flawed as it is). It is not unusual for scholars to observe that the deck is stacked against the defense,[99] and from this stance it is problematic to think about removing one of the defense's tools. In addition, this tool may respond rather directly to one of the most concerning forms of deck-stacking. That form of stacking is the frequent construction in advance of and during trial of two diametrically opposed sides: the innocent "victim(s)" and the guilty/criminal "offender."[100] Law enforcement attempts to tell a story of guilt at trial—indeed, well before trial.[101] It is a story that may be rehearsed,[102] that may be bought (in both senses),[103] that may be false,[104] that may be coordinated,[105] and that is often supported by the media,[106] vocabulary,[107] handcuffs,[108] and other mechanisms. It is a

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represents an unreasonable application of Supreme Court jurisprudence, most notably *Davis v. Alaska*."); State v. Conroy, 642 P.2d 873, 876 (Ariz. Ct. App. 1982).

[99] *See, e.g.*, Eva S. Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 GEO. J. LEGAL ETHICS 1, 19–20 (1994) ("[T]here is a nearly universal view that the adversary system places one accused of a crime in such a weak position vis-a-vis the state that he deserves every protection possible against governmental overreaching.").

[100] *See* Roberts, *supra* note 52, at 1009–10 (critiquing the prevalence in criminal legal contexts of preadjudication uses of "offender"); State v. Corbin, 892 P.2d 580, 583 (Nev. 1995) ("The criminal defendant's character is already tainted by the mere fact of being the accused."); Vida B. Johnson, *Silenced by Instruction*, 70 EMORY L.J. 309, 311 (2020) (describing jury instructions to view a criminal defendant's testimony with caution). *See generally* Roberts, *supra* note 61 (critiquing the prevalence in criminal legal contexts of preadjudication uses of "victim").

[101] See, for example, "perp walks."

[102] *See* Richard E. Myers II, *Challenges to Terry for the Twenty-First Century*, 81 MISS. L.J. 937, 964 (2012) (discussing prosecutors preparing police officers to testify).

[103] *See* George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 1 (2000) ("As a general rule, payments to witnesses in return for testimony are considered unethical and illegal. There are, however, two major exceptions to that general rule: 1) compensation (either immunity from prosecution, reduced charges, sentence reduction, or cash) by the government to cooperating witnesses in criminal prosecutions; and 2) fees to expert witnesses in civil and criminal cases."); *see also* Nancy Gertner, *Is the Jury Worth Saving?*, 75 B.U. L. REV. 923, 931 n.44 (1995) (noting a study that shows that juries believe that because defendants are on trial, they are probably guilty of something); *id.* at 931 (stating that "[t]he public, with few exceptions, has enormous faith in the skill and integrity of police and prosecutors").

[104] *See* Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 255–56 (1998).

[105] *See id.*

[106] *See* Ryan Hagglund, *Constitutional Protections Against the Harms to Suspects in Custody Stemming from Perp Walks*, 81 MISS. L.J. 1757, 1767 (2012) ("Perp walks are a natural outgrowth of the symbiotic relationship between law enforcement and the media. Accordingly, the police often assist the media's efforts to obtain images of a suspect in custody." (footnote omitted)).

[107] *See* Roberts, *supra* note 61, at 1471 (describing the treatment of preadjudication terminology like "victim" as if it were "neutral").

[108] See the "perp walk."

story that may be met with no story in response.[109] What prior conviction impeachment of a prosecution witness can do is attempt to shake up this united front, this binary of innocence/guilt, of pure versus immoral character. And in shaking up this united front, perhaps it has the potential to do something that the rules of evidence and the use of cross-examination are said to be striving to do, namely to get us closer to the truth.[110] In addition, by prompting the government to respond—assuming that it takes an oppositional stance—that the conviction does not necessarily signal a character flaw and does not necessarily affect credibility, this intervention may lead to a healthy questioning of the meaning of the criminal system and its actions on the part of the judge and jury.

Bringing these conflicting considerations together suggests that there is no good answer here. This is a flawed tool along many dimensions. I have suggested elsewhere that it should be abolished as regards those charged with crimes.[111] But as regards prosecution witnesses, both permitting it and abolishing it are problematic. And while recent scholarship in this area has proposed that we cut away the worst and keep the least bad,[112] it is important to note the tension. Right at the core of this practice is a reifying of a conviction as a character brand. No tweaking of the rule or asymmetrical arrangement gets rid of that. As will be explored at the end of this Part, the tension is in part the point. The system cannot serve the needs, goals, or people that it purports to serve.

B. What Is the Defense Role?

One can read Judge Weinstein's opinion not just for its relevance to the scholarly community, but also for its implications for the defense role. In his order prohibiting defense counsel's impeachment, and reciting the many problems with prior conviction impeachment, one can read Judge Weinstein as saying to defense counsel: you fight every day against what you are asking for here. We can read him as alluding to the bind in which defense counsel find themselves—

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[109] *See, e.g.*, Ronald J. Bretz, *Scientific Evidence and the* Frye *Rule: The Case for a Cautious Approach*, 4 COOLEY L. REV. 506, 510 (1987) ("[M]any defendants simply cannot afford to hire their own expert witnesses . . . ."); *see also* Roberts, supra note 69, at 835–37 (describing one form of deterrent to the testimony of those charged with crimes, namely the fear of prior conviction impeachment).

[110] Chambers v. Mississippi, 410 U.S. 284, 295 (1973); *see also* FED. R. EVID. 102.

[111] Roberts, *supra* note 1, at 2036.

[112] *See, e.g.*, Tilly, *supra* note 4, at 1620 (proposing a revised Rule 609 for North Carolina, which would permit only *crimina falsi* convictions, subject to Rule 403).

forced,[113] perhaps, to argue that convictions hold meaning that in their own practice they may have seen is illusory.

As Judge Weinstein's opinion suggests, defense attorneys—perhaps particularly those like the defense attorney in that case who represent clients with no assets[114]—find themselves in a curious posture when they contemplate engaging in prior conviction impeachment. They are keenly aware of the vulnerability of their clients to stereotypes, of the distortions and disparities (factual and racial) contained within and produced by "criminal records," of the use of these distorted records to pass judgment on who their clients are, of the humiliation and trauma inflicted by the criminal system,[115] and of the vulnerability of their clients to impeachment of all sorts.[116] They may be aware of the way in which evidentiary rules function to protect the racial and economic inequity of the status quo.[117] They may have seen the harm done to their clients by questionable "science."[118] And yet up they step—up they must step, in the views of many[119]—to fling at the witness,[120] perhaps a traumatized

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[113] One can compare Jamelia Morgan's description of the dilemma facing lawyers representing people with disabilities. *See* Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 DENV. L. REV. 973, 985–86 (2019) ("In cases challenging the treatment of people with disabilities . . . lawyers representing people with disabilities are forced to represent their clients as physically, mentally, and emotionally damaged.").

[114] *See* United States v. Walker, 314 F. Supp. 3d 400, 419 (E.D.N.Y. 2018) ("Walker is sentenced to 10 years' incarceration for Count Three, to run consecutive to a concurrent sentence of time served, approximately 34 months, for Counts One and Four. He is sentenced to five years' supervised release. No fine is imposed since he has, and will have, no assets. A $300 special assessment is payable forthwith.").

[115] *See* David Luban, *The Inevitability of Conscience: A Response to My Critics*, 93 CORNELL L. REV. 1437, 1458 (2008) (mentioning the potential of a "brutal cross-examination" to "profoundly humiliate the victim"); *see also* Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 951 (2000) ("It is difficult, if not impossible, to zealously represent the criminally accused and simultaneously tend to the feelings of others.").

[116] *See* Commonwealth v. Small, 980 A.2d 549, 565 (Pa. 2009) (saying of a government witness that his "credibility was already assaulted to the nth degree—he was depicted as a crook, a recidivist, a drug abuser, a drunkard, and an admitted liar").

[117] Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2244 (2017) (using Critical Race Theory to describe "how the law of evidence can insidiously operate to perpetuate racial subordination").

[118] *See* Maneka Sinha, *Radically Reimagining Forensic Science*, 73 ALA. L. REV. (forthcoming 2022) (manuscript at 5–6), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3891788 [https://perma.cc/ED77-F2DM].

[119] *See* State v. Balthrop, 457 A.2d 1152, 1155 (N.J. 1983) (indicating that to represent one's client well, one must argue that, for example, a drug conviction is relevant to the complainant's testimony).

[120] Sometimes literally. State v. Holmes, 464 S.E.2d 334, 338 (S.C. 1995) ("[D]uring cross-examination, defense counsel threw a document on the floor in front of Burton and the jury and asked Burton if that was his 'rap sheet,' and if he had a record. Burton responded, 'Yes, sir, I do.'").

victim of crime,[121] more trauma,[122] more distortions; up they step to frame a criminal record as behavior that reveals who this person is, and that they are not the kind of person who can be trusted;[123] and indeed perhaps that they have engaged in acts "of baseness, vileness, or depravity."[124] They may need to argue that, even if years have gone by, the dishonesty remains. Thus, they may need to reinforce the stereotypes that daily affect their clients.[125]

It is a curious posture, but not an unprecedented one.[126] Take, for example, defense attorneys who conclude that in order to maximize their clients' chances they need to exercise race-based or gender-based peremptory challenges.[127] Yes, that may mean the endorsement of stereotypes, including race-based ones, against which their work so often tries to push, but it may be the best chance to tackle the anticipated or actual bias of

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[121] Note that Almontaser, mentioned above, *see supra* notes 79–84 and accompanying text, was alleged to have narrowly avoided a bullet. *See* United States v. Walker, 314 F. Supp. 3d 400, 405 (E.D.N.Y. 2018).

[122] *See* Tilly, *supra* note 4, at 1558 (mentioning that prior conviction impeachment enables "the revictimization of victim-witnesses"); *id.* at 1610 ("Being castigated as a liar with her prior criminal record is one more trauma needlessly imposed on the survivor by the justice system."); *see also* United States v. Walker, No. 07-CR-347, 2008 WL 3049897, at *1 (E.D.N.Y. July 28, 2008) (Judge Weinstein describing Mr. Walker, whose case is highlighted in this piece, as "an intelligent man who had a difficult childhood marked by an emotional disturbance, separation from his immediate family and his mother's substance abuse problems.").

[123] *See* Appellant's Reply Brief at 10, State v. Doyle, 160 P.3d 516 (Mont. 2007) (No. 05-362) (defense attorney arguing that a conviction is "reliable evidence on the issue of dishonesty and credibility").

[124] State v. Perry, 364 S.E.2d 201, 202 (S.C. 1988) ("A prior conviction may be used to impeach a witness's credibility [in South Carolina] only if the conviction involves a crime of moral turpitude . . . . A crime involving moral turpitude is an act of baseness, vileness, or depravity in the private and social duties which man owes to his fellow man or to society in general, contrary to the customary and accepted rule of right and duty between man and man.").

[125] *See* Griffin, *supra* note 32, at 30–31 (noting that FRE 609 "codifies a stereotype about felons"). And note that, although precluded from using store clerk Almontaser's convictions to strengthen his arguments, Mr. Walker was still permitted to argue (and did argue) that Almontaser was "a lying drug dealer." United States v. Walker, 974 F.3d 193, 200 (2d Cir. 2020).

[126] *See* Futrell, *supra* note 11, at 177 ("Defenders often play to the perceived biases of judges, prosecutors, and jurors by promoting harmful narratives about race, culture, gender, sexual orientation, or ability if it presents the clearest path to a positive legal outcome for their client.").

[127] *See, e.g.*, Abbe Smith, *"Nice Work if You Can Get It": "Ethical" Jury Selection in Criminal Defense*, 67 FORDHAM L. REV. 523, 565 (1998) ("No matter how personally distasteful or morally unsettling, zealous advocacy demands that criminal defense lawyers use whatever they can, including stereotypes, to defend their clients." (footnote omitted)); *see also* Amy Porter, *Representing the Reprehensible and Identity Conflicts in Legal Representation*, 14 TEMP. POL. & CIV. RTS. L. REV. 143, 169 (2004) ("[W]omen defenders who have written about the repugnancy of exploiting sexual stereotypes to discredit the rape complainant generally remain committed to the libertarian notion that sometimes the defender's role requires this action.").

criminal decision-makers.[128] Or take defense attorneys who conclude that they need to invoke a "gay panic" defense,[129] even if they view their work as centrally focused on fighting stereotyping and marginalization. Or those who attack prosecution witnesses as "snitches,"[130] even if they have seen in representing their clients the fearsome pressures that can bring about cooperation.[131] One can also compare Innocence Project attorneys, many of whom espouse not just a "[fight] wrongful convictions" stance but also a "transform the system" stance,[132] who may denounce a conviction as the product of "snitch" testimony,[133] or who may argue that part of what was so heinous about governmental misconduct is that "the real perpetrator" was still out there for years.[134] While these attorneys are driven by the need to help their clients, what results is language that dehumanizes, that fuels fears that those who may have committed crimes remain an alarming threat because of their persistent criminality, and that appears to endorse the widespread assumption that for every criminal charge there is a crime and a criminal wrongdoer.[135] The more you speak the familiar language, and the more you adopt the familiar categories, perhaps the more persuasive you are in getting your

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[128] *See* Roberts, *supra* note 87, at 1527–28 ("Before a criminal defendant reaches the moment of being able to exercise peremptory challenges against potential jurors, he or she will already have been subject to decision making by a host of criminal justice players: legislators, police officers, prosecutors, defense attorneys, and judges. Others, such as probation officers and parole boards, may lie ahead. Each of these has been shown to be vulnerable to implicit bias, a phenomenon that is a particular threat to the criminal defendant population, given the disproportionate representation of people of color therein. Despite the implicit bias affecting these groups of decision makers, the criminal defendant is—with rare exceptions—stuck with them: no matter how extreme their bias may be, nothing like a peremptory challenge is permitted. The peremptory challenge process represents one small area in which an effort to right the balance can be made." (footnotes omitted)).

[129] *See* Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 471 (2008).

[130] For powerful scholarship about "snitches" by someone with a keen interest in defendants' rights, see generally ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE (2011).

[131] *But see* Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1195–96 (2005) (mentioning defense attorney who "would no sooner represent a snitch than he would represent 'Nazis or an Argentine general said to be responsible for 10,000 "disappearances"'").

[132] *About*, INNOCENCE PROJECT, https://innocenceproject.org/about/ [https://perma.cc/P49J-ZBW5] ("The Innocence Project's mission is to free the staggering number of innocent people who remain incarcerated, and to bring reform to the system responsible for their unjust imprisonment.").

[133] *Contributing Causes of Wrongful Conviction*, INNOCENCE PROJECT, https://innocenceproject.org/causes-wrongful-conviction./ [https://perma.cc/EL8L-KRQ3] (including "Informants / Snitches" in a bar chart of "contributing causes of wrongful convictions").

[134] *See* Thomas McGowan, *Freeing the Innocent and Identifying True Perpetrators,* INNOCENCE PROJECT (Aug. 1, 2008), https://innocenceproject.org/freeing-the-innocent-and-identifying-true-perpetrators/ [https://perma.cc/JB2L-K9V9].

[135] *See* Roberts, *supra* note 61, at 1449, 1453–54.

client into the least bad one, but the more you grind these categories into law and life.

One might respond that this is just what lawyers do. We make our best arguments for the client at hand, knowing that we might have to push a contrary position five minutes later. A few considerations add interesting complexities. First, recent scholarship has raised the potential relevance of defense counsel's duties to their *other* clients, present and perhaps future.[136] Might it be argued that there is no clear ethical mandate to leverage stereotypes and assumptions in this case if they contribute to a climate that will negatively affect other clients? One can ask related strategic questions about the very case at hand: does your act of humiliating, stigmatizing, traumatizing, essentializing a person down to their record, and attributing damning meaning to a conviction, strengthen the risk that the judge will feel emboldened to do just that to your client when it comes to selecting a sentence,[137] and potentially imposing other consequences of conviction?[138]

The picture is also potentially complicated by the fact that defense attorneys are currently less likely to be seen as the kinds of single-minded zealous advocacy machines conjured up by scholars like Abbe Smith, who champions the position that defense attorneys need to do what they need to do for their clients, even if it involves making use of stereotypes, and even if it may conflict with values that they hold.[139] An increasing number of public defender agencies—and the attorneys within them—are

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[136] *See* Rayza B. Goldsmith, *Is It Possible to Be an Ethical Public Defender*, 44 N.Y.U. REV. L. & SOC. CHANGE 13, 38 n.118 (2019) ("[T]he rules governing conflicts of interest would caution against playing on stereotypes if those same characterizations could hurt future clients." (citing MODEL R. 1.7(a) ("defining conflict of interest as representation of one client that 'will be directly adverse to another client'"))). *But see* Fourth Edition of *Criminal Justice Standards for the Defense Function*, AM. BAR ASS'N (2017), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/ [https://perma.cc/R8KV-426R] (4-1.7 Conflicts of Interest; "(b) Defense counsel should not permit their professional judgment or obligations regarding the representation of a client to be adversely affected by loyalties or obligations to other, former, or potential clients . . . .").

[137] *See* Morgan, *supra* note 113, at 987 ("[W]here the pathology of disability is reinforced, even a legal victory could entail settlement measures with heightened security restrictions in, albeit, less isolating conditions, or continued segregation, although with more time out of cell.").

[138] *See* Smith, *supra* note 115, at 955 ("While I do not regard the use of stereotypes in criminal defense as an *ethical matter*, it is a serious *tactical* matter.").

[139] *See, e.g.*, *id.* at 953 ("There are certainly times when criminal defense lawyers *feel bad* about what they must do on behalf of clients, but the lawyer's conscience is generally not a helpful strategic guide. . . . I do not enjoy stirring up or manipulating homophobia or race, gender, or ethnic prejudice in the course of representing a client. However, my own ideological values cannot be the determining factor."); Abbe Smith, *Burdening the Least of Us: "Race-Conscious" Ethics in Criminal Defense*, 77 TEX. L. REV. 1585, 1595–96 (1999) ("Lawyers should not set limits on what they will do to achieve a client's interests because they conflict with the lawyer's values.").

claiming a role in the legal system, and the public arena, that explicitly pursues longer-term, bigger-scale change.[140] This change may be directed at some of the concerns implicated here, such as relying on junk science, or reifying convictions as acts that reveal norm-flouting, immoral, or dishonest character, or the doubling and redoubling of racial disparities, or the silencing of those who may have stories to tell of, for example, racist police conduct, or the lasting and pervasive branding and impact of criminal records. There seems to be a conflict here between what Smith rightly points out is a requirement of passionate dedication to do what it takes and this growing determination not to reinforce, but to shift, the attitudes that are so detrimental to those at risk of, or living through, criminal system involvement. The powerful long-term potential of those with experience of defense practice helping to push toward change seems inevitably to be hampered by the short-term demands to do whatever it takes to resist the devastating weight of a criminal conviction.[141] Those oppressed by stereotypes may have to reinforce them. Those oppressed by the system may act as if deputized by the system's oppressive mechanisms. We can see an example in an Eighth Circuit case, *United States v. Ferguson*, in which Mr. Ferguson argued that the relevant expungement statute violated his confrontation rights, because it protects witnesses from the lasting reminder of their conviction.[142] An expungement statute that would now serve him well.

This topic therefore merits attention as an example of some of the challenges facing defense attorneys, and defender organizations, as they champion roles that go beyond individual representation and embrace reform of the system, or abolitionist approaches. How does one square the short-term with the long-term:[143] the need to exploit the available tools even while pushing against purposes that they serve and messages that

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[140] *See* Futrell, *supra* note 11, at 161 (mentioning "the debate that has emerged in criminal defense literature about the potential conflict between cause lawyering and loyalty to the individual client").

[141] *See* Robin Walker Sterling, *Defense Attorney Resistance*, 99 IOWA L. REV. 2245, 2251 (2014) ("Because of their access to criminal defendants and their ethical mandate to represent their clients' expressed interests, defense attorneys are uniquely positioned to be an incredibly powerful weapon in the fight against invidious race bias in the criminal justice system."). *See generally* Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. 997 (2021) (discussing apparent carve-outs from abolitionist/anticarceral agendas, on the part of individuals and organizations).

[142] United States v. Ferguson, 776 F.2d 217, 222 (8th Cir. 1985).

[143] In a different context, see Morgan, *supra* note 113, at 986, stating that "although these practical concerns appear paramount in the immediate, or short-term, perspective of an attorney-client relationship or legal strategy, in the long-term, this mode of representation and rhetoric may harm the long-term interests of clients with disabilities, legal or otherwise."

they send?[144] Recent scholarship highlights this type of short-term/long-term tension as a mechanism impeding the kind of reformist or even abolitionist visions that are gaining mainstream attention. Kate Levine, for example, writes of individuals and institutions whose long-term vision is of a radical reduction or even doing away with the system, but who in the short-term call for prosecution, and imprisonment, of at least certain categories of people.[145] The system functions to defang its critics, and impede their long-term goals, through the short-term promise that it seems to hold of vindicating the most vulnerable.[146] Is the longer-term vision achievable if always being countered by the short-term or the carve-outs? Can public defense ever be abolitionist, or even progressive?

Nicole Smith Futrell has analyzed this kind of tension in a recent article exploring the possibility of abolitionist clinical teaching,[147] and she opens with a student inquiry into the topic at hand: the rightness, the soundness, the sense one can find in the use of a conviction to impeach in a way that enforces all the regressive assumptions discussed above.[148] After all, surely any organization or individual interested in systemic change in the criminal sphere must tackle the weight and meaning given to convictions. And even if your impeachment must be done to help your client, you are adding to the miasma of stereotypes about what criminal convictions mean—stereotypes that may shape the thinking of repeat courtroom players and the jurors passing through, and that may affect this same client and other clients, both in the courtroom and in their life outside.[149]

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[144] *See* Gerald F. Uelmen, *Lord Brougham's Bromide: Good Lawyers as Bad Citizens*, 30 LOY. L.A. L. REV. 119, 122 (1996) ("Any lawyer who decides what evidence to offer or what positions to assert based upon considerations such as, 'Will this advance the goal of racial equality?' or 'Will this lessen public confidence in the justice system?' is cheating the client.").

[145] *See* Levine, *supra* note 141, at 1004–06 (discussing demands for prosecution/prison time for police suspects/defendants, by those who otherwise take anticarceral or abolitionist positions).

[146] *See id.* at 1002–03.

[147] Futrell, *supra* note 11, at 164.

[148] *Id.* at 161 ("One of the attorneys was discussing how questioning a witness about their prior convictions can be a powerful way of undermining that witness's credibility. A student, visibly disturbed by the conversation, raised their hand to comment: 'How in one moment can we abhor the inherently racist ways that people's criminal histories are constantly being used against them, and then in the other moment exploit someone's criminal record in the name of doing justice for our client? Don't we have an obligation not to engage in the racist practices that the criminal legal system thrives on? Shouldn't our advocacy refrain from building up the system we supposedly despise?'").

[149] Griffin, *supra* note 43, at 290–91 ("Legal processes not only reflect, but also create, familiar narratives."); *see* Morgan, *supra* note 113, at 987 (in a related context, stating that "[t]he mode of representation—namely, that which presents disability as a type of weakness, pathology, or deficiency—reinforces a set of beliefs which normalize the mistreatment and abuse of people with disabilities both within the legal system and beyond. These beliefs become normalized and, once normalized, then provide a basis for justifying this same mistreatment and abuse.").

Thus, even if one accepts Abbe Smith's basic take on the need for individual defenders to prioritize lawyering that maximizes their clients' chances,[150] this form of impeachment complicates this stance, particularly as defenders explore expanded roles. Again, the goal here is not to find resolution, but to highlight the fundamental contradictions involved where defense attorneys may impede the very things desired by their clients and themselves.[151] The goal is not to criticize the hunger of defenders and defense organizations to avoid complicity in and replication of the systems in which they work, but rather both to celebrate the vision and to recognize some of its limitations.

C. What Might an Abolitionist Perspective Offer?

Sections II.A and II.B tried to highlight the value of studying this topic because of the tensions that it presents. I resisted the temptation to search for compromise in either of the two dimensions on which I focused: the fundamental values that push toward abolishing this defense counsel practice versus those that push toward keeping it; and the fundamental values that compel defense attorneys to do this versus the broader goals and visions that they may harbor, and the needs that their clients may have, that may push in another direction.[152]

These tensions are reflective of the fact that the criminal system, and those working within it, are called upon to do incompatible things. The system is called upon to protect the rights of defendants but also increasingly called upon to afford "respect and dignity" to complainants.[153] Indeed, I have written about the fact that the common legal designation of complainants as "victims" seems to embody this tension: the

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[150] *See* Futrell, *supra* note 11, at 178 ("[A] defender's primary responsibility must always be to prioritize the urgent, life-saving work of helping to mitigate the impact of the system on a client's life."); *see also* Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1949 ("A thoughtful resistance lawyer . . . will likely resort to the conventional ethical commitment to serve her client first.").

[151] *See* Lawrence Vogelman, *The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom*, 20 FORDHAM URB. L.J. 571, 574 (1993) ("[W]hat are the ethical and moral implications of allowing defense counsel to so cleverly play upon the racial fears they evidently recognized? The answer is not a simple one. It pits two fundamental values of our society against one another: the need to have our system of justice do its work free from the shackles of racial, ethnic, or religious prejudice, versus the rights of those accused of crimes to zealously and creatively defend themselves.").

[152] *See* Farbman, *supra* note 150, at 1947 (mentioning that the defense lawyers to whom he spoke "came [to their work] with critiques of the system they were practicing in and with aspirations about what that practice might accomplish").

[153] *See* Roberts, *supra* note 61, at 1478 (discussing the invocation of "respect and dignity" in constitutional and other "victims' rights" provisions).

term is frequently read as an appropriate and necessary way of showing trust, dignity, and respect,[154] but given the core legal definition of the criminal "victim" (someone who has suffered a crime), its common preadjudication usage blasts through the concepts of the presumption of innocence, the prosecution's burden of proof, and the notion that it is our adjudication processes that determine the existence of things like crimes and victims.[155] Similarly, defense attorneys work in a space where the goals that many of them share are in tension—to fight to the utmost for their clients, but also to fight the things that prior conviction impeachment (and much of the system) embodies: questionable science, bias, stereotyping, and perpetual reminders of one's record. In each of the contexts mentioned above—jury selection, deployment of defenses, deployment of cross-examination, and jury argument[156]—they may find themselves required to exploit stereotypes. Stereotyping is thus not an unfortunate historical or cultural artifact within the system, but a tool consciously deployed by those who might want—and whom we might want—to fight it with vigor; such are the forces that defense attorneys must oppose.

So, by all means let us think about which of the states has it best—let us debate the Montana model versus that of Hawai'i and Kansas—and which state might get it better. But there is no obvious way to do prior conviction impeachment that is unobjectionable, and no obvious way that taking this tool away from the defense will not be objectionable, and thus the nub of the paradox will remain.

Rather than feeling defeated by these irreducible tensions, one can usefully reflect on abolitionist visions. Abolition is understood in a variety of ways, but as described in one recent account, abolitionists "work toward eliminating prisons and police, and building an alternate and varied set of political, economic, and social arrangements or institutions to respond to many of the social ills to which prison and police now respond."[157] A few aspects of this literature indicate its potential value for those puzzling over how to respond to these tensions. First,

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[154] *See* Z.W. v. Foster, 422 P.3d 582, 583 (Ariz. Ct. App. 2018) (complaining witness suing presiding judge, after he denied her request to preclude reference to her as the "alleged victim," and arguing that "alleged victim" violates her state constitutional right to be treated throughout the criminal justice process with "fairness, respect, and dignity").

[155] *See* Roberts, *supra* note 61, at 1455 (mentioning Black's Law Dictionary definition of "victim," which requires actual commission of crime, tort, or harm—rather than an allegation of the same).

[156] *See supra* Part II.B.

[157] Amna Akbar, *Teaching Penal Abolition*, LAW & POL. ECON. (July 15, 2019), https://lpeblog.org/2019/07/15/teaching-abolition/ [https://perma.cc/4SMS-7SN2].

while sharing with, for example, "victims' rights" proponents an interest in respect and dignity, abolitionists point out that honoring these values for all is not something that our criminal system is equipped to do.[158] Second, and related, they point out that the criminal system traps us into zero-sum thinking and a zero-sum reality, where efforts to reduce one side's degradation may help bring about the other's.[159] Third, and again related, abolitionist thinkers explain that those alleged to have committed crimes and those alleged to have been harmed by them frequently exist in a world of shared subordination, allied more closely than are prosecution and complainant.[160] Note, for example, what is happening when defense counsel flings a criminal record at a complainant: they are in some instances flinging the mud of state mistreatment. Abolitionists argue that those to whom we might turn for reformist initiatives may end up reinforcing the very systems that they would like to see changed.[161] So too in some instances we can see those who impeach prosecution witnesses as having been deputized by the state to do its work for it—reinforcing stereotypes about what a conviction means—even while fighting it.

The way in which courts and litigators often conceptualize this issue is that if one side is permitted to show that the other side has this kind of stain on their character, then that side should be able to reverse the narrative and show that

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[158] *See* Allegra M. McLeod, *Envisioning Abolition Democracy,* 132 HARV. L. REV. 1613, 1647 (2019) ("Because of [its] commitment to active amends and accountability, justice consistent with an abolitionist ethic offers more to survivors of harm" and "[a]bolitionist justice also better responds to the dignity and humanity of those who have perpetrated wrongs."); *see also* I. India Thusi, *Feminist Scripts for Punishment*, 134 HARV. L. REV. 2449, 2469 (2021).

[159] *See* Tilly, *supra* note 4, at 1610 (mentioning that prior conviction impeachment leads to a defendant "who may reap the windfall of revictimizing the victim-witness" and that this "is a simple reality of the system the state has adopted"); Allegra McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1171 (2015) ("[O]n an abolitionist account, justice is not meaningfully achieved by caging, degrading, or even more humanely confining, the person who assaulted the vulnerable among us."); Elizabeth L. MacDowell, *Theorizing from Particularity: Perpetrators and Intersectional Theory on Domestic Violence*, 16 J. GENDER RACE & JUST. 531, 546–47 (2013) ("A victim requires a perpetrator, an identity that is constructed in opposition to the perfect victim.").

[160] *See* Ellen Yaroshefsky, *Balancing Victim's Rights and Vigorous Advocacy for the Defendant*, 1989 ANN. SURV. AM. L. 135, 143 (1989); Stacy Caplow, *What If There Is No Client?: Prosecutors as "Counselors" of Crime Victims*, 5 CLINICAL L. REV. 1, 25 (1998); Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 253–55 (2019); Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1358 (2005) ("The divergence of prosecutors' and accusers' interests has become plain . . . .").

[161] *See, e.g.*, McLeod, *supra* note 158, at 1643 ("[E]fforts to reform criminal legal processes in order to attempt to realize idealized visions of justice are doomed to simply further entrench existing injustices if they are not accompanied by more transformative demands.").

you ain't so perfect either. But if one conceptualizes the battle differently, and perhaps more accurately, as one side saying, "you've been harmed by a racist under-resourced system that left you with this permanent encumbrance that the law, resting on junk science and ignoring empirical data and disregarding racially disparate impact allows me to fling at you," and the other side saying, "well you've been equally screwed," one can start to see another example of something that scholars concerned about the "victims' rights movement" in its current form have raised: complainant and defendant have been put into the arena as sparring partners, when in fact as to both the state may have failed and imposed racialized harms and hampered their life prospects.[162]

A final point on the abolitionist front relates to the fact that wariness about abolitionist visions is often tied to concerns about "victims."[163] The irreducible nub within prior conviction impeachment of potential degradation,[164] of humiliation,[165] of stripping one down to one's record that is permitted—indeed sometimes found to be a necessary part of effective representation[166]—might unsettle a potential assumption underlying that sort of resistance: that the criminal system can be one where complainants are able to pass through the trial process in a way that guarantees them respectful treatment and affirms their worth,[167] at least if they have qualifying convictions.

CONCLUSION

Commentators have largely neglected the impeachment of prosecution witnesses. The reasons are understandable:

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[162] *See, e.g.*, United States v. Walker, 314 F. Supp. 3d 400, 417 (E.D.N.Y. 2018) (saying of Mr. Walker, who sought to impeach complainant store clerk Bazel Almontaser, that "[b]ecause of his mother's drug addiction, he was removed from her home as a young child and placed in foster care. . . . He was first incarcerated at age 14.").

[163] *See, e.g.*, I. India Thusi, *Harm, Sex, and Consequences*, 2019 UTAH L. REV. 159, 208 (2019).

[164] Tilly, *supra* note 4, at 1560 (stating that North Carolina's rule "deters and demeans"); *id.* at 1565 (describing "degrading character attacks").

[165] *Id.* at 1611 ("North Carolina Rule 609 effectively tells victim-witnesses with criminal pasts they can expect to the humiliated with their criminal record."). Note that the commission responsible for drafting Montana's rule prohibiting this form of impeachment observed that the ability to cross-examine witnesses about felony convictions "can, in many instances, cause severe embarrassment on the part of the witness." MONT. CODE ANN. § 26-10-609 commission's cmt.

[166] *See, e.g.*, Commonwealth v. Grove, 324 A.2d 405, 406–07 (Pa. Super. Ct. 1974) (finding that it was ineffective assistance of counsel not to engage in this form of impeachment).

[167] *See* Tilly, *supra* note 4, at 1558 (stating that jurors may view "victim-witnesses" with prior convictions as "lesser human beings unworthy of protection").

when it comes to the impeachment of criminal defendants, the stakes are higher, and a consensus on the need for reform is clearer. Focusing on prosecution witnesses reveals conflicting values implicated by the choices of both rule drafters and defense attorneys. Exposing those conflicts is important. First, because those who seek reform need to navigate them wisely. And second, because their lack of easy resolution sheds light on irreconcilable conflicts in the system and the resulting appeal of abolitionist arguments.