UCONN | SCHOOL OF LAW

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Dear Advisory Committee Members,

The Coalition for Prior Conviction Impeachment Reform (the "Coalition") is a group of 11 law professors,[1] each of whom has studied prior conviction impeachment. We write a second time to your committee to endorse a proposed change to FRE 609(a)(1) discussed at your meeting of April 19, 2024. This new proposal would alter the balancing test for defendants in criminal cases such that defendants could be impeached with prior convictions only if the probative value of the convictions substantially outweighed the risk of unfair prejudice. While, for the reasons given in our previous letter (reproduced below), we believe that eliminating FRE 609(a)(1) would be a better course, we support the change now being considered.

Rather than recapitulate the need for reform, we enclose our previous letter here. We add simply that our research shows that judges consistently misapply the balancing test now inscribed in Rule 609(a)(1)(B).[2] Defendants are impeached with prior convictions that have no established bearing on their untruthfulness and judges often show no sign that they are weighing the enormous risk of unfair prejudice that comes with admitting such prior convictions for impeachment.[3] Further, because this has been a dominant approach to applying the existing balancing test, defendants in consultation with counsel often make the devastating decision not to take the stand in their own defense rather than incur this risk of unfair prejudice from the introduction of a prior convictions under FRE 609(a)(1).[4]

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[1] Professors Jeffrey Bellin (William and Mary Law School), John Blume (Cornell Law School), Bennett Capers (Fordham University School of Law, Montré Carodine (University of Alabama School of Law), Jasmine Gonzales Rose (Boston University School of Law), Lisa Kern Griffin (Duke University School of Law), John D. King (Rutgers Law School), Colin Miller (University of South Carolina School of Law), Aviva Orenstein (Indiana University Maurer School of Law), Anna Roberts (Brooklyn Law School), and Julia Simon-Kerr (The University of Connecticut School of Law).

[2] *See, e.g.*, Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. Davis L. Rev. 289, 325–26 (2008); 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, 864 (2016).

[3] *Id. See also, e.g.*, Julia Simon-Kerr, *Credibility by Proxy,* 85 Geo. Wash. L. Rev. 152 (2017).

[4] *See, e.g.*, Jeffrey Bellin, *The Silence Penalty*, 103 Iowa L. Rev. 395, 432–33 (2018); John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. Empirical Legal Stud. 477, 491 (2008). *See also* 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, 1370 (2009) ("In the cases in which defendants testified, judges reported that, on average, defendant testimony was more important than that of the police, of informants, of codefendants, and of expert witnesses."); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 NYU L. Rev. 1449, 1459–60 (2005) ("Defendants do not testify largely because it is so dangerous. . . It . . . allows the government to elicit the defendant's criminal history . . . which may

In adding the word "substantially" to the balancing test, this Committee would have an opportunity to correct the misapplication of FRE 609(a)(1)(B)'s balancing test. Of equal importance, it could also use the Advisory Committee notes to clarify that only in very rare instances would the probative value of a prior conviction on the question of untruthfulness outweigh the demonstrated and significant risk of unfair prejudice.[5]

We thank you for your attention to this vital issue.

Sincerely,

Professor Julia Simon-Kerr, The University of Connecticut School of Law
Professor Anna Roberts, Brooklyn Law School

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dissuade the jury from hearing the substance of the defendant's story, from having sympathy with the defendant, or from disbelieving the government.").

[5] *See* Anna Roberts & Julia Simon-Kerr, PRIOR CONVICTION IMPEACHMENT: THE NEED FOR REFORM, https://strengthenthesixth.org/focus/PRIOR-CONVICTION-IMPEACHMENT-THE-NEED-FOR-REFORM.

Letter of April 11, 2024

The Coalition for Prior Conviction Impeachment Reform (the "Coalition") is a group of 11 law professors,[6] each of whom has studied prior conviction impeachment. The Coalition formed in 2021 and has since focused its efforts at the state level, filing amicus briefs in cases challenging state equivalents to Federal Rule of Evidence 609 in Oregon and Washington. Two Coalition members authored a report on the need for prior conviction reform in association with the National Association of Criminal Defense Lawyers.[7] Another Coalition member, Professor Bellin, recently presented on the issue to your Committee. We were delighted to learn that possible reform of Rule 609 is on the Committee's agenda, and we felt compelled to write briefly to you to express support for the Committee's putting forward a rule change proposal that would allow for notice and comment on this issue.

Each of us has approached this topic from a different scholarly angle, and we differ in the solutions that we would view as ideal. But we are united in viewing the reform proposed in the Reporter's memo as a vast improvement on the status quo, and in our request that the Committee open this topic up for public comment. While we have collectively written hundreds of pages on this issue, we will flag just three of the factors that make this an urgent topic for public debate:

- **Racial bias**. Prior conviction impeachment is a continuation of policies that barred witnesses from testifying in courtrooms in the United States based on racism, sexism, classism, and other forms of bigotry.[8] Although these patently unconstitutional witness competency laws are gone, impeachment with prior convictions still functions systematically to exclude and silence witnesses with prior convictions who—due to racial disparities at each stage of criminal proceedings—are disproportionately witnesses of color. Rule 609 stands not as a testament to hard-fought Congressional compromise, but as the continuation of a historical view that certain witnesses were not worthy of belief.[9] The rule itself was the product of a racially charged Congressional debate in which the "stereotype of the Black criminal" played a central role.[10] Today, as discussed below, Rule 609 functions in large part as a witness silencing mechanism, and the witnesses it silences are disproportionately people of color.

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[6] Professors Jeffrey Bellin (William and Mary Law School), John Blume (Cornell Law School), Bennett Capers (Fordham University School of Law, Montré Carodine (University of Alabama School of Law), Jasmine Gonzales Rose (Boston University School of Law), Lisa Kern Griffin (Duke University School of Law), John D. King (Rutgers Law School), Colin Miller (University of South Carolina School of Law), Aviva Orenstein (Indiana University Maurer School of Law), Anna Roberts (Brooklyn Law School), and Julia Simon-Kerr (The University of Connecticut School of Law).

[7] Anna Roberts & Julia Simon-Kerr, PRIOR CONVICTION IMPEACHMENT: THE NEED FOR REFORM, https://strengthenthesixth.org/focus/PRIOR-CONVICTION-IMPEACHMENT-THE-NEED-FOR-REFORM.

[8] *See* Julia Simon-Kerr, *Credibility by Proxy,* 85 Geo. Wash. L. Rev. 152 (2017).

[9] *Id.*

[10] Montré Carodine, *"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 Ind. L.J. 521, 549 (2009) (noting that "one must keep in mind that most people at that time-as is true today-saw a Black face when they thought about the criminal element in society.").

- **Constitutional implications**. The threat of prior conviction impeachment chills the exercise of the constitutional right to testify in one's defense. Studies of wrongful convictions and first-hand accounts offered by exonerees who chose not to testify at their trials describe the decision as motivated by a well-founded fear of being branded in the eyes of the jury by their prior convictions.[11] Prior conviction impeachment has also encouraged those facing criminal charges—including those subsequently exonerated—to waive the right to trial and take a guilty plea.[12] Concern for protecting the constitutional right to testify caused the Hawai'i Supreme Court to bar prior conviction impeachment of those facing criminal charges.[13] Relatedly, many evidentiary rules and precepts assume the existence of a meaningful—and vital—opportunity for those facing criminal charges to testify.[14] Evidence rules also favor live testimony of witnesses where possible. By silencing many defendants in criminal cases and imposing a penalty on non-party witnesses who must face questioning about unrelated prior convictions when performing their civic duty and testifying in court, Rule 609 stands in tension with these precepts.

- **Lack of empirical basis**. Prior convictions are not a tested metric of untruthfulness. Instead, they have long signified which witnesses are deemed unworthy of being heard or believed. Yet, being unworthy of belief in the eyes of those in power is not the same as being dishonest. Fifty years after the enactment of Rule 609, it is clear that the only permitted use of convictions under Rule 609, namely to shed light on a witness's "character for truthfulness," is not supported by social science data.**[15]** To the contrary, the best empirical study on the effect of prior conviction impeachment found that "determinations of the defendant's credibility are not the prime method by which criminal record influences guilt judgments."[16] Instead, "[t]he evidence against a defendant with a prior record appears stronger to the jury."[17]

We very much hope that the Committee will put forward a rule change proposal that would allow concerned members of our Coalition, the broader legal academy, the bench, the bar and the public to

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[11] John Thompson, Opinion, *The Prosecution Rests, but I Can't*, N.Y. Times (Apr.9,2011), https://www.nytimes.com/2011/04/10/opinion/10thompson.html (describing Thompson's own inability to tell his story at the trial at which he was wrongfully convicted due to a prior conviction); John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. Empirical Legal Stud. 477, 491 (2008).

[12] Recent appellate litigation in Washington makes this point powerfully. *See* Brief of Appellant at *105-07, State v. Gates, 2022 WL 2402337 (Wash. Ct. Apps.).

[13] *See* State v. Santiago, 492 P.2d 657, 660-61 (Haw. 1971).

[14] *See, e.g.,* Roger Park, *The Rationale of Personal Admissions*, 21 Ind. L. Rev. 509, 516 (1988) ("It is fair to receive an admission [under Federal Rule of Evidence 801(d)(2)] because ordinarily the party who made the admission will have the opportunity to put himself or herself on the stand to explain the statement or to deny having made it").

[15] An Oregon Supreme Court Justice recently made that very point in a question to the Government attorney at oral argument. Oral Arg., State v. Aranda, Or. Sup. Ct., https://oregoncourts.mediasite.com/mediasite/Channel/default/watch/94e222ad8fb44fd8bf624fb29d6430fd1d 8:28- 9:18 (Feb. 1, 2023) (asking the government for its response to data suggesting that convictions offer no probative value on truthfulness).

[16] 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, 1359–61 (2009).

[17] *Id.*

expand on these points and others during the notice and comment period. In the half century since it was enacted, Rule 609 has proved to be a rule that does little to advance the mission of the Federal Rules, to "ascertain[] the truth and secure[] a just determination." Instead, it is one key reason that so many trials are conducted without the most critical evidence available, the testimony of the defendant.

Sincerely,

Professor Julia Simon-Kerr, The University of Connecticut School of Law
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Coalition Membership
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Professor John Blume, Cornell Law School
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