Credibility by Proxy

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Abstract

Evidence jurisprudence assumes that impeachment rules are intended to help determine the truth of the matter by identifying liars. For example, a witness's credibility can be impeached with evidence that she has a fraud conviction because in theory that conviction suggests she is deceitful and is therefore likely to lie under oath. Scholars, judges, and rulemakers have criticized this system of impeachment, demonstrating again and again that the rules are ineffective at identifying liars and lack any social science basis. Yet the impeachment rules endure.

This Article identifies the reason for these rules' endurance in the face of overwhelming evidence: impeachment rules are not and never have been about identifying false statements in order to get to the truth. Instead they delineate which persons have the culturally recognized moral integrity or honor to be worthy of belief in court. In other words, impeachment rules enforce not a scientific but a status-based view of truth in which status markers, such as reputation and prior crimes, determine who will be deemed a probable liar. This fixation on status, in turn, has repercussions along lines of race and gender. This Article shows this using both historical and modern examples. The effect of this categorical error (confusing status with veracity) is to abandon one purpose of evidence law—truthseeking—in favor of the very different, and potentially contrary, goal of norm enforcement. The side effect is that it perpetuates systemic biases in the justice system. It may be that soon we will have some scientific way to identify liars. In the interim, though, we should abandon status as a proxy for credibility.

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Introduction

The American legal system has a complicated relationship to truth. The system relies on partisan advocates to bring information to court, it frequently privileges policy goals over information-gathering,[1] and it tolerates obvious falsehoods in certain circumstances.[2] Truth in legal proceedings not only competes with other priorities, such as fairness and efficiency, but under the American legal system, it may be sought through deception,[3] half-truths, misleading statements, and, at times, outright falsehoods.[4]

The law of impeachment offers an example of the legal system's ambivalence toward the truth. At least superficially, the system's approach to witness credibility prioritizes getting at the truth. Evidence of a witness's bias or defects in her perception or memory of an event are straightforwardly admissible because relevant, while hearsay rules ease the path to admitting evidence of prior inconsistent statements.[5]

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1 For example, testimonial privileges shield relevant information from the jury in order to promote goals such as marital cohesion. *See, e.g.*, Trammel v. United States, 445 U.S. 40, 51 (1980) (describing how policy rationales for certain privileges trump general principle that relevant evidence should be admitted).

2 *See, e.g.*, Julia Simon-Kerr, *Systemic Lying*, 56 Wm. & Mary L. Rev. 2175, 2178 (2015) (defining "systemic lies" as "lies that participants in the legal system tell repeatedly, knowing they are lies and with the complicity of all participants, for what they see as a higher purpose").

3 For example, in the United States, police have discretion to lie to suspects during interrogations once they have been Mirandized. Illinois v. Perkins, 496 U.S. 292, 297 (1990) (finding unproblematic police misrepresentation during interrogation not rising to level of compulsion or coercion).

4 Perjury, for example, is only defined as telling overt lies. 18 U.S.C. § 1621 (2012). Omissions or misleading answers that are factually truthful do not qualify. *See id.*

5 *See* Roger Park & Tom Lininger, The New Wigmore: A Treatise on Evidence: Impeachment and Rehabilitation § 2.1 (Aspen Publishers 2016) (describing forms of impeachment). Prior inconsistent statements can be used to impeach and are admissible because relevant under Federal Rule 402, unless their probative value is substantially outweighed by a

In addition to these basic forms of impeaching evidence, however, in the federal and all state systems, special impeachment rules permit a witness's credibility to be attacked with evidence of prior convictions, reputation or opinion testimony, or testimony about prior bad acts, most of which would not otherwise be admissible.[6] It is these latter so-called "impeachment rules" with which this Article is concerned. Courts insist that these rules are designed to promote the "truth-finding process of trial"[7] and scholars have critiqued them through that lens.[8] Yet, as much as we pay lip service to the notion, these rules have never been, and are not today, about identifying false statements in order to get at the truth.

Through a close study of the jurisprudence surrounding impeachment rules, this Article excavates the law's deep and enduring commitment to status as a proxy for credibility. This Article suggests that the real function of American impeachment jurisprudence has been to embed notions of status in the law of evidence. Simply attacking the rules for their failure as truthseeking devices, while important, misses the elision between status and credibility that provides a theoretical grounding for the rules and accounts for their staying power.

By status, this Article refers to a person's social position and perceived compliance with rules of conduct imposed by society, in particular with norms of honorable behavior.[9] Status has a tautological relationship to credibility, which leading law dictionaries have long defined as "worthiness of belief."[10] Courts maintain that credibility is a product of "conduct which reflects . . . honesty and integrity,"[11] but the very definitions of honesty and integrity are infected by status-

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danger of unfair prejudice under Federal Rule 403. To the extent they are governed by the Federal Rules of Evidence ("FRE" or "Federal Rules"), it is to delineate when they are not hearsay and the form in which they can be introduced. *See* FED. R. EVID. 801(d)(1); FED. R. EVID. 613(a), (b).

6 Today, these forms of impeachment are covered by formal rules in every state and in Federal Rules 608 and 609. *See also* Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 2027–30 (2016) (describing state approaches to impeaching with prior convictions).

7 United States v. Bagley, 473 U.S. 667, 690 (1985) ("Whenever the Government fails, in response to a request, to disclose impeachment evidence relating to the credibility of its key witnesses, the truth-finding process of trial is necessarily thrown askew.").

8 *See infra* notes 15–22 and accompanying text.

9 *See* RALPH LINTON, THE STUDY OF MAN: AN INTRODUCTION 113, 115 (New York, Appleton-Century-Crofts, Inc. 1936) (describing how status defines an individual's position within society and ways in which status can be both ascribed and achieved).

10 Standard law dictionaries have used this definition for credibility for almost two centuries. *See, e.g.*, *Credibility*, BLACK'S LAW DICTIONARY (10th ed. 2014); *Credibility*, 1 JOHN BOUVIER, A LAW DICTIONARY 393 (2d ed. 1843).

11 Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967).

based judgments.[12] What makes a witness "worthy of belief" is not passing a lie detector test or meeting some scientific definition of a truth-teller. Such a definition is missing because we have yet to find reliable methods for identifying liars. Instead, this Article will show that what makes a witness worthy of belief is his or her culturally-recognized moral integrity or honor.In other words, people are worthy of belief because they comply with norms of worthiness.

Status enters impeachment jurisprudence through a choice about how to identify unreliable testimony. There are multiple ways that the American legal system looks for such testimony, but they can be grouped into two categories. In the first category, fact-finders look for lies told in court by assessing demeanor and evidence of bias and inconsistency. This Article refers to this category as the search for *lies*. In the second, the legal system allows impeachment with certain markers that suggest that a person is more likely to lie. This category will be referred to as the search for *liars*. It is this second search that introduces status. It is also the source of evidence rules in every jurisdiction that allow witnesses to be impeached with evidence of prior convictions, with prior bad acts related to truthfulness, and with testimony from witnesses about whether they can be believed and what kind of reputations for truthfulness they have.[13] This information is not case or testimony specific. It does not relate to what the witness says or has said in relation to the matter at hand, but instead is viewed as telling the fact-finder something about the type of person on the stand. In essence, the court makes a determination that certain attributes or status markers make the witness a potential liar and for that reason the markers, whether a prior criminal conviction or a bad reputation for truthfulness, may be revealed to the jury. Although not every state has adopted the precise approach of the Federal Rules of Evidence (or "Federal Rules"), every state provides similar avenues for looking for liars.[14]

Aspects of this search for liars have long been the focus of criticism.Writing in 1904, John Henry Wigmore argued that the law should stop importing the notion "that a usually bad man will usually lie and

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12 *Compare Honest*, OXFORD ENGLISH DICTIONARY, http://www.oed.com (last visited Dec. 16, 2016) ("Worthy of honour, honourable, commendable; (also) that confers honour, that does a person credit."), *Honor, With Reference to a woman*, *id.* ("[V]irtue as regards sexual morality; chastity; virginity.").

13 *See* FED R. EVID. 608, 609. *See also, e.g.*, CAL. EVID. CODE §§ 785–788 (1965); IOWA R. CIV. P. 5.608, 5.609; N.J. R. EVID. 608, 609; S.C. R. EVID. 608, 609.

14 *See infra* notes 195–97 and accompanying text. Montana comes closest to prohibiting impeachment with prior convictions. *See* Roberts, *supra* note 6, at 2030.

a usually good man will usually tell the truth" through its impeachment rules.[15]Since Wigmore's day, criticism of impeachment jurisprudence has been unrelenting. Scholars have pointed out that assessing truthfulness is not simply a function of common sense.[16] Instead, identifying lies or liars is so complicated that even trained interrogators do no better at it than lay people.[17] Another line of argument has maintained that in today's atomistic society, people do not have discernable reputations for truthfulness or untruthfulness that can be accurately commented on in court.[18] Scholars have also argued, persuasively, that prior convictions and other bad acts admissible under the impeachment rules are poor predictors of truthfulness in the courtroom because people are highly contextual in their decisions to lie.[19] There is no reason to believe, they argue, that those with admissible prior convictions lie on the stand more often than those without such prior convictions.[20] These critics have documented and studied the negative consequences of the rules for criminal defendants with prior convictions who are, in essence, deprived of the ability to present a defense by the inevitable disclosure of their prior crimes and the effect of that disclosure on juries.[21] These criticisms also highlight

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15 2 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 921 (1904).

16 *See, e.g.*, Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 72 (2000) ("[M]ost jurors' common sense would lead them to focus on . . . fallacious stereotypical correlates of deception.").

17 *See, e.g.*, Saul M. Kassin & Christina T. Fong, *"I'm Innocent!": Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 23 LAW & HUM. BEHAV. 499, 501–03, 511 (1999) (reporting on experimental findings in a mock interrogation setting that "training in the use of verbal and nonverbal cues" to detect lying "did not improve judgment accuracy").

18 *See, e.g.*, Daniel D. Blinka, *Why Modern Evidence Law Lacks Credibility*, 58 BUFF. L. REV. 357, 401 (2010) (citing and quoting FED. R. EVID. 608 advisory committee note) (observing that the Federal Rules added a provision for witnesses to give an "opinion" of a person's character in response to the difficulty in distilling reputation in court).

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

20 *See id.*

21 *See* Montré D. Carodine, *Keeping It Real: Reforming the "Untried Conviction" Impeachment Rule*, 69 MD. L. REV. 501, 507 (2010) (addressing the interrelationship between FED. R. EVID. 609 and plea bargaining); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1461 (2005) (arguing that FED. R. EVID. 404(b), which provides for admissibility of character evidence, and 609 both "threaten the defendant's ability to be heard by the jury" and negatively impact the attorney-client relationship).

the disproportionate impact of these issues on minority communities in which larger percentages of the population have criminal records.[22]

While valuable, these critiques miss a fundamental attribute of this impeachment jurisprudence: it is designed around a historical proxy for truth. Our credibility rules developed in the shadow of elite nineteenth-century honor norms.[23] Those norms suggested that certain statuses and behaviors would function as stand-ins for a person's proclivity for truthfulness or untruthfulness. Those behavioral and status norms were culturally more relevant than anything else to whether a person was "worthy" of belief. In a sense, truth could only be produced by worthy people. This manifested in certain patterns within impeachment jurisprudence that are still present. Notably, early courts routinely admitted evidence of theft or other crimes involving deception to impeach witnesses while at the same time routinely excluding evidence of crimes of violence.[24] Theft crimes would permanently tarnish a man's reputation beyond repair, but violence was still regarded by many as a means of defending a man's honor, not as a blot on his reputation that would call his credibility into question. Similarly, community reputation was extremely important and courts viewed evidence of a man's—or often a woman's—tarnished reputation for morality as salient impeaching evidence.[25] These early courts often focused on tailoring impeachment jurisprudence to truthseeking, but that tailoring simply reflected culturally-produced notions about the types of people who should be believed.

Today, however, whatever care judges might have given in the past to the correspondence between status and truthfulness has largely given way to blind reliance on precedent with an expansionist bent. Courts still identify a "rejection of social mores" or a lack of "integrity," variously defined, as markers of the liar.[26] This might lead us to expect an updated doctrine that corresponds to modern social mores, such as they are. Instead, the search for liars in the courtroom is still shaped most clearly by nineteenth century notions of status and honor. Certain delineations have survived, even as the cultural beliefs

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22 *See* Carodine, *supra* note 21, at 506. Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. Rev. 563, 583–86 (2014) (describing adoption by courts of assumptions about the reliability of plea bargains that imply race is relevant to credibility).

23 *See infra* Section I.B.

24 *See infra* notes 121–22 and accompanying text.

25 *See infra* Sections I.B.3–4.

26 United States v. Estrada, 430 F.3d 606, 617–18 (2d Cir. 2005) (citing 28 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure: Evidence § 6134, at 233 (1993)).

undergirding them are no longer salient. The best example of this vestigial honor system is the distinction between crimes of violence, which courts continue to suggest are not probative of credibility, and other crimes, such as theft, which courts almost invariably find to be probative.[27] With burgeoning criminal codes and a federal evidence code interpreted as presuming that "all felonies are probative of credibility to some degree,"[28] the set of credibility proxies today is vaster and less tailored than at any time previously.

What we do when we allow the introduction of prior crimes or reputation for truthfulness as impeachment evidence is to replace truthseeking with norm enforcement. Our continued attachment to status-based impeachment requires judges to determine, based on nothing other than precedent and intuition, if a particular crime, act, or other marker is the hallmark of a liar. Those decisions are guided, often explicitly, by the court's sense of the moral seriousness of the impeaching information or the extent to which it connotes a lack of "integrity."[29] This judicial weighing of moral seriousness has the side effect of perpetuating systemic biases in the justice system. By allowing evidence of a wide range of prior crimes and bad acts in the name of truth, the rules continue disproportionality to penalize those who have become most entangled with the justice system—people of color.[30] It may be that soon we will have some scientific way to identify liars. In the interim, though, we should reevaluate our reliance on a set of outdated, outmoded, and ineffectual proxies.

This Article proceeds in two parts. Part I describes the development of our system of impeachment by status. This Part outlines the boundaries of competency doctrine that informed impeachment rules, and traces the transition to those rules in order to expose the formative role of cultural beliefs about honor in impeachment doctrine. Part I also teases out certain status-based patterns, including an insistence that violence is somehow not related to credibility, the use of "moral turpitude" to delineate crimes relevant to credibility, an early focus on sexual virtue as a proxy for credibility, and courts' insistence on reputation evidence as a form of impeachment. Next, Part I turns to mod-

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27 *See infra* Sections I.C.2–3.

28 United States v. Lipscomb, 702 F.2d 1049, 1060–62 (D.C. Cir. 1983) (concluding that FED. R. EVID. 609 should be read to suggest that "all felonies are probative of credibility" after extensive analysis of the text and legislative history of the rule); *see Estrada*, 430 F.3d at 617 (finding that FED. R. EVID. 609(a)(1) "presumes that all felonies are at least somewhat probative of a witness's propensity to testify truthfully").

29 *See infra* notes 253–54 and accompanying text.

30 *See infra* Section I.C.1.

ern credibility doctrine, which continues to cling to old status-based notions of who is worthy of belief. This has the effect of perpetuating systemic biases in the system, in particular against black people, by singling out prior felons and those whose past behavior is subject to social opprobrium for particular distrust.

Part II argues that a status-based system of credibility proxies produces little benefit and much harm to the system. This Part shows that credibility jurisprudence does not correspond to social science research on liars; that instead, it requires that judges make status-based determinations; and that the clearest outcome of all of this is an end run around the prohibition on propensity evidence. Finally, Part II offers a simple policy proposal, which is that we stop searching for liars. This Article proposes that, instead, we continue to look for lies in the courtroom and offers a rule aimed at maintaining the integrity of witnesses who are repeat players in the system.

I. Looking for Liars

Incompetency doctrine, which excluded certain witnesses from testifying, provides much of the foundation for today's impeachment jurisprudence. Most importantly, as Section I.A describes, the doctrine equated infamy of character, as revealed by a criminal conviction or its punishment, with a lack of credibility. Only certain criminal convictions carried the stigma of infamy, however, and that boundary around infamy became to an extent coextensive with credibility. When courts and legislatures shifted away from incompetency and towards impeachment throughout the latter half of the nineteenth century, they carried forward this focus on infamy along with certain boundaries it created.

The turn to impeachment put still more pressure on courts to identify probative impeaching information. Judicial resources are limited and judges needed a way to demarcate admissible evidence in the impeachment context. In the absence of direct access to a witness's inner motivations and behavior, courts relied on external markers of untruthfulness. The specific contours of these markers, or proxies, were indebted to popular conceptions of what it looks like to be a truthful person, which turned on notions of worthiness. As they still do today, the country's leading law dictionaries defined "credibility" as "worthiness of belief."[31] The simple definition settled on by these lexicographers embraces another, more complex concept. What does

31 *See supra* note 10 and accompanying text.

it mean to be "worthy of belief"? "Worthy," is traditionally defined as "[d]istinguished by good qualities; entitled to honour or respect on this account; estimable."[32] To be believable, in other words, a person must have good qualities that would entitle him to status, or the honor, esteem, and respect of those who will judge him. Credibility and honor were thus intertwined and whether a witness was worthy of belief depended on the "quality and person of the witness."[33]

Section I.B tells the story of how judges came to demarcate "worthiness of belief" or its counterpart—"unworthiness." This was largely a product of behavioral norms espoused by the country's governing elite. How we look for liars, in other words, depends on how those in power conceive of honor. This is clear from certain patterns in early impeachment jurisprudence, in particular: the belief that male violence was not probative of credibility, the use of moral turpitude as an impeachment standard, and the impeachment of women with evidence of their lack of chastity. The focus on impeaching with reputation testimony that developed in this period also reflects the cultural belief that reputation was essential to honor and therefore to credibility.

As Section I.C shows, many of the patterns that emerged in the late eighteen hundreds are still present today and have been codified in the Federal Rules. Violence is still exceptional and lack of chastity is still admissible in many jurisdictions. Reputation is still salient, but in keeping with an overall expansion in the doctrine, witnesses can also now be impeached with opinion testimony.[34] In the absence of the strong normative foundation that guided early impeachment jurisprudence, today's courts continue to parrot the notion that violating moral norms is a hallmark of the liar. At the same time, they are unable to apply that concept of "moral norm" in any meaningful way. Instead, impeachment jurisprudence today is mired in both technical and substantive confusion. This has particularly damaging consequences for certain groups of people, most notably black defendants, who, in an echo of early incompetency statutes, continue to be disproportionately singled out as liars.

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32 *Worthy*, OXFORD ENGLISH DICTIONARY, http://www.oed.com (last visited Dec. 16, 2016).

33 BOUVIER, *supra* note 10, at 393.

34 *See* FED. R. EVID. 608(a).

A. Competency

Our modern system of credibility proxies dates back to witness competency rules that evolved in England in the sixteenth and seventeenth centuries[35] and were imported into the American colonies along with the common law. Competency rules served to disqualify certain classes of witnesses from offering testimony. As George Fisher has explained, they arose from a desire *not* to require juries to identify perjurers. At a time when the oath still inspired fear and awe, courts adhered to a presumption that sworn evidence was true.[36] They also mistrusted juries' ability to detect falsehood.[37] If unreliable witnesses were excluded altogether, jurors would not have to do the work of determining which witnesses were telling the truth.[38] Thus, the competency rules evolved to "keep from the witness stand anyone whose temptation or inclination to lie was greater than average."[39]

Broadly speaking, these common law competency rules sought to prevent "likely perjurers from testifying,"[40] by targeting both people with case-specific reasons to lie and liars, or those most likely to lie for reasons unrelated to the action. As Thomas Starkie, an early treatise writer, explained this dual focus, both "a legal interest in the result of the cause" and "[t]he infamy of [a person's] character" would "wholly disqualify a person as a witness."[41] Thus, one group of "likely perjurers" who were prevented from testifying were parties who would be tempted to lie in order to achieve a favorable outcome.[42] Another group, however, were people who had no particular reason to lie in the case at hand, but were considered probable liars because of their prior criminal behavior. Courts viewed these people as "stigmatized" by their convictions and thus generally incompetent as witnesses.[43]

Not all criminals were thus stigmatized and rendered incompetent, however. Instead, the English common law based disqualification

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35 *See* George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 624–25 (1997) (showing that these initial rules classified plaintiffs, defendants, spouses, felons, and irreligious persons as among those who were not deemed competent to testify).

36 *See id.* at 627 (describing how when witnesses offered conflicting evidence, "the jury should conclude that one witness was mistaken . . . before concluding that either had lied").

37 *See id.* at 657–62.

38 *See id.* at 626.

39 *Id.* at 625.

40 *Id.* at 624.

41 2 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE *393 (Bos., Wells & Lilly 1826).

42 *See* Fisher, *supra* note 35, at 625 (citing JEFFREY GILBERT, THE LAW OF EVIDENCE 122 (London, Henry Lintot 1756)).

43 Taylor v. Beck, 24 Va. (3 Rand.) 316, 348 (Va. 1825) (Coalter, J., concurring).

on a category of crimes whose convictions carried an "infamous punishment."[44] This punishment test was later modified in the competency context to emphasize the infamous nature of the crime.[45] Infamy was defined as a "state which is produced by the conviction of crime and the loss of honor," which in turn "renders the infamous person incompetent as a witness."[46]Thus, crimes that produced dishonor, or a "loss of character or position,"[47] would render a witness so unworthy of belief that he would be excluded from testifying altogether.

Treatise writers routinely used language sounding in honor and morality when describing competency rules. For example, Starkie identified the crimes that would have this effect as "Crimes against the common Principles of Honesty and Humanity."[48] Similarly, Simon Greenleaf wrote that

> [t]he basis of the rule seems to be, that such a person is morally too corrupt to be trusted to testify; so reckless of the distinction between truth and falsehood, and insensible to the restraining force of an oath, as to render it extremely improbable that he will speak the truth at all.[49]

The rule that "infamous" crimes could disqualify a witness established an overarching proxy for credibility that substituted dishonor, or infamy, for untruthfulness. Rather than debate whether particular crimes were predictive of lying, courts and attorneys focused on whether a crime was infamous at common law. Thus, competency doctrine developed a tautology revolving around honor and worthiness. A person convicted of committing a crime considered particularly offensive was unworthy of belief because he or she had been dishonored by the conviction. That dishonor had originally come from the nature of the punishment for the crime, such as a whipping or hard labor,

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44 As James Whitman explains, infamy was initially tied to the "low-status" nature of the punishment, such as being "whipped, mutilated, or subjected to hard labor." JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 187 (2003).

45 Pendock v. Mackender (1755) 95 Eng. Rep. 662, 662; 2 Wils. K.B. 18 (Gr. Brit.) ("[I]t is the crime that creates the infamy, and takes away a man's competency, and not the punishment for it . . . .").

46 2 JOHN BOUVIER, BOUVIER'S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA 1554 (Francis Rawle ed., 8th ed. 1914).

47 *Id.*

48 GILBERT, *supra* note 42, at 142.

49 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 372, at 523 (Bos., Little, Brown & Co., 9th ed. 1858).

which were low-status punishments.[50] Later, it was attached to the crime itself without reference to the punishment. In either case, the witness was unworthy of belief because unworthy.

As competency law developed in the United States, much of the doctrinal debate focused on which crimes were infamous and how the common law definition of infamous crimes would interact with expanding criminal codes. This confusion arose, in part, because many states used a common law definition for the set of infamous crimes that simply pointed to other categories of crimes. In these states, the crimes that would disqualify a witness were "[t]reason, felon[ies], and the *crimen falsi*."[51] As a practical matter, the felony and treason portions of this definition were relatively straightforward. Treason and felony had clear definitions at common law.[52] In addition, Greenleaf explained that because "all treasons, and almost all felonies were punishable with death, it was very natural that crimes, deemed of so grave a character as to render the offender unworthy to live, should be considered as rendering him unworthy of belief in a Court of Justice."[53]

Crimes constituting *crimen falsi* were harder to identify,[54] while also less indebted to notions of dishonor. In Roman law, *crimen falsi* included "not only forgery, but every species of fraud and deceit."[55] Early courts, however, used a narrower definition in competency determinations.[56] Men convicted of crimes involving deception, such as conspiracy to defraud by spreading false news and deceit in the quality

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50 *See* WHITMAN, *supra* note 44, at 187 (describing punishments reserved for low-status offenders).

51 GREENLEAF, *supra* note 49, § 373, at 524; *see also* People v. Whipple, 9 Cow. 707, 707 (N.Y. Sup. Ct. 1827) ("A conviction of treason, felony or any species of the *crimen falsi*, renders the convict incompetent to testify.").

52 *See, e.g.*, 1 FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 1–2 (Phila., Kay & Brother, 6th ed. 1846) (offering set list of common law felonies, including treason, and noting that new felonies were created by statute).

53 GREENLEAF, *supra* note 49, § 373, at 524. As the criminal law expanded, new crimes were labeled felonies regardless of punishment and some crimes that had formerly been felonies became misdemeanors. *See* HENRY J. STEPHEN, SUMMARY OF THE CRIMINAL LAW 1 (N.Y., Halsted & Voorheis 1840). Nevertheless, the felony category remained generally limited to what at common law were considered "heinous offense[s] against person or property." Will Tress, *Unintended Collateral Consequences: Defining Felony in the Early American Republic*, 57 CLEV. ST. L. REV. 461, 490–91 (2009) (describing evolving definition of "felony" and multiple definitions in use in the nineteenth century, some of which were dependent on punishment while others focused on crimes defined as felonies at common law). See *infra* Section I.C for a discussion of modern felonies.

54 *See, e.g.*, Cheatham v. State, 59 Ala. 40, 43 (1877) (describing *crimen falsi* category as "not easy in all cases to determine").

55 GREENLEAF, *supra* note 49, § 373, at 524.

56 *Id.* § 373.

of provisions, were often permitted to testify.[57] Those convicted of crimes such as perjury, bribing a witness, conspiring to procure the absence of a witness, barratry,[58] and making false accusations were not.[59] Courts thus understood the category to be limited to "any offence tending to pervert the administration of justice by falsehood or fraud."[60] It was not enough that the crime involved falsehood. The falsehood had to undermine the administration of justice.[61]

Finally, there were jurisdictions that conducted open-ended inquiries into which crimes were infamous without focusing exclusively on the treason, felony, and *crimen falsi* categories.[62] In some states, for example, any crime deemed infamous at common law would render a witness incompetent, even if that crime had more recently been labeled a misdemeanor by statute.[63] In these jurisdictions, a relaxation in attitudes towards the conduct at issue did not translate into competency doctrine. At the same time other jurisdictions declined to treat prior crimes as disqualifying if the crimes had not been considered "infamous" at common law. This had the effect of excluding crimes that were deemed morally corrupt by the standards of the day, but had not been considered infamous—or possibly had not been criminalized at all—at common law.[64] For example, New Hampshire's Supreme Court refused to disqualify from testifying a woman who had been convicted of adultery.[65] The court explained:

> We have been unable to find any decision holding adultery to be one of those offences, conviction for which renders a person infamous; it works no forfeiture of goods or lands,

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57 *Id.*

58 Barratry was a maritime offense that consisted of a master running away with the ship or losing it through fraud or possibly negligence. *See* CHARLES P. DALY, BARRATRY: ITS ORIGIN, HISTORY AND MEANING, IN THE MARITIME LAWS. 7 (N.Y., Baker & Godwin 1872).

59 *See* Little v. Gibson, 39 N.H. 505, 510 (1859).

60 *Id.*

61 *See id.* ("[*C*]*rimen falsi* of the common law not only involves the charge of falsehood, but is any offence which may injuriously affect the administration of justice, by the introduction of falsehood and fraud."). This thread of incompetency jurisprudence bears some resemblance to today's rules, which place special emphasis on impeaching with prior crimes involving deception. *See, e.g.*, FED. R. EVID. 609(a)(2) (requiring that a prior conviction involving deception or false statement be admitted without balancing its prejudicial effect).

62 In South Carolina and New Hampshire, for example, courts focused primarily on "infamy" in making competency determinations. State v. James, 15 S.C. 233, 235 (1881) (holding two men convicted of petit larceny, an infamous crime at common law, incompetent to testify); *Little*, 39 N.H. at 510 (holding adultery not disqualifying because not infamous at common law).

63 *James*, 15 S.C. at 235.

64 STARKIE, *supra* note 41, at *22 n.1.

65 *Little*, 39 N.H. at 510.

> and therefore is not a felony; . . . [nor does it] come within any of the classes of crime recognized by the common law as *crimena falsi*.[66]

The court focused on precedent despite arguments that the crime represented a serious breach of both legal and social mores and should therefore have been disqualifying.[67]

One feature of the focus on infamous crimes in the competency context was that it excluded non-felony crimes of violence—an expansive category—from the list of crimes that would disqualify a witness. In one early federal case from the Pennsylvania circuit, the court held that a witness who had been convicted of "assault and battery with intent to murder" was not incompetent to testify.[68] Although the rationale for that holding focused on the non-infamous nature of the punishment for the crime—a fine and six months in jail—the holding that violent crimes other than murder were not infamous was typical, no matter the definition of infamy.[69]

A final piece of competency doctrine unique to United States law was the use of race as a blanket disqualification from testifying in many states. In all southern states and some beyond the South, "negroes," "mulattoes," and "mustizoes" were, by statute, rendered incompetent as witnesses.[70] In some states, the statutory exclusions extended to persons with Native American ancestry.[71] These disqualifications were bound up with attitudes towards the personhood of slaves and people with African-American or Native-American ancestry.[72] They reflected a view that without personhood, these groups lacked credibility. The tautological reasoning behind the status-based

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66 *Id.*

67 *See id.*

68 United States v. Brockius, 24 F. Cas. 1242 (C.C.D. Pa. 1811) (No. 14,652).

69 *See id.*

70 *See, e.g.*, An Act Concerning Witnesses and Prescribing the Manner of Obtaining and Executing Commissions for Taking Their Depositions in Certain Cases (1792), *reprinted in* A Collection of All Such Acts of the General Assembly of Virginia, of a Public and Permanent Nature, as Are Now in Force 278 (Richmond, Samuel Pleasants & Henry Pace 1803) ("No negro, mulatto or Indian, shall be admitted to give evidence, but against or between negroes, mulattoes or Indians.") (emphasis omitted); *see also* United States v. Dow, 25 F. Cas. 901, 902 (C.C.D. Md. 1840) (No. 14,990) (applying Maryland statute providing "no negro or mulatto slave, free negro, or mulatto born of a white woman . . . or any Indian slave, or free Indian, native of this or the neighboring provinces, be admitted or received as good and valid evidence in law").

71 *See, e.g.*, *Dow*, 25 F. Cas. at 902.

72 By suggesting that people are not autonomous moral agents, slavery is itself, by many accounts, antithetical to personhood. *See, e.g.*, Joanne Pope Melish, Disowning Slavery: Gradual Emancipation and "Race" in New England 150 (1998).

exclusion still held: black witnesses were unworthy of belief because they were deemed unworthy. However, the unworthiness here had its origin not in transgressing norms of honorable behavior but in their inability to be honorable in the first place in the eyes of those in power.[73] By refusing to hear whole swaths of the population in court, southern states used ascribed status as a powerful credibility proxy.

With their focus on criminal behavior that was viewed as particularly base or dishonorable, on prior lying to undermine the justice system, and on race, early competency rules were thus loosely tailored to elite society's conception of those least worthy of belief. These were the people who were expected to lie for reasons unconnected to the case. Their status, whether derived from race or a criminal act, made their credibility so suspect that jurors would not be permitted to hear from them. As a result, they joined the ranks of those with case-specific reasons to lie, such as interested parties, in being prohibited from the courtroom. This nascent jurisprudence of credibility would only become more tailored to status as the legal system transitioned from competency to impeachment.

B. Impeachment

As the nineteenth century drew to a close amid rapid social change and cultural upheaval, a shift away from excluding those witnesses perceived to be unreliable was almost complete.[74] That shift was part of what George Fisher has argued was a larger trend towards conceiving of juries as the preferred arbiters of credibility. Juries provided a "source of systemic legitimacy" because their verdicts were impenetrable, thus making the credibility determinations that went into them harder to question.[75] This larger trend was helped along by the political events reshaping the United States. During Reconstruction, for example, the federal government eventually forced southern states to remove overt bans on testimony from black witnesses, a change that had ramifications for other parts of competency doc-

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73 Cecil J. Hunt, II provides a particularly cogent explanation for this in *No Right to Respect: Dred Scott and the Southern Honor Culture*, 42 NEW ENG. L. REV. 79, 95 (2007). Hunt contends that honor culture was the defining feature of southern existence at this time and that slavery of black people was a necessary corollary to honor for whites. *See id.* A feature of this was that "slaves were 'universally treated as dishonored persons.'" *Id.* (quoting ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY 96 (1982)).

74 *See* Fisher, *supra* note 35, at 659–66 (describing the "crumbling" of witness competency rules, beginning with Michigan in 1846). By 1880, up to thirty-three states allowed criminal defendants to testify. *Id.*

75 *Id.* at 705.

trine.[76] Fisher suggests that southern states eliminated prohibitions on testimony by parties in civil cases and, decades later, prohibitions on defendant testimony because it was untenable that a black witness might testify in a case in which a white plaintiff or defendant could not.[77] Similar changes in northern competency rules happened earlier, but for reasons also tied into the struggle to force southern states to permit African Americans to testify.[78]

The transition to impeachment expanded the testimony that could be heard by the jury. In addition to hearing from witnesses who formerly would have been excluded, jurors would now be exposed to impeaching information about those witnesses—their prior crimes, their prior bad acts, their reputation for truthfulness or lack thereof, and in some jurisdictions evidence of their so-called bad moral character. This placed new pressure on how to delineate the information that would be considered probative on the question of credibility.

Even as they removed race-based and other incompetency provisions from their laws, legislatures did not abandon the idea that it was not just lies, but also liars, with which the justice system should be concerned. While legislatures and courts did not revisit the basic assumptions about lying and liars that gave competency doctrine its substance, they had to determine which crimes, prior bad acts, or reputational markers would be admissible in impeachment. As courts grappled with how to shape impeachment jurisprudence, they did so against a cultural background with strong norms about status, or who was worthy of belief. These cultural assumptions helped shape the impeachment jurisprudence that emerged from this transitional period. To demonstrate this interrelationship, this Section focuses on four areas of the jurisprudence that were deeply influenced by cultural norms. First, the widespread notion that violent crimes were uniquely irrelevant to credibility. Second, courts' invocation of "moral turpitude" to describe the subset of acts or crimes that would be particularly damaging to a person's credibility. Third, courts' treatment of sexual virtue as a credibility proxy. And finally, the widespread adoption of reputation testimony as a way to impeach credibility.

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76 *See generally id.* at 676–96 (describing policy battles of 1862, 1864, and 1866, in which northern senators attacked race-based competency laws).

77 *See id.* at 675.

78 *Id.* Fisher suggests that northern states eliminated bans on defendant testimony in order to avoid a charge of hypocrisy as they tried to force southern states to do away with incompetency provisions directed at black witnesses. *Id.*

1. The Exceptionalism of Violence

In his *Rationale of Judicial Evidence*, an influential text in U.S. courtrooms and statehouses,[79] Jeremy Bentham excoriated common law incompetency rules, which he felt were overbroad. One way in which he demonstrated this overbreadth was to invoke the inclusion of homicide as an excludable offense:

> [T]ake homicide in the way of dueling. Two men quarrel; one of them calls the other a liar. So highly does he prize the reputation of veracity, that, rather than suffer a stain to remain upon it, he determines to risk his life, challenges his adversary to fight, and kills him. Jurisprudence, in its sapience knowing no difference between homicide by consent, by which no other human being is put in fear, and homicide in pursuit of a scheme of highway robbery, of nocturnal housebreaking, by which every man who has a life is put in fear of it, has made the one and the other murder, and consequently felony. The man prefers death to the imputation of a lie, and the inference of the law is, that he cannot open his mouth but lies will issue from it. Such are the inconsistencies which are unavoidable in the application of any rule which takes improbity for a ground of exclusion.[80]

For Bentham, the law's failure to distinguish between acts with dramatically different motives was fatal to the legitimacy of common law incompetency rules. Violence was a particularly helpful example because it was such a widely accepted cultural norm that a man might at times fight to defend his or his family's honor.[81] Americans needed to look no farther than Alexander Hamilton's death in a duel with Aaron Burr for an example of how violence could reflect honorable conduct rather than moral laxity. Before his death, and despite his public opposition to dueling, Hamilton wrote of the impending duel, "what men of the world denominate honor, impressed on me (as I thought) a peculiar necessity not to decline the call [to fight]."[82] Although much violence was still deplored, the effect of acts of violence

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79 *See, e.g.*, ARTHUR N. HOLCOMBE, STATE GOVERNMENT IN THE UNITED STATES 348 (1919) ("Bentham's work especially made a deep impression in America.").

80 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 101 (London, Hunt & Clarke 1827).

81 *See* JOANNE B. FREEMAN, AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC 168–69 (2001).

82 Alexander Hamilton, *Statement on Impending Duel with Aaron Burr, [28 June–10 July 1804]*, FOUNDERS ONLINE, NATIONAL ARCHIVES, http://founders.archives.gov/documents/Hamilton/01-26-02-0001-0241 (last visited Dec. 16, 2016).

on a man's honor and reputation was different from the effect of other criminal activity.

Indeed, concern about using crimes of violence to impeach witnesses emerges as a preoccupation in judicial opinions surrounding the transition from incompetency to impeachment. This was in part because many statutes repealing competency laws simply provided that impeachment, rather than incompetency, should result from prior convictions. These statutes often ignored the distinctions among crimes drawn in competency doctrine and simply referred to prior crimes without qualification. For example, New Jersey's statute read, "no person offered as a witness in any action or proceedings of a civil or criminal nature shall be excluded by reason of his having been convicted of crime, but such conviction may be shown . . . for the purpose of affecting his credit."[83] The New Jersey Supreme Court held, over a strenuous dissent, that "[t]he word 'crime,' being used without qualification, must be held to be used in its general sense, to include any crime."[84] At the same time, the court seemed troubled by the implication that all crimes of violence would be admissible on the question of credibility. "It may be," the court wrote, "that conviction of the crime of assault and battery in many instances would be no substantial ground for impairing credibility . . . ."[85] Nevertheless, the court ruled that it was the jury's role to determine the effect of a prior conviction.[86]

The dissenting justice criticized the majority's reading as overbroad precisely because it would allow impeachment with crimes of violence. He was "certain" that convictions for assault and battery were not disqualifying at common law, and he argued that even assault with intent to murder would not disqualify a witness.[87] In a curious reimagining of the encounter between George Washington and General Lee at the battle of Monmouth, he disclaimed any link between violence and lack of veracity.[88] He explained:

> Truthful men may be violent. Indeed, one prone to provocation is likely to be of a frank and open nature. If Washington at the battle of Monmouth had struck down Lee instead of angrily reproaching him, he might have incurred punishment,

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83 State v. Henson, 50 A. 468, 469 (N.J. 1901).

84 *Id.*

85 *Id.* at 470.

86 *See id.* (holding the effect of a prior conviction "is a question for the jury, whose province alone it is to say to what extent, if any, credibility shall be affected").

87 State v. Henson, 50 A. 616, 616–17 (N.J. 1901) (Collins, J., dissenting).

88 *See id.* at 617.

> but his traditional reputation for veracity would not have been shaken.[89]

Conversely, states that decided to adhere to the delineations of incompetency doctrine found comfort in that doctrine's exclusion of many violent crimes. For example, the Supreme Court of Illinois held that a statutory provision essentially indistinguishable from that in New Jersey did not change the common law approach to identifying the prior convictions that would be relevant to impeachment.[90] The Illinois legislature had defined "infamous crimes" as "murder, rape, kidnapping, willful and corrupt perjury or subornation of perjury, arson, burglary, robbery, sodomy or other crime against nature, incest, larceny, forgery, counterfeiting, or bigamy . . . ."[91] The Illinois court pointed to the treatment of violent crime to show that the list remained well-suited to the task of identifying liars.[92] The list excludes "several offences punishable by confinement in the penitentiary . . . notably among which may be mentioned manslaughter,—an offence which is clearly not inconsistent with entire veracity."[93]

This treatment of violence as a category apart appears in other facets of impeachment jurisprudence at this time. In Missouri, Alabama, and Tennessee, for example, turn of the twentieth century impeachment jurisprudence held that a witness could be impeached "by assailing his general moral character."[94] Yet the supreme courts in all three states held that being "violent" or "turbulent" "is no evidence of such bad character"[95] and casts "no light" on credibility.[96] Because the courts did not offer explanations for these holdings, it is impossible to identify the precise rationale. By taking for granted the logic that violence and bad character were not correlated, however, they echo the reality that for elite men of the nineteenth century, particularly those living in the South, honor at times demanded violence.[97] Far from being incompatible with "worthiness of belief," for a good, honorable,

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89 *Id.*

90 Bartholomew v. People, 104 Ill. 601, 607–08 (1882).

91 *Id.* at 607.

92 *See id.*

93 *Id.*

94 Powers v. State, 97 S.W. 815, 818 (Tenn. 1906).

95 State v. Shuster, 173 S.W. 1049, 1049 (Mo. 1915).

96 *Powers*, 97 S.W. at 818; Dolan v. State, 1 So. 707, 713 (Ala. 1887).

97 *See* RICHARD E. NISBETT & DOV COHEN, CULTURE OF HONOR: THE PSYCHOLOGY OF VIOLENCE IN THE SOUTH 9 (1996) (arguing that higher rates of violence in the American South are best explained by "the South being home to a version of the culture of honor, in which affronts are met with violent retribution").

and therefore honest man, violence was at times required to maintain such worthiness.[98]

2. *Moral Turpitude*

The notion that violence was often consistent with honor was also embedded in the concept of moral turpitude. Moral turpitude originated as a legal standard in the United States in the law of slander. It was a way to identify accusations connoting breaches of the honor code deemed egregious enough to destroy a person's reputation.[99] Courts found the standard useful in slander cases because it was a phrase in popular use to describe violations of norms of honorable behavior.[100] It embodied many of the country's self-conscious norms of conduct, such as the notions that oath-breaking and disloyalty in men and sexual impurity in women were particularly damning to honor and reputation.[101] As a phrase that entered the law from popular usage, it carried with it a complex set of associations seemingly understood by the courts that used it. Importantly, moral turpitude was not invoked to describe violence, an interpretation that is borne out by early cases using the standard.[102] For example, one court explained that "to say of a man, he was guilty of an assault and battery, or that he was the bearer of a challenge to fight a duel," would not be grounds for a slander action.[103] Such accusations imputed no moral turpitude to the accused.

For the same reason that moral turpitude was an appealing standard in the law of slander, courts started employing it in the law of impeachment. The standard trickled into early nineteenth century evidence jurisprudence and later appeared in some state statutes repealing incompetency laws in favor of impeachment. For example, Vermont's statute, passed in 1894, repealed all incompetency rules except for those grounded in perjury convictions.[104] At the same time, it

98 *Id.* When courts adopted the "moral turpitude" standard to determine which crimes or acts would be admissible to impeach, they also imported the exceptionalism of violence, which was embodied in that standard. *See infra* Section I.B.2; *see also* Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001, 1010–15 (describing popular and legal understanding of "moral turpitude" as referring to the most status-destroying conduct, but not generally including acts of violence).

99 *See* Simon-Kerr, *Moral Turpitude*, *supra* note 98, at 1010.

100 *See id.* ("[M]oral turpitude was a phrase that had clear content, even if its boundaries were less clear.").

101 *Id.* at 1010–15.

102 *Id.*

103 Miller v. Holstein, 16 La. 395, 406–07 (1840) (Garland, J., concurring).

104 *See* McGovern v. Smith, 53 A. 326, 327 (Vt. 1902) (citing VT. STAT. ANN. tit. 12, § 1245

allowed a witness's credibility to be impeached with "conviction of a crime involving moral turpitude."[105] Acts that were so socially reprehensible that they would destroy a witness's reputation for purposes of a slander case would almost certainly render the witness less worthy of belief.[106] For this reason, many courts and legislatures decided that evidence of acts or crimes involving moral turpitude could be admitted on the issue of credibility.[107] This appropriation of moral turpitude as an impeachment standard is one example of just how central honor norms were to conceptions of who was "worthy of belief" in the development of impeachment rules.[108]

By the late nineteenth century, courts in states including Alabama, Arkansas, Georgia, Texas, California, Connecticut, Louisiana, Maine, New York, Ohio, Oklahoma, Tennessee, Vermont, Wyoming, and Maine were using moral turpitude as an impeachment standard.[109]

(1894) (current version at VT. STAT. ANN. tit. 12, § 1608 (2015)); *see* State v. Russ, 167 A.2d 528, 529 (1961) (recognizing effect of change in statutory language).

105 VT. STAT. ANN. tit. 12, § 1608.

106 *See* Simon-Kerr, *Moral Turpitude*, *supra* note 98, at 1026 ("Extending that logic, attorneys argued that evidence of a witness's acts involving moral turpitude were relevant to his or her credibility because such evidence was 'decisive of . . . infamy,' stamping an indelible mark on a person's reputation.").

107 *See id.*

108 Writing after most states had moved to impeachment rather than incompetency, Wigmore conceptualized incompetency doctrine using a "theory of actual moral turpitude." 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 519 (1904). In other words, he argued that the doctrine was best explained by an analogy between immorality and untruthfulness: "the person is to be excluded because from such a moral nature it is useless to expect the truth." *Id.*

109 *See generally* Simon-Kerr, *Moral Turpitude*, *supra* note 98, at 1027–33. In some states, like Vermont, moral turpitude delineated which crimes, irrespective of degree, were admissible to impeach. *See supra* notes 104–08 and accompanying text. In others, moral turpitude was used to identify which misdemeanors would be admissible to impeach witnesses in addition to those felonies already admissible by virtue of the incorporation of incompetency standards. Simon-Kerr, *Moral Turpitude*, *supra* note 98, at 1029. For example, in Texas, the courts held that witnesses could not be impeached with "convictions for misdemeanors which do not involve moral turpitude." Brittain v. State, 37 S.W. 758, 758–59 (Tex. Crim. App. 1896); *see also* See v. Wormser, 129 A.D. 596, 597 (N.Y. App. Div. 1908) (finding trivial crimes, such as a violation of a local ordinance that "do not imply any moral turpitude" generally inadmissible for impeachment); *In re* Comm'rs of Franklin Cty., 7 Ohio N.P. 450 (1896) (holding when a witness has a criminal record, "the fact that his crime involved in any sense moral turpitude is a fact which should be taken into consideration as affecting the weight and value of his testimony"); Cowan v. State, 114 P. 627, 628 (Okla. Crim. App. 1911) ("for the purpose of affecting his credibility as a witness, it was entirely proper for the state to show on cross-examination that he had previously been convicted of a felony or of any offense which indicates moral turpitude"); Eads v. State, 101 P. 946, 951 (Wyo. 1909) (holding "evidence, to be competent and relevant to discredit the witness, should at least tend to prove moral turpitude or a lack of veracity"). In still others, courts used moral turpitude to describe behavior deemed relevant to credibility and that was often admitted through inquiries into a witness's "general moral character." Hume v. Scott, 10 Ky. 260,

In an early case, the Kentucky Supreme Court explained why learning about a witness's "turpitude"[110] was important to the jury's ability to identify liars.[111]Underscoring the importance of social status to evaluating credibility, the court reasoned that "[b]y the character of every individual, that is, by the estimation in which he is held in the society or neighborhood where he is conversant, his word and his oath are estimated."[112] If a witness was shown to have a "vile reputation," the court concluded, the jury would be "warranted in disbelieving him."[113] For this reason, Kentucky courts would permit inquiry into a witness's "general moral character."[114]

Louisiana adopted a similar approach. A lower court had excluded evidence that a prosecution witness was a man of "infamous character," but the Louisiana Supreme Court reversed the conviction and remanded.[115] The court wanted the jury to consider that the key witness "had notoriously the character of acting falsely and fraudulently, of extorting money by force and cheating from the unwary and feeble, and of living among low and abandoned women; that he was idle, dissolute and profligate, and supported himself by obtaining money by the means set forth . . . ."[116] That catalogue of iniquities, sounding in fraud and financial misdealing as well as a failure to become part of a family unit—another priority of early elites—is representative of how courts understood moral turpitude and its relevance

261 (1821). Tennessee held, for example, that "[a] witness, on cross-examination, may be asked any question throwing light on his or her moral character, provided they involve moral turpitude, whether they relate to domestic relations or other habits, if the tendency is to show that the witness is guilty of wanton, habitual violation and disregard of the most sacred marital relations, or of the law, or of the rules of decent society, involving the witness in moral turpitude . . . ." Zanone v. State, 36 S.W. 711, 715 (Tenn. 1896); *see also* McAlister v. State, 139 S.W. 684, 689 (Ark. 1911) (finding it "proper to permit the witness to be asked as to specific acts involving moral turpitude affecting his credibility"); State v. Jackson, 10 So. 600, 601 (La. 1892) (describing proper "inquiry into general character" for impeachment "must be of that kind which will show such moral turpitude in the witness that no one would be justified in believing his uncorroborated statement"); People v. Veld, 139 N.Y.S. 788, 793 (N.Y. App. Div. 1913) (describing rule permitting defendant who testifies to be "cross-examin[ed] as to any specific act of his life which may tend to show moral turpitude and thus affect his credibility").

110 *Hume*, 10 Ky. at 261.

111 *Id.* at 262. Although almost every state still disqualified certain witnesses from testifying at the time of this decision, the court's insistence that the jury could be trusted "with a full knowledge of the standing of a witness into whose character an inquiry is made" foreshadowed the abandonment of incompetency statutes later in the century. *Id.*

112 *Id.* at 261–62.

113 *Id.* at 262.

114 *Id.*

115 State v. Parker, 7 La. Ann. 83, 85, 88 (1852).

116 *Id.* at 87.

to credibility.[117] The court held that "from his vices and general bad character, [the jury might conclude] he was unworthy of credit, and not to be believed on oath."[118] In other words, as the Supreme Court of Tennessee explained bluntly in a similar case, the witness was unworthy of belief because of his "violation and disregard . . . of the rules of decent society."[119]

The presumed relevance of moral turpitude to credibility justified allowing general character evidence for impeachment in some jurisdictions and provided others with a way to differentiate between prior crimes that were and were not admissible in impeachment. In either usage, courts continued to understand moral turpitude by reference to popular mores.[120] Not surprisingly, this approach also harmonized with factors already used by courts to identify prior crimes relevant to credibility. Courts consistently held that financial misbehavior or the failure to pursue honest work could signal a liar.[121] Thus, theft and fraud were invariably encompassed by the standard. At the same time, crimes of violence were generally not understood to involve moral turpitude, with the result that witnesses who had been convicted of such crimes were not flagged as presumptive liars.[122]

3. Sexual Virtue

Although the nation's Founders promoted marriage and family life as two of the higher duties of men, which would presumably promote economic and business stability, sexual virtue itself was not integral to male honor norms.[123] By contrast, for women, honor—and by extension credibility—was tied to compliance with norms that de-

117 *See generally* Simon-Kerr, *Moral Turpitude*, *supra* note 98, at 1025–39 (discussing relationship between credibility and acts involving moral turpitude, where bad acts would stamp "an indelible mark on a person's reputation").

118 *Parker*, 7 La. Ann. at 87.

119 Zanone v. State, 36 S.W. 711, 715 (Tenn. 1896).

120 *See, e.g.*, Simon-Kerr, *Moral Turpitude*, *supra* note 98, at 1028–29 (using cases from Texas and Wyoming to show examples of jurisdictions that would not allow impeachment of violent misdemeanors that did not fit moral turpitude's ambit).

121 *See, e.g.*, Ford v. State, 17 S.E. 667, 667 (Ga. 1893) (holding simple larceny admissible to impeach a male witness under moral turpitude standard); Curtis v. State, 81 S.W. 29, 29 (Tex. Crim. App. 1904) (holding "disreputable vocation" admissible to impeach under moral turpitude standard); State v. Guyer, 100 A. 113, 114 (Vt. 1917) (holding obtaining money on false pretenses admissible to impeach female witness under moral turpitude standard).

122 *See, e.g.*, Brittain v. State, 37 S.W. 758, 758–59 (Tex. Crim. App. 1896) (holding conviction for assault and battery and carrying a firearm not admissible to impeach under moral turpitude standard); Eads v. State, 101 P. 946, 951 (Wyo. 1909) (holding misdemeanor conviction for carrying concealed firearm not admissible to impeach under moral turpitude standard).

123 *See* Simon-Kerr, *Moral Turpitude*, *supra* note 98, at 1008.

manded "virginity, chastity, [and] fidelity to a husband."[124] From the earliest days of the Republic, courts were confronted with a claimed link between sexual virtue and credibility, at least for female witnesses. Women who lacked or appeared to lack sexual virtue were generally not rendered incompetent because prostitution and adultery were either not criminalized or not classified as felonies or as infamous crimes.[125] Instead, these women were impeached with evidence that they were thought to be prostitutes or to be unchaste in some other way, such as by living with a man outside of marriage.

In its now infamous opinion in *State v. Sibley*,[126] the Missouri Supreme Court invoked this double standard when it wrote, "[i]t is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman."[127] The court's rationale highlighted the "central role chastity played in determining a woman's reputation relative to that of a man,"[128] and hence, why chastity's relevance to credibility was understood to vary according to gender:

> It is no compliment to a woman to measure her character for truth by the same standard that you do that of a man's predicated upon character for chastity. What destroys the standing of the one in all the walks of life has no effect whatever on the standing for truth of the other. Thus . . . it is said: "Adultery has been committed openly by distinguished and otherwise honorable members [of the bar] as well in Great Britain as in our own country, yet the offending party has not been supposed to destroy the force of the obligation which they feel from the oath of office."[129]

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124 *See* Julia Simon-Kerr, *Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment*, 117 YALE L.J. 1854, 1862–63 (2008) (alteration in original) ("Early references to honor in American jurisprudence show that '[h]onor was indisputably a gendered system.'" (quoting ARIELA J. GROSS, DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM 49 (2000))); *see also* Simon-Kerr, *Unchaste and Incredible*, *supra* at 1863 n.35 (collecting references to "male" honor in early caselaw focused on oath-keeping); *Honor, of a woman*, 7 OXFORD ENGLISH DICTIONARY 357 (1989) (defining "honor of a woman" as "chastity; virginity; a reputation for this, one's good name").

125 Prostitution was not legally defined as a crime in most states in the nineteenth century. Katherine Winham & George E. Higgins, *Prostitution*, *in* WOMEN IN THE CRIMINAL JUSTICE SYSTEM: TRACKING THE JOURNEY OF FEMALES AND CRIME 169 (Tina L. Freiburger & Catherine D. Marcum eds., 2016).

126 33 S.W. 167 (Mo. 1895).

127 *Id.* at 171.

128 Simon-Kerr, *Unchaste and Incredible*, *supra* note 124, at 1882.

129 *Sibley*, 33 S.W. at 171 (citation omitted).

This pronouncement has been singled out by scholars as an instantiation of sexism in the legal system,[130] and it highlights how a search for liars based on social worthiness can entangle courts in deeply rooted biases based on gender, race, or class and perceptions of how these statuses bear on integrity. Courts and attorneys grappling with what makes a person "unworthy of belief" must resort to cultural definitions of such worthiness, necessarily reflecting all of the prejudices embodied by those definitions.[131]

In states using the moral turpitude standard in impeachment determinations, courts were more often inclined to accept a link between violation of sexual norms and a lack of integrity. As the Court of Criminal Appeals of Texas explained in 1898:

> In common experience, it is known that persons who are so morally degraded as to ply their vocation as common prostitutes are not on a plane with the mass of people who follow legitimate and honorable vocations, in the matter of integrity. As a general rule, they are no more capable of telling the truth than one who has been convicted of a felony, or of some misdemeanor involving moral turpitude, and they are not more worthy of belief than such a one . . . .[132]

Of course, although the opinion uses a neutral pronoun, women made up the majority of nineteenth century prostitutes.[133]

Gender-specific perceptions of who was worthy of belief are apparent in many early opinions. Whereas courts typically focused on non-criminal unchaste behavior when identifying characteristics bearing on a woman's credibility, they often described only overtly criminal conduct as linked to male credibility. The Michigan Supreme Court illustrated this dichotomy in a 1917 case involving a woman accused of murdering her husband.[134] The court wrote that, for purposes of impeachment, a female witness could be asked "whether she is a prostitute, is living in adultery, or is or has been the kept mistress of a particular man, or has had illegitimate children, or has kept girls for

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130 *See, e.g.*, Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 75 (2002) ("The notion that a lack of chastity made a witness less credible was not gender neutral."); Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 787 n.116 (1986) (citing *Sibley*).

131 Simon-Kerr, *Unchaste and Incredible*, *supra* note 124, at 1868–69 (describing how nineteenth-century cultural discourse was reflected in women's credibility being attacked in court through questions about their chastity or reputation for sexual purity).

132 McCray v. State, 44 S.W. 170, 171 (Tex. Crim. App. 1898).

133 *See* Winham & Higgins, *supra* note 125, at 169.

134 *See* People v. Cutler, 163 N.W. 493, 496 (Mich. 1917).

the purpose of prostitution."[135] A male witness, by contrast, could be asked "whether he has committed certain crimes, whether he ran a saloon . . . in violation of law, whether he has been criminally intimate with a certain person, and whether he swore falsely on a certain occasion . . . ."[136]

It is important to note that despite the pervasiveness of a sexual double standard, admitting unchastity evidence for impeachment was not the majority rule in nineteenth-century courts.[137] Even in Missouri, there was no consensus on the issue. The dissenting justice in *Sibley* questioned why a man's "disregard of the laws of chastity" would not equally tend to prove a "disposition to lightly regard the obligations of his oath."[138] Forty years later, in 1935, Missouri moved away from this line of inquiry altogether when it determined that a witness's "bad reputation for morality" would no longer be admissible for impeachment, thus eliminating the rule that had allowed women to be impeached with evidence of their unchastity.[139] Nevertheless, the notion that sexual virtue has a connection to credibility is still embedded in the law in the many states that allow witnesses to be impeached with evidence of a conviction for prostitution.[140]

4. Reputation

As the preceding discussion shows, reputation was and continues to be central to the credibility inquiry. Courts viewed behavior that would damage reputation, such as a woman's lack of chastity or a man's failure to pay his debts, as indicative of a lack of credibility. Most courts eventually formalized the functional overlap between reputation and credibility that emerges in impeachment doctrine by settling on the notion that a witness could be impeached with evidence of his or her reputation for morality or for truth and veracity.[141] This use of reputation evidence for impeachment shows once again the primacy of social status in legal assessments of credibility. Worthiness of belief depended on a person's standing in the community, in other words, her reputation, so why not allow impeachment with reputation

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135 *Id.* (citing 40 CYCLOPEDIA OF LAW AND PROCEDURE 2616, 2618 (William Mack ed., 1909)).

136 *Id.*

137 *See generally* Simon-Kerr, *Unchaste and Incredible*, *supra* note 124, at 1868–69.

138 State v. Sibley, 33 S.W. 167, 172 (Mo. 1895) (Gantt, J., dissenting in part).

139 State v. Williams, 87 S.W.2d 175, 181 (Mo. 1935); *see also* Simon-Kerr, *Unchaste and Incredible*, *supra* note 124, at 1883 (discussing the merits of *Williams*).

140 *See infra* Section I.C.3.

141 *See* Simon-Kerr, *Unchaste and Incredible*, *supra* note 124, at 1874.

testimony? Courts understood that reputation testimony would be shaped by a witness's compliance with social norms that defined virtue—and worthiness of belief. At the same time, the focus on reputation moved the credibility inquiry still further away from a person's true nature and towards a stand-in, reputation, that could be wholly disconnected from the actual character of the witness.

Evidence law's embrace of reputation as a credibility proxy had benefits as a practical matter. Particularly in cases that also involved sensational subject matter, such as those in which attorneys sought to impeach women with evidence that they were prostitutes or had cohabited out of wedlock, courts and attorneys struggled over how such proof could be introduced.[142] Could witnesses be asked about specific acts—which could open the door to endless rounds of rebuttal testimony—or should the testimony of impeaching witnesses be confined to reputation alone? Rather than wade into specific acts and character traits, many courts decided that reputation testimony would be preferable.[143] In such jurisdictions, attorneys could ask an impeaching witness whether another witness's reputation in the community for truth and veracity—or in some jurisdictions the witness's general reputation—was bad.[144] This avoided any need for testimony about actual behavior and specific character traits.

The question whether witnesses should be impeached with reputation or specific acts generated intense debate around the turn of the twentieth century. Wigmore, for one, disliked the use of reputation testimony. He saw its adoption as an American slant on an old English rule that an impeaching witness could testify to his or her personal belief about the credibility of the original witness based on his or her "personal knowledge" of that witness.[145] Other treatise writers disagreed, many arguing that impeaching with specific acts—unless on cross-examination—would lead to a mini-trial on a collateral issue.[146] These writers contended that reputation was a better source of infor-

142 *See id.* at 1874–79.

143 *Id.*

144 *Id.*

145 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1982 (1904).

146 *See, e.g.*, W.M. BEST, A TREATISE ON THE PRINCIPLES OF EVIDENCE AND PRACTICE AS TO PROOFS IN COURTS OF COMMON LAW; WITH ELEMENTARY RULES FOR CONDUCTING THE EXAMINATION AND CROSS-EXAMINATION OF WITNESSES § 248, at 290 (London, S. Sweet 1849); 1 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE, AND DIGEST OF PROOFS IN CIVIL AND CRIMINAL PROCEEDINGS § 182 (1837) (advocating reputation rule to avoid "an accumulated burthen of collateral proof [such that] the administration of justice would become impracticable").

mation because it provided a summary of all information about a witness and was therefore more reliable than testimony limited to specific acts. Their critics countered that at least a specific act could be denied. One New York judge explained the objection this way:

> [I]t would be much safer for a female witness to permit the adverse party to prove the *fact* that she was a common prostitute, than to attempt to impeach her credit by showing it by *general reputation*: as there would be some chance of refuting the charge, if it was false, in the one case, when there would not be any in the other.[147]

Courts may have settled on reputation testimony despite such objections because of the perception that reputation and credibility were indistinguishable, particularly for female witnesses.[148] Because the cases that brought up the most heated discussion of whether reputation or specific act testimony should be permitted involved the chastity of female witnesses, judges may have been particularly receptive to the idea that reputation was a relevant and probative method of impeachment.[149] As Jean-Jacques Rousseau wrote in *Emile*, the key to female virtue lies equally in the thing itself and in its appearance.[150] Thus, a woman must focus as much, if not more so, on preserving her reputation for virtue than on being virtuous in fact.[151] This prescription for female honor, which puts enormous weight on reputational concerns, aligns with courts' decisions to bypass complicated collateral issues by permitting witnesses to testify about reputation. Given a cultural assumption that, particularly for women, reputation is as salient as actual behavior, and the fact that it provided a more efficient way to access information that would otherwise require extended testimony about multiple, possibly contested prior bad acts, reputation seemed the better method for impeachment. In this way cultural notions of what it meant to be unworthy of belief influenced not only the substantive law of impeachment, but also the procedural mechanisms by which it was carried out.

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147 Bakeman v. Rose, 18 Wend. 146, 149 (N.Y. Sup. Ct. 1837).

148 *See* Simon-Kerr, *Unchaste and Incredible*, *supra* note 124, at 1875 (making the argument that reputation was particularly powerful in impeaching female witnesses and that this circumstance may have influenced the preference for reputation testimony).

149 *See id.*

150 Jean-Jacques Rousseau, Emile (Barbara Foxley trans., Dent & Sons Ltd. 1974) (1762).

151 *See id.* Of course, the idea that reputation is important has more general roots. In the King James translation of the Bible, Paul exhorts the Thessalonians to "[a]bstain from all appearance of evil." 1 *Thessalonians* 5:22 (King James).

Whether a witness could be impeached with testimony about her general "reputation for morality," her "reputation for chastity," or simply her "reputation for truth and veracity" were questions that followed from the decision to admit reputation evidence. Admitting impeaching evidence in the form of questions about reputation, however, was the crucial step. Once a witness could discuss another's reputation, for example, it may not have mattered whether it was a woman's reputation for "truth" or for "chastity." Witnesses called on to testify about a person's reputation for truth or veracity would be free to call upon behaviors that were socially intertwined with believability and honor, such as chastity for women or integrity in business dealings for men.

In moments of candor, some judges acknowledged that the focus on reputation simply obscured the real source of a witness's opinion. As a New York judge explained in *Bakeman v. Rose*,[152] a leading case on the question, any witness called to discuss the reputation for truth and veracity of a prostitute would no doubt take her profession into account even if a direct reference were not allowed.[153] "I imagine it would have been difficult," the judge mused, "to find a witness, having any regard to his own character, and knowing her general reputation to be that of a public prostitute, who would have ventured to maintain for her the credibility of an ordinary witness."[154] Thus, the emphasis on reputation to the exclusion of specific acts such as prostitution did not necessarily keep that information from influencing trials.[155] By permitting inquiry into reputation, these courts created an avenue for evidence of sexual or other transgressions to enter the courtroom so long as it was translated by a witness into a more general statement about reputation.

Courts often did not require much by way of translation. A quarter of a century after *Bakeman*, another New York judge refused to find error in the impeachment of a female witness with evidence showing not only that her general moral character and character for honesty and integrity were bad, but "that she was reputed to be unchaste and to possess a disposition to steal; and that she kept a place for the sale of liquors, which was the resort of vile characters."[156] De-

152 18 Wend. 146 (N.Y. Sup. Ct. 1837).

153 *Id.* at 153.

154 *Id.*

155 *See id.* at 148–49; *see also* Commonwealth v. Churchill, 52 Mass. (11 Met.) 538, 539 (1846) (limiting impeachment to witnesses' "general character . . . for veracity").

156 Wright v. Paige, 36 Barb. 438, 441 (N.Y. Gen. Term. 1862), *aff'd*, 3 Keyes 581 (N.Y. 1867).

spite repeating the axiom that for impeachment purposes, evidence "as to any particular offense, species or class of crimes or immoralities" is not allowed, the court had no problem with testimony about the woman's *reputation* for specific behaviors and character traits like unchastity and keeping a saloon.[157] Nor did the court require the testimony to directly connect those behaviors to the witness's proclivity to lie, or even for the testimony to be framed in such a way.[158] As the judge explained:

> On the question of general impeachment, the credibility of a witness is to be determined from general character. After one has so conducted [himself] in [the] community that he has earned the reputation of being a person of notoriously bad character, he is open to discredit in a court of justice. This is the common sentiment of mankind.[159]

No witness, in other words, need translate that bad character into a proclivity to lie—the jury could do that for itself.

Other courts were more stringent in focusing witnesses on "general reputation for veracity" as opposed to "general moral character."[160] In Arkansas, for example, the supreme court declined to follow New York's lead and allow an inquiry into the "general immorality" of witnesses, broadly construed.[161] Once again addressing an attempt to impeach a witness with evidence about sexual virtue, the court held that questioning about "reputation for chastity" was improper.[162] Perhaps significantly, the witness in that case was a man.[163]

In Iowa, the supreme court focused on a different facet of the problem when it held that reputation testimony must address the witness's general reputation, not the impeaching witness's personal opinion about his or her character.[164] An Iowa statute provided that "the general moral character of a witness may be proved for the purpose of testing his credibility."[165] The court clarified that "[t]he word 'charac-

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157 *Id.* at 441–44.

158 *See id.* at 442.

159 *Id.* at 443–44.

160 Cline v. State, 10 S.W. 225, 226 (Ark. 1889).

161 *Id.* at 226–27.

162 *Id.* at 227.

163 *See id.* at 226.

164 State v. Egan, 13 N.W. 730, 730 (Iowa 1882) ("If a witness could be impeached by proof of his moral qualities, as known to the witness called to discredit him, it would involve endless inquiry into the truth of the matters upon which the opinion of his moral qualities is found . . . .").

165 *Id.* at 731.

ter,' as used here, means *reputation* . . . ."[166] Thus, although the inquiry would not be confined to "a reputation for want of truth," it was nonetheless improper to impeach a witness with testimony that in another witness's opinion he was "a man of bad morals."[167] The court insisted that "the general reputation as to morals" had to be proved with testimony about the witness's reputation in the community rather than by eliciting the opinion of one witness on the subject.[168]

Although they continued to endorse a focus on character or reputation in determining if a witness would be worthy of belief, courts did eventually coalesce around the notion that such inquiries should be limited, at least to a degree. In 1935, for example, the Missouri Supreme Court held that "impeaching testimony should be confined to the real and ultimate object of the inquiry, which is the reputation of the witness for truth and veracity."[169] The court also reasoned that any rule other than one focused on truth and veracity is overbroad, may introduce collateral issues, and gives too much leeway for "personal prejudice or honest differences of opinion on points of belief or conduct . . . ."[170] The court noted that its new rule had the approval of commentators such as Wigmore, Jones, and Greenleaf, as well as at least twenty-two states.[171] Making similar arguments that referenced both procedural and substantive concerns with the practice, other courts and legislatures, and ultimately Congress in the Federal Rules of Evidence, embraced a mode of impeachment that still allowed reputation testimony but tailored it to credibility by limiting the evidence to a witness's reputation for truthfulness.[172]

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166 *Id.*

167 *Id.* at 730–31.

168 *Id.* at 731.

169 State v. Williams, 87 S.W.2d 175, 182 (Mo. 1935).

170 *Id.* at 183.

171 *See id.* (citing 2 WIGMORE ON EVIDENCE § 922, at 301 (2d ed. 1923); JONES ON EVIDENCE §§ 860–61, at 1356, 1360 (3d ed.); SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE, § 461a (16th ed. 1899) (listing Colorado, Connecticut, Florida, Illinois, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Jersey, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, Virginia, Vermont, and West Virginia). By contrast, nine states were statutorily bound to a rule permitting impeachment with evidence of "general moral character." *Williams*, 87 S.W.2d at 183 n.1 (listing Arkansas, Georgia, Indiana, Iowa, Kentucky, Louisiana, Montana, New Mexico, and Oregon). Seven additional states extended the inquiry to "the general reputation of the witness for morality" although not bound to do so by statute. *Id.* at 183 n.3 (listing Alabama, Missouri, New York, North Carolina, Oklahoma, Tennessee, and Washington).

172 *See, e.g.*, FED. R. EVID. 608; State v. Scott, 58 S.W.2d 275, 280 (Mo. 1933) (noting, in dicta, that allowing expansive impeachment with general character "is impractical, confuses the issues, and is unfair to the defendant").

Even this emerging consensus created another paradox in credibility jurisprudence. Although most jurisdictions superficially restrict impeachment of witnesses through reputation or opinion evidence to evidence of truthfulness or lack thereof, all jurisdictions still overtly embraced the connection between "moral degeneration"[173] and a lack of credibility by admitting evidence of prior crimes for purposes of impeachment.[174] Twentieth-century reformers would cite rules holding that reputation testimony should focus on truth and veracity as evidence of the illogic of impeachment with all manner of prior felony convictions.[175]

No matter what behavior is found to bear upon a reputation for truthfulness, there are obvious flaws in the assumption that reputation and character are perfect analogues. Judges and juries are no more skilled than any of us in trying to fully understand another person (or even ourselves), and the information they receive is always subject to the selective eye of adversaries trying to win a case. If we want any information about character in the credibility context, we must rely on witnesses chosen because they are prepared to present testimony that will undermine (or support) a material witness's credibility. Those impeachment witnesses with their own biases and limited information can only illuminate a person's character to a certain degree. The confusion in this meta-procedural debate over how to conduct impeachment is, thus, perhaps best explained by the reality that looking for liars through character evidence requires that we admit evidence—whether through reputation or opinion—that will always be superficial. Despite this disjunction, reputation and opinion evidence remain entrenched in today's credibility jurisprudence.[176]

C. Credibility Proxies Today

The early twentieth century saw increasing calls for evidentiary codification and reform. As it related to impeachment doctrine, the reform agenda reflected a growing sense that the rules were primitive and had little correlation with the task of identifying potential liars.[177]

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173 *Williams*, 87 S.W.2d at 181.

174 *See infra* notes 189–91 and accompanying text.

175 *See e.g.*, Mason Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166, 172 (1941).

176 *See infra* Section I.C.4.

177 *See generally* Michael Ariens, *Progress Is Our Only Product: Legal Reform and the Codification of Evidence*, 17 LAW & SOC. INQUIRY 213, 226–29 (1992) (discussing the twentieth-century reform of evidentiary standards as "a difference between the 'old' formalist jurisprudence and the 'new' sociological jurisprudence").

Legal scholars were influenced by new social science research suggesting that people make contextual decisions about lying. A growing cultural pluralism also called into question the behavioral norms undergirding much credibility jurisprudence.

Dean Mason Ladd exemplified this viewpoint in a 1940 article that called for bringing the law of evidence "closer to reality in its truth finding function."[178] He argued that impeaching with prior convictions rests on the questionable assumption that "the doing of an act designated by organized society as a crime is itself an indication of testimonial unreliability."[179] This treats "character as a fixed quality [ ] predicated upon a single act," a notion he argued was at odds with scientific theories of character.[180] Ladd criticized the admission of prior convictions as lacking tailoring to the purpose of impeachment. It is unclear, he wrote, how "convictions-at-large of crimes-at-large satisfy the needs of relevancy to the task which they are assigned to perform."[181] The prior conviction tells us "not the specific tendency of the witness to falsify but the general bad character of the witness as evidenced by the single act of which he was convicted . . . ."[182] Prior convictions, Ladd suggests, signal simply that a witness may not be worthy of belief, whether or not the witness is truthful.[183]

Ladd, like many others, hoped the American Law Institute Model Code of Evidence would spur the modernization of credibility standards, but codification on a national scale did not occur for another thirty-five years. In 1975, the Federal Rules of Evidence were adopted.[184] Rather than a moment of major reform in the system of evidence, however, the rules represented compromise between the realism that Ladd and others had espoused and those who favored common law evolution and reasoned elaboration.[185] Most importantly, as this Article shows, codification in the area of impeachment produced little in the way of reform.

The Federal Rules codified and in some ways expanded the most problematic features of the common law approach to credibility.

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178 Ladd, *supra* note 175, at 166.

179 *Id.* at 176.

180 *Id.* at 177.

181 *Id.* at 178

182 *Id.* at 176.

183 *Id.* at 175–76.

184 Ariens, *supra* note 177, at 255.

185 Compromise between Congress and the Advisory Committee drafting the rules was also a factor in shaping the Federal Rules. *See, e.g.*, *id.*; 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5005 (2d ed. 2005).

Rather than further tailoring impeachment rules, Congress coarsened them. For example, Rule 608 of the Federal Rules permits impeachment after a witness's character for truthfulness has been attacked not only "by testimony about the witness's reputation for having a character for truthfulness or untruthfulness," but also "by testimony in the form of an opinion about that character."[186] Specific instances of a witness's conduct relating to truthfulness or untruthfulness, such as lying on a job application, may also be referred to on cross-examination.[187] The primary limitation is that under no circumstances can additional evidence be adduced to support the implied contention that the witness has lied.[188] If the witness denies it, the jury is left with the cross-examined witness's word that he never committed the prior bad act, even if proof exists that he did.

Still more troublesome was the treatment of prior crimes. Rather than limiting this type of impeachment to crimes with a specific connection to veracity as many had suggested, Congress came to the apparent conclusion that "all felonies have some probative value on the issue of credibility."[189] According to the legislators whose views on the issue prevailed, such crimes "entail substantial injury to and disregard of the rights of other persons"[190] and are therefore probative of credibility. Accordingly, Federal Rule of Evidence 609 allows for impeachment by evidence of criminal convictions under certain conditions.[191] The rule states that for a crime punishable by "death or imprisonment for more than one year," the prior conviction must be admitted unless its probative value is substantially outweighed by a danger of unfair prejudice.[192] If the witness is a criminal defendant, the balancing shifts and the prior conviction must be admitted if "the probative value outweighs its prejudicial effect."[193] However, in the only provision of the Federal Rules of Evidence not to incorporate a balancing test, the rules provide that the court *must* admit a past criminal conviction if

186 FED. R. EVID. 608(a).

187 *See* FED. R. EVID. 608(b) (disallowing extrinsic evidence while allowing questioning of a witness in cross-examination).

188 *See id.*

189 United States v. Lipscomb, 702 F.2d 1049, 1062 (D.C. Cir. 1983). "Apparent" is used because Congress did not make this point explicitly. Instead, the leading early case interpreting Federal Rule 609 came to that conclusion after extensive analysis of the text and legislative history of the rule. *See id.*

190 120 CONG. REC. 1414 (1974) (statement of Rep. Lawrence Hogan).

191 FED. R. EVID. 609.

192 FED. R. EVID. 609(a)(1)(A).

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

the elements of the crime require proving or the witness's admitting "a dishonest act or false statement."[194]

Most states have gradually adopted the Federal Rules' approach to impeachment, and the dual focus on crimes and character evidence is nearly universal.[195] The link between credibility, reputation, and criminality drawn in today's impeachment rules thus continues to reflect the notion that the indicia of being a bad person, however defined, is also the indicia of a liar. One bad act is still sufficient to draw an inference about a person's bad character, and that bad character, in turn, tells us something about a witness's propensity to lie. Although the Federal Rules limit reputation and opinion testimony to the witness's truth and veracity,[196] behavior that is deviant but unrelated to lying may nonetheless contribute to the formation of a reputation or an opinion.

From the days of competency doctrine to the Federal Rules of Evidence, the theory linking prior convictions or bad acts, reputation, and opinion to credibility has remained constant. Justice Holmes perhaps best articulated it in 1884:

> [W]hen it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact. The evidence has no tendency to prove that he was mistaken, but only that he has perjured himself, and it reaches that conclusion solely through the general proposition that he is of bad character and unworthy of credit.[197]

Holmes recognized that the prior conviction tells nothing about a lie or mistaken testimony in a particular case. The conviction simply identifies the witness who is deemed unworthy of belief.

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

195 *See* WRIGHT & GRAHAM, *supra* note 185, § 5009 (describing adoption of FRE by states). In what follows, the Federal Rules are used to ground the discussion of modern credibility jurisprudence. The FRE numbering system, which many states follow, is helpful as a shorthand for different methods of impeachment. For an analysis of states' approaches to impeaching with prior convictions, see Roberts, *Conviction by Prior Impeachment*, *supra* note 6.

196 *See* FED. R. EVID. 608.

197 Gertz v. Fitchburg R.R. Co., 137 Mass. 77, 78 (1884).

1. *A Return to Competency: Silencing Black Witnesses*

In many respects the Federal Rules era formalized a regression to the status-based exclusion approach of competency doctrine. Just as English common law initially focused on whether a witness had been sentenced to an "infamous punishment" in determining competency to testify,[198] the Federal Rules declare that for a huge swath of crimes it is the potential punishment,[199] not the character of the crime, that matters in impeachment.[200] Furthermore, because the Federal Rules consolidate broad discretion with trial judges to admit evidence of any prior crime punishable by more than one year and mandate admission of prior convictions involving dishonesty or false statement, they create a real likelihood that a witness's prior conviction will be revealed. Thus, a criminal record is once again firmly established as not only a marker of profound distrust, but as one that has implications for whose testimony a jury will hear. Finally, this regime not only looks like early competency doctrine, it has similar effects. In particular, as applied, it has the effect of disproportionately silencing black witnesses.

Numerous empirical studies show that the majority of defendants with prior criminal convictions choose not to testify.[201] To give one example, in a study of defendants later exonerated with DNA evidence, Professor John Blume found that 91% of innocent defendants who did not testify had a prior criminal conviction as opposed to 43% of innocent defendants who did testify.[202] Blume reports that "[i]n every single case in which a defendant with a prior record testified, the trial court permitted the prosecution to impeach the defendant with his or her prior convictions."[203] To be sure, this sample may be

198 *See* WHITMAN, *supra* note 44, at 187.

199 The rules prescribe different treatment for crimes punishable by death or imprisonment for more than one year and other crimes. *See* FED. R. EVID. 609(a)(1), (a)(2).

200 *See* FED. R. EVID. 609.

201 *See, e.g.*, John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL L. STUD. 477, 477 (2008) (finding factually innocent defendants with past criminal records testify much less often than criminal defendants in general); 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) (suggesting defendants choose not to testify because they believe prosecutors will use the record to the defendant's disadvantage); Gordon Van Kessel, *Quieting the Guilty and Acquitting the Innocent: A Close Look at a New Twist on the Right to Silence*, 35 IND. L. REV. 925, 951 (2002) ("The failure of American defendants to testify has become so common that even the public rarely notices when the defendant does not take the witness stand.").

202 Blume, *supra* note 201, at 490.

203 *Id.*

skewed—from a fact-finding and justice perspective things went wrong in all of these trials. Still, other studies have found that over 70% of defendants who testify are impeached with prior criminal convictions.[204] The studies confirm the conventional assumption that a witness with a prior criminal conviction can expect it to be admitted at trial, and this assumption has demonstrable and profound repercussions for a criminal defendant's decision whether to testify.[205] Although the question has thus far defied careful empirical analysis, it is certain that defense attorneys advise clients of probable impeachment with prior convictions, and it is likely that prior conviction impeachment at trial is a factor in many defendants' choice to accept plea bargains.[206]

One reason prior conviction impeachment deters criminal defendants from testifying is that jurors seem to use the information as evidence of guilt rather than untruthfulness. In an important study on the subject, Ted Eisenberg and Valerie Hans studied over 300 criminal cases and came to a striking conclusion.[207] They found no association between the presence of a criminal record and jurors' credibility assessments, but that jurors "appear willing to convict on less strong other evidence if the defendant has a criminal past."[208] They hypothesized that jurors may use prior crimes to "categorize the defendant as a bad person, a person of poor character" and that this may create a halo effect that causes the jury to assume the defendant has other negative characteristics.[209] Eisenberg and Hans also found that jurors reported a lower level of sympathy for the defendant when informed of a prior criminal conviction.[210] When our impeachment rules themselves depend on a tautology of worthiness, the effort of logic re-

204 *See, e.g.*, Teree E. Foster, *Rule 609(a) in the Civil Context: A Recommendation for Reform*, 57 FORDHAM L. REV. 1, 45 n.230 (1988) (citing James E. Beaver & Steven L. Marques, *A Proposal to Modify the Rule on Criminal Conviction Impeachment*, 58 TEMP. L.Q. 585, 591 (1985)) (describing a 1966 study that found that seventy-two percent of criminal defendants are impeached under rule).

205 *See* Natapoff, *supra* note 21, at 1462 (describing fear of prejudice from jurors who hear of prior convictions and pressure from defense counsel on defendants with priors not to testify as major factors keeping defendants from testifying).

206 *See id.* at 1462–64 (discussing the implications of impeachment on pleas in general).

207 *See* Eisenberg & Hans, *supra* note 201, at 1372–73.

208 *Id.* at 1386.

209 *Id.* at 1357–58.

210 *Id.* at 1387. Mock juror studies also bear this out. They find that jurors' perception of the strength of the evidence against a defendant changes when they know the defendant has a prior record. *See, e.g.*, Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 LAW & HUM. BEHAV. 67, 76 (1995) (finding in a mock juror study that prior records increased convictions compared to no prior convictions); Roselle L. Wissler &

quired to take negative information only as evidence of credibility rather than guilt may be humanly impossible, too much for the average juror, or an instruction the juror chooses to reject. For this reason, using prior convictions as credibility proxies works to deter witnesses from testifying who recognize that their prior convictions will be exposed to jurors who may use the information as evidence of guilt, rather than untruthfulness.

Statistics illustrate that status, particularly race, is still a factor here. Eisenberg and Hans found that minority defendants were not only more likely to have criminal histories than white defendants (71% versus 54%), but also that "[a]bout 6 in 10 whites with criminal records testified, compared to about 4 in 10 minorities with criminal records."[211] A possible explanation for the disparity is that "[j]uries in minority defendants' cases were more likely to learn of criminal histories than were juries in white defendants' cases."[212] Although the authors do not elaborate on this, several possibilities present themselves. Judges may be more willing to admit prior convictions for black defendants or the prior convictions of black defendants may be more likely to fall into categories deemed relevant to credibility. In addition, prosecutors may make less effective arguments in favor of admitting the evidence in cases with white defendants or defense attorneys may make less effective arguments in favor of their being excluded in cases with minority defendants. Any explanation suggests that status has a role in the above disparities.

A statistic from a Department of Justice report in 2014 helps crystalize the implications of the findings by Eisenberg and Hans. For males ages twenty-five to thirty-nine, blacks are imprisoned at rates six times greater than whites.[213] Given rearrest rates,[214] we can reason-

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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 same).

211 Eisenberg & Hans, *supra* note 201, at 1372. This study included one jurisdiction, California, which does not have an evidence code based on the FRE. However, California takes a liberal approach to impeachment with prior crimes. *See id.* at 1367.

212 *Id.* at 1374–75. This result was slightly below statistical significance because, as the authors explain, their cases did not include enough white defendants. *Id.* It nevertheless suggests that discretion to exclude prior conviction evidence may be racially skewed in favor of white defendants. It is also possible that lawyers are more likely to counsel black defendants not to testify, either because of the increased risk that the conviction will be disclosed or for some other reason, such as attorney bias.

213 E. Ann Carson, *Prisoners in 2013*, U.S. DEP'T OF JUSTICE 7–8 (Sept. 2014), http://www.bjs.gov/content/pub/pdf/p13.pdf.

214 At least one scholar noted that in April 2014 "[t]he Bureau of Justice Statistics indicates that 67.8% of all prisoners who are released from prison will be re-arrested within three years,

ably assume that some percentage of those prisoners will one day be witnesses or defendants again. If the latter, and assuming the previously-convicted have competent counsel, they will all be advised that if they testify they are likely to be impeached with their prior convictions. As a result, many will decide not to testify. Further, as Bennett Capers has argued, the potential impeachment of *witnesses* with prior crimes may serve as a deterrent to the prosecution of particular types of crimes.[215] For example, an issue that has become part of the public conversation in the wake of recordings of police violence against black men is "prosecutions based on the use of excessive force in poor, minority communities, or civil suits seeking damages . . . ."[216] Capers contends that one reason these cases may not be brought or may be hard to win is that "many of the witnesses to the use of police brutality, including the victim, will themselves be marked as . . . less credible witnesses" by their prior convictions.[217] In short, our impeachment system is racially-skewed because it places heightened constraints on testimony by black defendants and witnesses. The result is that many black defendants take pleas or do not tell their stories in court and that some crimes affecting minority communities may not be prosecuted. The parallels to outright race-based competency rules of the nineteenth century are striking and troublesome.[218]

Montré Carodine has made a similar claim that the Federal Rules reflect racist understandings of credibility. She argues that the development of Rule 609, and its approval of prior crime impeachment, is attributable to the fact that "when most people think of the stereotypical 'criminal,' regardless of their race, a Black face comes to mind."[219] She suggests that impeaching with prior convictions follows from conceptualizing all criminals as black because of a "historical stereotype of Blacks as dishonest."[220] Thus, when Congress enacted

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and 76.6% will be re-arrested within five years." Charles Tarwater, Jr., *The Mind Oppressed: Recidivism as a Learned Behavior*, 6 WAKE FOREST J.L. & POL'Y 357, 358 (2016).

215 *See* Bennett Capers, *Crime, Legitimacy,* Our *Criminal Network, and* The Wire, 8 OHIO ST. J. CRIM. L. 459, 466–67 (2011).

216 *Id.* at 466.

217 *Id.* at 466–67.

218 Anna Roberts has extended this argument to the plea context. She contends that using prior convictions in impeachment is problematic because it assumes that a conviction is a reliable indicator of some quality of the defendant. *See* Anna Roberts, *Impeachment by Unreliable Conviction*, *supra* note 22, at 563–64. Plea negotiations, however, are influenced by factors other than culpability, one of which is race. *See id.* at 582–83.

219 Montré D. Carodine, *"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 550 (2009).

220 *Id.*

Rule 609, it accepted the proposition that criminals are dishonest at least partly because legislators had in mind black people as criminals.

While the use of prior crimes in general as a credibility proxy dates back to at least the English common law, Professor Carodine's broader argument that race is inextricable from our current approach to impeachment has merit. Because credibility proxies are simply an outgrowth of ideas about who is honorable or worthy of belief, stereotypes about believability—whether based on ascribed or behaviorally-based status—will help define these proxies. Both the limited data available and common sense teach that the consequences can extend well beyond a fact-finder's credibility determination. Defendants (as advised by their attorneys) are not acting irrationally when they choose not to testify to avoid allowing jurors to hear of their prior convictions. Importantly, Eisenberg and Hans concluded that juries in fact do not use prior crimes evidence for credibility determinations.[221] Instead, information about a criminal record has the effect of diluting the state's burden of proof by making jurors willing to convict on less evidence when the defendant has a criminal past.[222]

Even those who argue that all prior crimes evidence should be admitted do so in part because they believe that jurors use this information as evidence of guilt, and that jurors infer that a defendant has prior convictions unless they hear explicitly that the defendant has none.[223] If this is the case, they argue, then we should automatically admit all prior crimes evidence so there is no longer a disincentive to testify and jurors do not make erroneous assumptions about which defendants have a prior record.[224] This argument is misguided as a rationale for expanding impeachment jurisprudence. As the studies cited above show, jurors use prior crime information to make judgments about the defendant's general character, not his or her credibility.[225] Therefore, if prior crime information is essential to preventing jurors from making the wrong assumptions about defendants, the real relevance of that information is to guilt, not credibility. Admitting this evidence would require modifying the prohibition on propensity evidence embodied in Federal Rule of Evidence 404.[226] It is not a reason

221 *See* Eisenberg & Hans, *supra* note 201, at 1387.

222 *See id.* at 1386–87.

223 *See, e.g.*, Larry Laudan & Ronald J. Allen, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. CRIM. L. & CRIMINOLOGY 493, 523 (2011).

224 *Id.*

225 *See supra* notes 207–10 and accompanying text.

226 Federal Rule of Evidence 404(a)(1) provides that "[e]vidence of a person's character or

to continue admitting prior crimes under the pretense that they tell the jury something about credibility rather than status. In the impeachment context, this Article has shown that prior crimes serve as a credibility proxy through a chain of inferences about who is worthy of belief rather than who actually lies. That prior crime impeachment has disproportionate effects on black defendants is all the more reason to resist calls to expand the scope of this mode of impeachment.

2. The Continued Exceptionalism of Violence

Although the studies cited above give strong reason to doubt that impeachment evidence contributes to jurors' credibility assessments, they have had no perceivable effect on jurisprudence in this area.[227] Courts continue to wrestle with which prior crimes are probative of credibility, as the rules require. Federal Rule 609 and its many state analogues ask courts to decide whether a felony is more probative than prejudicial and whether a particular crime involves lying or deception and is thus automatically admissible.[228] As described below, the resulting doctrine is confused on almost every level. Courts disagree about which crimes, in theory, are probative of credibility or involve lying. They also disagree about whether the assessment of a prior conviction should be made in the abstract or whether they should look into the actual circumstances of the prior crime to determine its nature.

In this doctrinal morass, conceptions of status continue to provide the doctrine's conceptual underpinnings and its few areas of relative uniformity. One, if not the only, such area is the continued assertion that all but the most serious violence is not probative of credibility.[229] *United States v. Estrada*,[230] a 2005 opinion written by now-Justice Sotomayor, is exemplary. At issue was a trial court's determination

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character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." FED. R. EVID. 404(a)(1).

227 The Eisenberg and Hans study, for example, has been cited in ten appellate briefs that appear on Westlaw as of this writing, but in no judicial opinions.

228 *See, e.g.*, FED. R. EVID. 609(a)(1)(B).

229 *See, e.g.*, State v. Ybarra, 634 P.2d 435, 443 (Idaho 1981) ("Acts of violence . . . generally have little or no direct bearing on honesty and veracity."); People v. Woodard, 590 P.2d 391, 395 (Cal. 1979) (same); State v. Wright, 502 A.2d 911, 915 (Conn. 1986) ("crimes of violence do not have 'the special probative value on the issue of credibility which a conviction of a crime involving dishonesty would carry'"); State v. Black, 732 S.E.2d 880, 887 (S.C. 2012) ("A rule of thumb is that convictions that rest on dishonest conduct relate to credibility, whereas crimes of violence, which may result from a myriad of causes, generally do not"). See also the cases cited *infra* note 237.

230 430 F.3d 606 (2d Cir. 2005).

that two government witnesses could be impeached with prior convictions for burglary, larceny, felony drug possession, and murder.[231]

In *Estrada*, Justice Sotomayor reminds trial courts that it is their role to examine "which of a witness's crimes have elements relevant to veracity and honesty and which do not," leaving the impact of that information to the jury whenever possible.[232] Relying on precedent, she distinguishes acts of violence from crimes that "reflect adversely on a person's integrity."[233] Justice Sotomayor claims that crimes of violence "generally have little or no direct bearing on honesty and veracity" because they result from "provocation, carelessness, impatience or combativeness."[234] Justice Sotomayor explains that, by contrast, theft and escape crimes are highly probative of credibility because they involve a "deliberate and injurious violation of basic standards rather than impulse or anger, and usually . . . some element of deceiving the victim."[235] Thus, she endorses a "rule of thumb" that "convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not."[236]

This rule of thumb, which is broadly adopted, is generally explained, as in Justice Sotomayor's opinion, with the assertion that violence is impulsive while lying is predicated on the ability to scheme or plan.[237] This logic, which at least one court attributes to "common

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231 *Id.* at 609.

232 *Id.* at 617.

233 *Id.*

234 *Id.* at 617–18 (quoting Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967)).

235 *Id.* at 618 (quoting CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 6.31 (2d ed. 1999)). At times, courts use this logic to make exceptions for crimes of violence. *See, e.g.*, People v. Murray, 122 A.D.2d 81, 82 (N.Y. Ct. App. 1986) (finding admissible to impeach a homicide conviction because "it was an act of calculated violence, evincing the defendant's willingness to place his own self-interest ahead of the interests of society").

236 *Estrada*, 430 F.3d at 618 (quoting *Gordon*, 383 F.2d at 940). District courts have followed *Estrada*'s counsel. *See, e.g.*, Celestin v. Premo, No. 9:12–CV–301, 2015 WL 5089687, at *2 (N.D.N.Y. Aug. 27, 2015) (finding "[s]ome larcenies occur out of impulsive violent acts while others may be more deliberative and calculating" and "[t]hose tending to be deliberative and stealth[y] have a greater bearing on credibility").

237 *See, e.g.*, *Gordon*, 383 F.2d at 940 ("[c]onvictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not."); Tate v. City of Philadelphia, No. CIV.A. 13-131, 2014 WL 4249765, at *3 (E.D. Pa. Aug. 28, 2014) (distinguishing crimes of violence); United States v. Aranda-Daiz, No. CR 12-2686 JB, 2014 WL 459607, at *8 (D.N.M. Jan. 8, 2014) (finding domestic abuse "of limited value on the issue of . . . credibility, as acts of domestic violence is [sic] not a crime of dishonesty, and these crimes do not clearly implicate . . . veracity"); Reed-Bey v. Pramstaller, No. 06-10934, 2013 WL 5954424, at *4 (E.D. Mich. Nov. 7, 2013) (excluding prior conviction because "[v]iolent crimes generally do not reflect directly on the witness's propensity for truthfulness"); Eng v. Scully, 146 F.R.D. 74, 78 (S.D.N.Y. 1993) (excluding prior conviction for impeachment in part because "[m]urder is not necessarily

human experience,"[238] has superficial appeal in the sense that impulsive violence and conniving fraud or theft are common tropes. However, the argument does not withstand scrutiny. Theft crimes may be committed impulsively or as a result of compulsive behavior beyond the control of the wrongdoer.[239] They may be just as readily analyzed as a result of thoughtlessness, compulsion, or necessity as violent crimes.[240] At the same time, violent crimes are not all unplanned "heat of passion" crimes.[241] The Advisory Committee to the Federal Rules of Evidence tacitly acknowledged as much when it felt the need to stipulate that "evidence that a witness was convicted for a crime of violence, such as murder, is not admissible under Rule 609(a)(2), even if the witness acted deceitfully in the course of committing the crime."[242] Finally, as shown in Part II, even if we accept that violent crimes involve less scheming than theft, we still lack any reliable evidence that crimes involving deception are predictive that the wrongdoer will lie on the witness stand.

Although courts have justified the notion that violence is not probative of credibility using logic akin to Justice Sotomayor's in *Estrada*, it is no secret that status still undergirds the distinction. Courts and commentators continue to invoke an honor culture in which violence was not necessarily an affront to status and credibility. One such clear-eyed explanation for excluding violent crimes comes from Judge Posner. In a 1985 appeal of a case in which a defendant had been asked if he was "a peaceable man," Judge Posner held that the question was not proper "to challenge his credibility."[243] Posner explained, "[v]iolent men are not necessarily liars, and indeed one class of violent men consists of those with an exaggerated sense of honor."[244] The fal-

indicative of truthfulness"); People v. Beagle, 492 P.2d 1, 8 (Cal. 1972) (distinguishing crimes of violence).

238 *Gordon*, 383 F.2d at 940.

239 *See generally* Donald R. Cressey, *The Differential Association Theory and Compulsive Crimes*, 45 J. CRIM. L. & CRIMINOLOGY 29, 29 (1954) (arguing that "compulsive crimes" are an exception to the general theory that "criminality is learned in interaction with others in a process of communication").

240 *See id.*

241 Criminological studies suggest that the external factors that contribute to both violence and theft crimes are similar. *See, e.g.*, Johan van Wilsem, *Criminal Victimization in Cross-National Perspective: An Analysis of Rates of Theft, Violence and Vandalism Across 27 Countries*, 1 EUR. J. CRIMINOLOGY 89, 105 (2004) (concluding that "national rates of homicide are positively related to both rates of theft and non-lethal violence").

242 FED. R. EVID, Committee Notes on Rules, 2006 Amendment.

243 United States v. Fountain, 768 F.2d 790, 795 (7th Cir.), *opinion supplemented on denial of reh'g*, 777 F.2d 345 (7th Cir. 1985).

244 *Id.*

lacy of this logic, that men who engage in so-called honor violence somehow have more integrity than others, should be obvious. If it is not, it becomes apparent if we substitute the image of a white man using violence to defend his family (or womenfolk), with a brown man killing his daughter or sister because she has committed adultery or married the wrong man, something that happens frequently in certain cultures in the name of honor.[245]

Nonetheless, the latest edition of Wigmore's evidence treatise explains that, "[a] classic illustration of a crime that does not reflect on credibility involves violence in defense of honor."[246] While the authors acknowledge that dueling is infrequent in modern times, they nonetheless use the dueling example as the primary explanation for why "crimes of violence, in general, are not regarded as being as probative as crimes involving theft."[247] This account makes plain the true logic of the hundreds of judicial opinions parroting the maxim that violence is not probative of credibility. Notions of status and honor, rather than a demonstrable difference between the asserted integrity of those who commit violent crimes and those who commit other crimes, such as theft, undergird the doctrine that crimes of violence are less likely to bear on credibility.[248] While courts pay lip service to the idea that they are instead tracking a distinction between impulsivity and stealth, this is simply a form of preservation-through-transformation.[249] Pinning a more modern justification on an age-old distinction grounded in white

245 *See* Nicholas Kristof, Opinion, *Her Father Shot Her in the Head, as an "Honor Killing,"* N.Y. TIMES (Jan. 30, 2016), http://www.nytimes.com/2016/01/31/opinion/sunday/her-father-shot-her-in-the-head-as-an-honor-killing.html?_r=0 (describing Pakistani man's killing of his daughter after she eloped and suggesting that "[a]bout every 90 minutes, an honor killing unfolds somewhere in the world").

246 PARK & LININGER, *supra* note 5, § 3.4.4.1.1.1.

247 *Id.*

248 We might expect as a logical extension of this focus on honor that courts would treat crimes that seem to involve honorable violence—or violence that does not affect status—differently from other violent crimes. This does not seem to be the case in modern jurisprudence. This may be because impeachment is a collateral matter and courts are wary of digging too deeply into the precise motivations of a prior act. *See supra* note 146 and accompanying text. It may also be that courts do not have access to documents that would reveal the subtleties of the conduct underlying a conviction or plea agreement. For ease of application, courts have simply generalized from an age-old understanding that violence is not always dishonorable to the notion that violence is not particularly probative of credibility.

249 Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997) ("The ways in which the legal system enforces social stratification are various and evolve over time. Efforts to reform a status regime bring about changes in its rule structure and justificatory rhetoric—a dynamic I have [ ] called 'preservation-through-transformation.'").

male status norms does not, in fact, make it any more rational to hold that assault tells us nothing about credibility while shoplifting does.

In *Estrada*, Justice Sotomayor provides a further clue to the continued salience of status in the impeachment calculation. She counsels trial courts to consider the gravity and/or depravity involved in the offense. She suggests that the severity of the crime should be considered both for its ability to prejudice the jury and because "particularly heinous crimes may be high in probative value insofar as they reflect a rejection of social mores."[250] This should sound familiar. Rejection of social mores and "violation of basic standards" are status markers. These status markers have always denoted those who are "unworthy of belief" because they are the metric by which society adjudges worthiness.[251] Ironically, crimes of violence seem to fit those definitions quite well in today's society. A violent lack of inhibition or a deliberate indifference to the injuries caused by one's actions arguably run contrary to basic standards that glue society together just as fundamentally as the decision to steal. Indeed, our basic standards seem to strictly condemn violent offenders, at least as measured by current criminal reform efforts that focus on scaling back sentences for nonviolent offenders, but do not enter the "politically poisonous" territory of reducing sentences for violent offenders.[252]

3. Theft, Sex, Drugs (and Moral Turpitude)

Under a rule that suggests all felonies are potentially admissible for impeachment, courts must assess all manner of prior convictions for how probative they are of credibility. This judicial analysis of prior conviction impeachment continues to be beholden to history and received social wisdom rather than empirical evidence and logic. Opinions such as *Estrada* tell judges to consider the moral depravity and severity of the crime and its ostensible connection to lying.[253] This sets up two theories for why a prior criminal act is predictive of future lying. The first is a broad version of the status theory: people who violate social mores are unworthy of belief. The other is the narrow version of the status theory: people who have lied are liars and are unworthy of belief. Modern courts may prefer the latter explanation for impeachment decisions, but they are obliged to return to the for-

250 United States v. Estrada, 430 F.3d 606, 618 (2d Cir. 2005).

251 *See supra* notes 117–19 and accompanying text.

252 Erik Eckholm, *How to Cut the Prison Population (See for Yourself)*, N.Y. TIMES: THE UPSHOT (Aug. 11, 2015) http://nyti.ms/1PindpF.

253 *See Estrada*, 430 F.3d at 618.

mer because it is the only way to explain why "all felonies are at least somewhat probative of a witness's propensity to testify truthfully."[254]

Estrada provides a way to briefly investigate the resulting morass of impeachment doctrine. The opinion uses the two announced theories of impeachment to sort crimes into categories that are or are not probative of credibility. Theft crimes are rated "high on the scale of probative worth on credibility . . . ."[255] Similarly probative are "at least sometimes drug importation and even sexual abuse of children" because the former involve some degree of duplicity and the latter is particularly depraved.[256] By contrast, *Estrada* suggests that "crimes involving public morality, such as prostitution, may be less probative of veracity."[257] Using these categories as a guide shows that theft, drugs, and public morality receive varied treatment depending on the jurisdiction, with courts straining to offer coherent explanations for their decisions. Status, however, is never far from view.

As Justice Sotomayor suggests, theft crimes are often viewed as solid credibility proxies. At least since biblical times, it has been clear that theft is considered morally wrong.[258] In addition, courts often persuade themselves that theft involves dishonesty.[259] Yet courts are split on whether petty theft, such as shoplifting, is probative of credibility.[260] In a 2008 case, the Colorado Supreme Court took up the question after defense counsel had asked the complaining child witness in a trial for sexual assault whether she had stolen $100 from her mother's store the previous summer.[261] The Colorado provision under which this question was asked, like its Federal Rules counterpart, Rule 608(b), is often used as a way to bring up prior convictions, such as minor thefts, that cannot be automatically admitted as crimes involving dishonesty or false statement under 609(a)(2) and are not punishable by more than one year as required by 609(a)(1).[262] The Colorado analogue to 608(b) permits impeachment with specific in-

254 *Id.* at 617.

255 *Id.* at 618.

256 *Id.* (quoting CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 6.31 (2d ed. 1999)).

257 *Id.*

258 *See Exodus* 20:15 (stating that God commands, "Thou shalt not steal").

259 One memorable such explanation comes from a now-overruled South Carolina Court of Appeals decision. "Stealing is defined in law as larceny," the court wrote, and "[l]arceny involves dishonesty." State v. Al-Amin, 578 S.E.2d 32, 41 (S.C. Ct. App. 2003), *overruled by* State v. Broadnax, 779 S.E.2d 789, 793 (S.C. 2015).

260 People v. Segovia, 196 P.3d 1126, 1131 (Colo. 2008).

261 *Id.* at 1129.

262 *See id.* at 1132.

stances of conduct "that are probative of a witness's character for truthfulness or untruthfulness."[263] The Colorado Supreme Court took the case to address whether the witness's shoplifting was probative of her character for truthfulness.[264]

To answer this question, the Colorado Supreme Court identified several impeachment theories and decided on a compromise. It took an approach that would encompass both acts with elements of false statement or deception and also "conduct seeking personal advantage by taking from others in violation of their rights."[265] According to the court, the latter conduct "reflects on dishonesty or truthfulness."[266] In keeping with many jurisdictions, the court tried to frame its approach to impeachment around the propensity for lying, but it folded into that idea the suggestion that certain conduct that does not clearly involve lying nonetheless makes a person unworthy of belief.

Ultimately, however, the Colorado court found the child's shoplifting was probative of credibility because, in essence, theft makes people unworthy and therefore unworthy of belief. "[C]ommon experience informs us," the court explained, "that a person who takes the property of another for her own benefit is acting in an untruthful or dishonest way."[267] Here, the court cited *Gordon v. United States*,[268] which held that "stealing . . . [is] universally regarded as conduct which reflects adversely on a man's honesty and integrity."[269] Perhaps trying to get beyond the tautology that stealing makes people unworthy of belief because it shows they are unworthy (or lacking in "integrity"), the court offered the further explanation that theft tells us something about credibility because "a person who stole from another may be more inclined to obtain an advantage for herself by giving false testimony."[270] The court reiterated, "conduct seeking personal advantage by taking from others in violation of their rights reflects on dishonesty or truthfulness."[271]

The Colorado court's rationale fails to distinguish theft from other acts that are not generally linked to credibility. Arguably, as-

263 *Id.* at 1130–31.

264 The court cited twelve jurisdictions both state and federal rejecting shoplifting as a credibility proxy and seventeen embracing it. *Id.* at 1131 nn.3–7.

265 *Id.* at 1132.

266 *Id.*

267 *Id.*

268 383 F.2d 936 (D.C. Cir. 1967).

269 *Id.* at 940.

270 *Segovia*, 196 P.3d at 1132.

271 *Id.*

saulting another person infringes their rights while advantaging an assailant who may derive satisfaction from inflicting pain on his or her victim. Putting this aside, it is also not clear why advantaging oneself at the expense of others should be the test for whether evidence is admissible for impeachment unless it is through the broader assumption that people who commit bad acts are more likely to lie. Thus, although the opinion overtly disavows the rationale that bad character itself is a proxy for credibility,[272] the reasons it gives add up to that very proposition.

If theft is a questionable credibility proxy, what of *Estrada*'s pronouncement that crimes against public morality are not probative of credibility? Despite Justice Sotomayor's assertion, violations of public morality continue to have currency as credibility proxies. This is true in jurisdictions, such as California and Texas, that still overtly use the moral turpitude standard to denote which prior acts or crimes are admissible to impeach. It is also true in jurisdictions that long ago adopted the Federal Rules approach to impeachment.

The easiest way to trace status norms related to public morality in modern evidence jurisprudence is by looking at the enduring linkage between credibility and a lack of chastity. In 2012, for example, a California district court decided a habeas case brought by a petitioner who had been convicted of rape.[273] One of the petitioner's arguments was that the trial court erred in excluding certain evidence about the victim's sexual history and sexual conduct after the rape allegedly occurred.[274] One might imagine, given this argument, that the trial court had excluded all evidence about the victim's sexual history, but this was not the case. In fact, the prosecution had *conceded* that the victim's two subsequent prostitution convictions could be used to impeach her credibility.[275] The trial court, however, excluded contextual information beyond the fact of the convictions.[276] Faced with the petitioner's claim that he should have been allowed to inquire into the details of the victim's work as a prostitute, the district court found that any error was harmless given that the jury had already learned that

272 *Id.* at 1131–32.

273 Foy v. Lopez, No. 2:10–cv–2322–TJB, 2012 WL 439620, at *1 (E.D. Cal. Feb. 9, 2012), *aff'd sub nom.* Foy v. Gipson, 609 F. App'x 903 (9th Cir. 2015); *see also* People v. Chandler, 56 Cal. App. 4th 703, 708 (1997) (citing California caselaw holding that "[e]vidence the victim participated in a form of prostitution is conduct involving moral turpitude which is admissible for impeachment purposes").

274 *Foy*, 2012 WL 439620, at *5.

275 *Id.* at *4.

276 *Id.* at *5.

the victim was a prostitute who used crack cocaine in the vicinity of the attack.[277] The jury, the court explained, had the relevant information because it knew the victim was not "a person of chaste character."[278] The opinion does not offer a rationale for linking chastity with credibility, but history offers a guide. In California, witnesses may be impeached with evidence that they committed crimes of "moral turpitude."[279] California courts generally agree that prostitution constitutes a crime of moral turpitude, a position that rests directly on nineteenth-century precedent and the belief that a woman who was unchaste lacked honor and therefore credibility.[280]

California is not alone in linking prostitution with a lack of credibility. In 2005 the Massachusetts Supreme Court reversed a rape conviction because the trial court failed to consider whether the victim's prior "[n]ightwalking" conviction should be admitted to impeach her credibility.[281] New York courts have also held that prostitution is admissible on the question of credibility, in one case refusing to find error in a trial court's decision that a female defendant in a manslaughter case could be impeached with a prostitution conviction.[282] The District of Columbia Circuit has held that a conviction for soliciting prostitution qualifies as a crime involving "dishonesty or false statement" under the D.C. Code of Evidence and could potentially be used to impeach a woman accused of assault.[283] Illinois courts have held that "[a] witnesses' general credibility may be attacked by cross-examining that witness regarding a disreputable occupation," citing

277 *Id.* at *8.

278 *Id.* at *9.

279 People v. Castro, 696 P.2d 111, 120 (Cal. 1985) (adopting moral turpitude standard to delineate crimes admissible to impeach).

280 *See* Simon-Kerr, *Moral Turpitude*, *supra* note 98, at 1019 ("Accusations that women were prostitutes, committed adultery, or fornicated outside of marriage, although they did not always support per se slander liability, were almost invariably found to involve moral turpitude."); *see also* People v. Jaimez, 228 Cal. Rptr. 852, 854 (Ct. App. 1986) (citing 23 A.L.R. Fed. 480, 565–66 (1975) for proposition that "prostitution and related offenses such as pimping and pandering have generally been recognized as crimes involving moral turpitude"). Adding further to the confusion on whether a woman's sexual history is relevant to her credibility, in rape cases the issue becomes confounded by the question of what evidence is relevant to consent. In New York, for example, the rape shield law allows for cross-examination about convictions for prostitution but not *acts* of prostitution, which echoes the distinction in impeachment jurisprudence between bad acts and prior convictions, the latter being more readily admissible on the question of credibility. N.Y. CRIM. PROC. LAW § 60.42(2) (McKinney 2016).

281 Commonwealth v. Harris, 825 N.E.2d 58, 71 (Mass. 2005).

282 People v. Drakes, 621 N.Y.S.2d 668, 669 (App. Div. 1995); *see also* People v. Jacobs, 538 N.Y.S.2d 647, 650 (App. Div. 1989).

283 Brown v. United States, 518 A.2d 446, 447 (D.C. 1986) (citing D.C. CODE § 14-305 (1981)).

with approval a 1930s case allowing impeachment with evidence that a witness operated a "house of prostitution."[284] And, as in California, courts in Texas hold that "prostitution is an offense involving moral turpitude, and a conviction therefor may be used for impeachment . . . ."[285] Thus, in states that represent over one-third of the United States population, it is still possible to argue in court that engaging in prostitution means a witness is unworthy of belief.

Drug crimes present another example of the salience of status in our impeachment jurisprudence. They offer an interesting contrast with theft and crimes against public morality because they show courts and legislatures applying modern status-based judgments as they grapple with impeachment. For example, courts in the District of Columbia have held that drug possession involves dishonesty and false statement within the meaning of the D.C. Code of Evidence.[286] The legislative history of the D.C. Code contains a list of offenses involving dishonesty or false statement that included almost anything other than offenses "of passion and short temper, such as assault."[287] By contrast, the House committee explicitly listed, "sales of narcotic and depressant and stimulant drugs" in the list of offenses involving dishonesty or false statement.[288] In a 1996 case, the D.C. Court of Appeals, without explanation, extrapolated from sales of drugs to drug possession as a credibility proxy.[289] One explanation for this is a version of Professor Carodine's theory that impeachment rules derive from racially-informed understandings of criminality and lying. It is possible that Congress in the early seventies and courts in the mid-nineties envisioned those who committed drug crimes as black.[290] If

284 Esser v. McIntyre, 661 N.E.2d 1138, 1144 (Ill. 1996).

285 Husting v. State, 790 S.W.2d 121, 126 (Tex. App. 1990). In fact, until 1985, not only prostitution convictions but *acts* of prostitution were admissible for impeachment purposes in Texas. *See* Cravens v. State, 687 S.W.2d 748, 749 (Tex. Crim. App. 1985). Texas moved away from this rule, not because of skepticism about the link between prostitution and credibility, but because the legislature prohibited impeachment with "prior acts of misconduct." *Id.*

286 Durant v. United States, 292 A.2d 157, 160–61 (D.C. 1972).

287 *Id.* at 160.

288 *Id.*

289 *See* Holt v. United States, 675 A.2d 474, 483 (D.C. 1996)

290 In the early 1970s, drugs were a growing public issue. President Nixon created the Drug Enforcement Agency in 1971 and declared illegal drugs "public enemy number one." MICHAEL NEWTON, CRIMINAL INVESTIGATIONS: GANGS AND GANG CRIME 29 (2008). Although it is difficult to locate drug-use statistics by race for D.C. in the early 1970s, the District's population at that time was 70% black. CAMPBELL GIBSON & KAY JUNG, HISTORICAL CENSUS STATISTICS ON POPULATION TOTALS BY RACE, 1790 TO 1990, AND BY HISPANIC ORIGIN, 1970 TO 1990, FOR LARGE CITIES AND OTHER URBAN PLACES IN THE UNITED STATES, at Table 9 (U.S. Census Bureau 2005). Furthermore, actual drug-use patterns may not have mattered because "drug poli-

those same legislators and judges also viewed black people as deceptive, it could explain their decision to draw a connection between drug crimes and dishonesty.[291]

The connection between drug possession and credibility is not widely accepted. This is in part attributable to the fact that misdemeanor drug convictions would have to be admissible under 609(a)(2) or a state analogue because they are not punishable by death or imprisonment for more than one year. This means that the convictions are only admissible if the court can determine that the crime involved "a dishonest act or false statement."[292] In Delaware, for example, the supreme court has held that prior misdemeanor drug convictions are not admissible under Delaware Rule of Evidence 609 because they are not crimes of dishonesty.[293] South Carolina has similar precedent. Its supreme court has held that a conviction for drug possession on its face does not involve false statements or acts of deceit.[294] A proponent of such evidence would need to show that an element of deceit was involved in order for the conviction to serve as a credibility proxy.[295]

Finally, Minnesota has an approach to impeachment that deserves attention. Taking drug offenses as an example, Minnesota caselaw both accepts that they do not explicitly involve dishonesty and holds that they can be used as credibility proxies. In Minnesota "[c]ontrolled-substance crimes are not considered crimes of dishonesty," but such convictions may be admissible because they "enable the jury to see the whole person when judging the truth of a witness's testimony."[296]

This "whole person" doctrine is in some ways the most honest explanation we have for credibility proxies. Rather than contorting logic to make a connection between a particular offense and the probable honesty of a witness, Minnesota courts hold simply that juries should see the "whole person," a goal that is promoted by admitting

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cies and enforcement practices are influenced by the cultural construction and racial coding of drugs and those who ingest them . . . ." Naomi Murakawa & Katherine Beckett, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 LAW & SOC'Y REV. 695, 711 (2010). In the context of American drug laws, "ostensibly race-neutral practices often reflect the association of certain substances or modes of ingestion with racially or ethnically stigmatized groups rather than public health or safety considerations." *Id.*

291 *See* Carodine, *supra* note 21, at 506.

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

293 Hull v. State, 889 A.2d 962, 965 (Del. 2005).

294 State v. Cheeseboro, 552 S.E.2d 300, 309 (S.C. 2001).

295 *Id.*

296 State v. Word, 755 N.W.2d 776, 786 (Minn. Ct. App. 2008) (admitting controlled substance convictions to impeach defendant in prosecution for violation of a protective order).

evidence of prior convictions. Minnesota explicitly links this rationale to the adoption of Minnesota Rule of Evidence 609, which echoes the federal rule.[297]

According to a leading Minnesota case, Rule 609 "sanctions the use of felonies which are not directly related to truth or falsity for purposes of impeachment, and thus necessarily recognizes that a prior conviction, though not specifically involving veracity, is nevertheless probative of credibility."[298] This case states the obvious. If we believe that all felonies are probative of credibility, we must also believe that they have some predictive value beyond the idea of once a liar always a liar. According to the Minnesota court, the connection is simple: "[w]hat a person is often determines whether he should be believed."[299] The jury, therefore, should "be informed what sort of person is asking them to take his word."[300] In eschewing *Estrada*'s talk of severity and intentionality and admitting that we want to know who people are—their status—in order to evaluate their credibility, Minnesota offers an unvarnished view of the theory behind impeachment jurisprudence. Evidence that tells us about "the whole person" should come in because we need to know "what a person is" to decide if he or she is worthy of belief.[301]

4. Reputation, Opinion, and Specific Acts

The whole person doctrine is a good place to begin a discussion of the modern approach to impeachment with reputation evidence. As described above, jurists initially viewed reputation evidence as a way to access the whole person, in the sense that it got at what really mattered in the status inquiry—what other people thought of the witness.[302] Today, reputation evidence is still admissible.[303] Many jurisdictions also now allow opinion testimony, permitting a witness to give his or her opinion of another's truthfulness or untruthfulness.[304] The theoretical basis for these rules remains unchanged. They assume that people can have a reputation for truthfulness, however derived, and that this is a good way to assess their credibility.

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297 *See id.*

298 State v. Brouillette, 286 N.W.2d 702, 708 (Minn. 1979).

299 *Id.* at 707 (quoting State v. Duke, 123 A.2d 745, 746 (N.H. 1956)).

300 *Id.*

301 *See id.* at 707–08.

302 *See supra* Section I.B.4.

303 *See, e.g.*, FED. R. EVID. 608(a).

304 *See, e.g.*, *id.*

Not surprisingly, recent critiques of impeaching with opinion and reputation testimony argue, among other things, that it provides a direct way to import social hierarchy, or status, into the courtroom.[305] It offers a "measure of one's standing in a community or group."[306] At the same time, and perhaps relatedly, courts seem more skeptical of this testimony than they once did.[307] Instead, it is through another provision, Rule 608(b), that courts are most amenable to character evidence impeachment. This provision allows for cross-examination about specific instances of conduct "if they are probative of [a] character for truthfulness or untruthfulness."[308] Courts have interpreted "probative of a character for truthfulness or untruthfulness" in much the way they view impeachment with prior convictions—broadly and with implicit reference to violations of social norms.

In order to admit reputation evidence, courts require a showing that the witness has a sufficient foundation for his or her belief. One representative test instructs trial courts to consider:

> (1) The background, occupation, residence, etc., of the character witness, (2) [The witness'] familiarity and ability to identify the party whose general reputation was the subject of comment, (3) Whether there have in fact been comments concerning the party's reputation for [truthfulness or untruthfulness], (4) The exact place of these comments, (5) The generality of these comments, many or few in number, (6) Whether from a limited group or class as opposed to a general cross-section of the community, (7) When and how long a period of time the comments have been made.[309]

This test sets a potentially high bar by suggesting that community members should actually have discussed the party's reputation for truthfulness. While it still leaves undefined what is meant by "community," modern courts take it to include a witness's professional environment, reflecting "the realities of our modern, mobile, impersonal society."[310] Still, the notion that people gather to discuss other people's reputations for truthfulness has been met with scorn. Professor Richard Uviller wrote, for example, "in my circles at least, friends and co-workers rarely discuss one another's characteristic respect for ver-

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305 *See* Blinka, *supra* note 18, at 403.

306 *Id.*

307 *See infra* notes 321–22 and accompanying text.

308 FED. R. EVID. 608(b).

309 State v. Caldwell, 529 N.W.2d 282, 286 (Iowa 1995) (alteration in original).

310 United States v. Mandel, 591 F.2d 1347, 1370 (4th Cir. 1979).

ity with each other. The idea is little short of ludicrous that I could report a reliable consensus on the subject . . . ."[311]

Perhaps for this reason and despite the Federal Rules' continued assumption that community reputation is indicative of credibility, modern courts are wary of this form of evidence. Without questioning reputation testimony's soundness as a theoretical matter, they have heightened the requirement that a witness have a proper foundation to describe another witness's reputation while at the same time applying a much lower barrier to admitting prior bad acts. One case, *United States v. Whitmore*,[312] demonstrates this approach.

Whitmore was convicted on firearm and drug charges and appealed his conviction, arguing that he should have been permitted to attack the arresting officer with evidence of his reputation for dishonesty as well as by asking him about specific acts on cross-examination.[313] The arresting police officer, Officer Soto, by all accounts is the type of character for whom the credibility rules should be designed. He is noteworthy for having performed a pretextual traffic stop memorialized in *Whren v. United States*,[314] a criminal procedure case that reached the U.S. Supreme Court.[315] From the facts of *Whitmore*, it seems clear that in addition to performing pretextual stops, Officer Soto had previously lied on the witness stand. Despite a judicial finding that he lied under oath, however, the officer had no prior conviction because the U.S. Attorney's Office had refused to prosecute him.[316] At trial, Whitmore sought to impeach Soto with evidence of that prior perjury under Rule 608 (609 is unavailable without a conviction), with evidence that he failed to report a suspension of his driver's license, and with evidence of his failure to pay child support.[317] Whitmore also hoped to call three character witnesses to impeach Soto with opinion and reputation evidence.[318] However, the trial judge, exercising his discretion to do so, rejected all of Whitmore's impeaching evidence.[319] This left Whitmore with "no evidence in his defense" and only a limited ability to cross-examine the witnesses against him.[320]

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311 H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 792 (1993).

312 United States v. Whitmore, 359 F.3d 609 (D.C. Cir. 2004).

313 *See id.* at 613.

314 517 U.S. 806 (1996).

315 GEORGE FISHER, EVIDENCE (3d ed., 2012) (Teacher's Manual at 157).

316 *Whitmore*, 359 F.3d at 614.

317 *See id.*

318 *See id.*

319 *See id.* at 614–15.

320 *Id.* at 615.

On appeal, the D.C. Circuit held that Whitmore's reputation and opinion evidence had been properly excluded.[321] The appellate court ruled that two character witnesses had information about Soto that was "too remote in time" from the trial, and that opinion testimony from a criminal defense lawyer was biased because it rested on his belief that Soto had testified falsely against a client.[322] It may be that these character witnesses were not ideal even under the theory that reputation and opinion make good credibility proxies. Their knowledge of Soto was limited and/or somewhat dated.[323]

What is notable, however, is how much the circuit court's abuse of discretion analysis changes when it analyzes the trial court's refusal to permit cross-examination of Soto with his prior bad acts. While the court had found no abuse of discretion in excluding opinion testimony based on an attorney's belief that Soto had testified falsely in the past, the court found that the trial court did abuse its discretion by not allowing Whitmore to cross-examine Soto about his failure to pay child support.[324] Exactly what a failure to pay child support has to do with "truthfulness or untruthfulness," the court of appeals does not explain. That it violates long-held social norms requiring payment of debts, however, is clear.[325] By contrast, the attorney's opinion that Soto is a liar, which the court excluded, would require a smaller detour through social norms of worthiness. It predicts a future lie in court based on a past lie in court. Put differently, it relies on the belief that a lie equals a liar and that a liar will lie again. Both of these forms of impeachment require status-based assumptions about who is a liar, but the excluded evidence puts less emphasis on worthiness, while emphasizing the witness's character for truthfulness. If we accept that a bad or socially deviant person, such as a man who does not pay child support, is a liar, it is not obvious why we should not accept that a person who works in law enforcement and has lied previously on the stand to secure a conviction is likely to be lying again.[326]

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321 *Id.* at 618.

322 *Id.* at 613–14.

323 *See id.*

324 *Id.* at 618, 621.

325 *See, e.g.,* GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 95–96 (2009) (describing Hamilton's insistence that the United State's war debt be repaid at the risk of ruin "to the honor and credibility of the nation").

326 It is possible that the court preferred the child support evidence because it had better support than the opinion testimony. Although the court in *Whitmore* does not make that point, courts do insist on some degree of certainty that a prior impeaching act occurred. For example, the District Court for the District of Columbia ruled that a defendant could not ask two of his arresting officers about formal complaints that they had planted evidence because the defendant

The result of this doctrine is that courts continue to focus on bad behavior like failing to pay child support that is clearly morally problematic in a way that was historically connected to credibility. At the same time, courts routinely exclude reputation and opinion evidence that by the system's own terms seems equally, if not more, probative on the issue of credibility because they find problems with the "rational basis" for the witness's belief. The logic behind character evidence has been critiqued for its layered assumptions that people can be "dishonest" and therefore more likely to lie, that this trait is detectable to people with enough connection to the witness or his or her community, and that jurors can take information about a dishonest character and turn it into a conclusion about someone's truthfulness rather than about guilt.[327] In practice, however, courts seem uncomfortable with the notion of a reputation for dishonesty even as they are inclined to admit prior bad acts, particularly when the evidence tracks deeply rooted assumptions about status and credibility.

II. Against Credibility Proxies

From competency doctrine to today, the search for liars has treated certain forms of criminal misconduct or certain failures to comply with social norms as markers of a potential liar. These markers serve as de facto proxies for credibility, but rather than having a basis in science, they reflect social beliefs about the behaviors and statuses that render people unworthy of belief. This focus on "worthiness of belief" is intertwined with social hierarchies and related moral judgments that have shaped evidence jurisprudence. It has clear repercussions for witnesses whose race or gender or both trigger distrust or disapprobation. The few areas of conformity in the caselaw on credibility proxies—such as the notion that crimes of violence do not bear on credibility—make sense only in light of historical beliefs about honor and integrity. These contours do little to rescue impeachment jurisprudence from incoherence and unpredictability, and much to perpetuate troublesome links between status and credibility.

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had not "proffered evidence tending to establish the truth of the allegations made by that complainant or the others . . . ." United States v. McCallum, 885 F. Supp. 2d 105, 118 (D.D.C. 2012), *aff'd*, 721 F.3d 706 (D.C. Cir. 2013). Similarly, most jurisdictions hold that "unproven accusations," such as arrests or pending criminal charges are not admissible to impeach. *See, e.g.*, People v. Pratt, 759 P.2d 676, 682 (Colo. 1988).

327 *See, e.g.*, Uviller, *supra* note 311, at 790–93 (criticizing the rationale for character evidence and arguing that "[a]n actor, detached from his personal history, retains no individuality by which to judge credibility").

The remainder of this Article argues that we should almost entirely abandon the search for liars as it has been conducted.

A. Liars and Social Science

As Part I shows, American law assumes that being a liar is a personality trait that can be revealed through a crime or bad act, through reputational markers, or through individual observation. Our search for courtroom liars is guided by the loose assumptions that prior acts involving untruthfulness reveal credibility, and that the more serious, morally offensive, or historically reputation-destroying a prior criminal conviction is, the more probative it will be.

Does this system identify liars? Many critics of the Federal Rules, in particular Rule 609, have used social science research to argue convincingly that it does not.[328] A brief survey of this field is required to see what we seem to know or not know about liars—and how to find them—and to contrast that with this Article's account of impeachment jurisprudence. There is a clear guiding principle behind our credibility proxies, and it is worthiness of belief, as defined by status. The social science suggests that if we used a research-based approach, impeachment jurisprudence would look much different.

For much of the twentieth century, social scientists who study personality debated whether our behavior is determined by situations in which we find ourselves or by our personalities. A landmark study by Hugh Hartshorne and Mark May from the 1920s found that children who cheated in one situation would be honest in others.[329] Almost no children were always honest and equally few were always dishonest.[330] At the same time, children were consistent in the type of situation in which they would cheat or be dishonest.[331] From these results, Hartshorne and May offered the theory that honesty is not a character trait but is instead a situation-driven behavior.[332]

Later research has contextualized those findings. While studies consistently find a relatively low correlation between personality and behavior, they also find a low correlation between situation and behavior.[333] The consensus is that behavior is determined by a combina-

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328 *See, e.g.*, Blinka, *supra* note 18, at 400–01; Kurland, *supra* note 19, at 147–49; Rand, *supra* note 16, at 72; Uviller, *supra* note 311, at 831.

329 1 HUGH HARTSHORNE & MARK A. MAY, STUDIES IN THE NATURE OF CHARACTER: STUDIES IN DECEIT 381 (1928).

330 *Id.*

331 *Id.* at 381–82.

332 *Id.*

333 *See, e.g.*, David C. Funder & Daniel J. Ozer, *Behavior as a Function of the Situation*, 44

tion of personality and situation. Researchers maintain that we all have "stable, distinctive, and highly meaningful patterns of variability" in the way we behave across different types of situations.[334] These "if *X* situation then *Y* behavior" patterns provide "a kind of 'behavioral signature of personality'" that can be unique to individuals and conforms with observations of what they are like.[335] This signature notwithstanding, most researchers in this area agree that our character traits are an amalgam "highly sensitive to different features of situations and can adjust their causal activity from one situation to the next."[336]

At the same time, there are individual differences in our degrees of dishonesty.[337] Some people lie much more frequently than others.[338] Personality researchers have recently started to account for this by identifying "Honesty-Humility" as a measurable feature of personality.[339] While there is debate as to whether this feature should be added to a list of "big five" character traits that already includes openness, conscientiousness, extroversion, agreeableness, and neuroticism, there is a growing consensus that it is an identifiable trait.[340] According to researchers, people with low scores on a test designed to measure levels of "Honesty-Humility" are "inclined to break rules for personal profit," among other things.[341] Recent lab experiments offer some support for this by suggesting that people who have low scores on this personality measure are more likely to lie for their own benefit.[342]

J. PERSONALITY & SOC. PSYCH. 107 (1983) (studying attitude change under forced compliance); John Sabini & Maury Silver, *Lack of Character? Situationism Critiqued*, 115 ETHICS 535, 561 (2005).

334 *See* Walter Mischel, *Toward an Integrative Science of the Person*, 55 ANN. REV. PSYCHOL. 1, 8 (2004).

335 *Id.*

336 CHRISTIAN B. MILLER, CHARACTER AND MORAL PSYCHOLOGY 100 (2014).

337 *See, e.g.*, Urs Fischbacher & Franziska Heusi, *Lies in Disguise: An Experimental Study on Cheating* 5 (Thurgau Inst. of Econ. and Dep't of Econ. at the Univ. of Konstanz Research Paper Series, Paper No. 40, 2008), http://www.twi-kreuzlingen.ch/uploads/tx_cal/media/TWI-RPS-040-Fischbacher-Heusi-2008-11.pdf (evaluating experimentally the "distribution of lying" in a given population and finding similar percentages of liars, non-liars and partial liars).

338 *Id.*

339 Benjamin E. Hilbig & Ingo Zettler, *When the Cat's Away, Some Mice Will Play: A Basic Trait Account of Dishonest Behavior*, 57 J. RES. PERSONALITY 72, 73 (2015).

340 *See id.* ("Indeed, various studies have demonstrated that this sixth basic factor accounts for variance in socially desirable outcomes and behavior . . . ."); *see also* Kibeom Lee & Michael C. Ashton, *The Hexaco Personality Inventory–Revised: A Measure of the Six Major Dimensions of Personality*, HEXACO (2016), http://hexaco.org/scaledescriptions.

341 Lee & Ashton, *supra* note 340.

342 Hilbig & Zettler, *supra* note 339, at 75 (finding that those scoring low on the authors'

At least one legal scholar has argued recently that we should expect this "Honesty-Humility" personality trait to be correlated with criminality.[343] If that is the case, his argument goes, and being a criminal offender is "one element of a larger syndrome of anti-social behavior that arises in childhood and tends to persist into adulthood,"[344] then it is "plausible to suppose that offenders have a comparative propensity to lie."[345] There are a number of problems with this conclusion, not least its speculative nature and implausibility given the broad scope of United States criminal laws in both the actions it targets and the mens rea required to convict.[346]

The connection is also unhelpful because the research only suggests that "Honesty-Humility" is connected with lying for one's own benefit.[347] This means that the propensity to lie would not necessarily apply to a non-party witness with a criminal record. If the witness has nothing to gain from testifying, the whole connection between "Honesty-Humility" and lying breaks down. If the witness does have a reason to lie for personal gain, such as a deal for a sentence reduction, that information would be admissible as evidence of bias, meaning there would be no need to impeach with evidence of a prior conviction.

The harder case arguably involves a criminal defendant with a prior conviction. If we accept the hypothesis that such a person would have an elevated propensity to lie, it might seem logical that the defendant's prior conviction would be relevant to the jury's credibility assessment. However, this assumption is problematic and not simply because of the speculative nature of the connection between widely divergent criminal conduct and dishonesty. It is common sense that a guilty defendant will be prepared to lie and an innocent defendant will be likely to tell the truth. This point obtains regardless of the defendant's propensity to lie. Therefore, a guilty defendant with no prior convictions will have a reason to lie just as an innocent defendant with

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Honesty-Humility factor also scored substantially higher in the cheating condition of their experiment).

343 *See* MIKE REDMAYNE, CHARACTER IN THE CRIMINAL TRIAL 4 (2015) (arguing that offenders tend to have many anti-social behaviors).

344 *Id.* (quoting David P. Farrington, *Human Development and Criminal Careers*, *in* THE OXFORD HANDBOOK OF CRIMINOLOGY 361, 363 (Mike Maguire, Rod Morgan & Robert Reiner eds., 2d ed. 1997)).

345 *Id.* at 5.

346 *See, e.g.*, Douglas N. Husak, *Retribution in Criminal Theory*, 37 SAN DIEGO L. REV. 959, 966 (2000) ("The hundreds of thousands of [U.S. criminal] laws that subject violators to punishment are so diverse that they resist any unifying theory.").

347 *See* Hilbig & Zettler, *supra* note 339, at 73–75.

prior convictions will have a reason to tell the truth. As a United Kingdom appellate court explained when it sharply restricted impeachment with prior convictions, "whether or not a defendant is telling the truth to the jury is likely to depend simply on whether or not he committed the offense charged."[348] Informing the jury that a particular defendant has a propensity to lie, particularly through the form of prejudicial information about a prior conviction, is entirely unhelpful because the jury should (and will) instead focus on the intertwined question of guilt.[349] Similarly, parties to civil actions have obvious motives to lie based on their positions in the case. Informing the fact-finder of their prior convictions and a supposed propensity for lying is at best cumulative in that the fact-finder has a preexisting assumption that interested parties or criminal defendants will either lie or not according to their obvious motivations.

Just as there is research suggesting our impeachment rules are overinclusive, other studies suggest they may also be underinclusive. To take one example, there is evidence that dishonesty may be "prosocial" or related to a desire to achieve good outcomes. In a recent field study in Nigeria, economists found that staff they recruited lied about how they were carrying out the distribution of subsidized price vouchers in order to allocate the vouchers to those more in need.[350] Thus, to the theory that criminals may have a propensity to lie we might add the theory that do-gooders may have a propensity to lie if it will achieve what they perceive to be a more just outcome.[351] Nothing in our approach to credibility proxies picks up on this hypothesis by, for example, singling out altruists for impeachment.[352]

In sum, current social science research explains neither the structural nor the substantive choices of modern impeachment jurispru-

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348 R v. Campbell [2007] EWCA (Crim) 1472 [30]. This seminal opinion foreclosed impeaching defendants with prior convictions in most situations in the United Kingdom. *See* REDMAYNE, *supra* note 343, at 6.

349 *See* REDMAYNE, *supra* note 343, at 6; *see also supra* notes 207–10 and accompanying text (examining studies suggesting that jurors use prior convictions as evidence of guilt).

350 Edward N. Okeke & Susan Godlonton, *Doing Wrong to Do Right? Social Preferences and Dishonest Behavior*, 106 J. ECON. BEHAV. & ORG. 124, 134 (2014).

351 This hypothesis is not foreign to common law. In the eighteenth century, England experienced frequent jury nullification—termed pious perjury—by juries and judges seeking to avoid imposing harsh punishments. *See* Julia Simon-Kerr, *Pious Perjury in Scott's* The Heart of Midlothian, *in* SUBVERSION AND SYMPATHY: GENDER, LAW, AND THE BRITISH NOVEL 101, 104–08 (Martha C. Nussbaum & Alison L. LaCroix eds., 2013).

352 Of course, impeaching with evidence of bias goes to this for case-specific reasons, but it does not address the general claim that an altruist with no ties to the case might be more likely to lie.

dence. From a structural perspective, impeachment jurisprudence is ever more focused on using single past actions, such as a prior convictions or bad acts, as proxies for credibility. Yet personality researchers agree that only "[b]y measuring a great number of trait-relevant responses for each individual" can we hope to be able to predict future behavior.[353] Furthermore, we can only hope to predict "the mean response that each individual will exhibit over a great number of future observations."[354] In other words, we would have to observe many prior acts very closely in order to make a prediction about how a witness will behave, and that prediction would only tell us something about a general pattern of future behavior, not any one particular future act, such as lying on the witness stand. On a substantive level, personality research into lying does not rationalize the specific contours of impeachment doctrine, from the exclusion of violent crimes to the focus on theft and beyond.

B. Evidence Law and the Enforcement of Morals

Theories of evidence law do not offer a justification or even an explanation for the continuing use of status-based credibility proxies. The rationalist tradition—exemplified by Bentham and Wigmore—holds that "rational" modes of determining issues should predominate over "irrational" methods in the pursuit of "truth as a means to justice under the law."[355] Thus, judgments about truth—whether probabilistic or otherwise—should be based on available knowledge about events in the external world.[356] This knowledge will include, in order of priority, "generalizations accepted by the scientific community as established, the opinions of experts, and 'common-sense' generalizations based on the experience of members of society."[357] Although common sense itself may be a convenient proxy for social stereotypes, once science contradicts those stereotypes the rationalist believes they should be eradicated. Following this precept, Wigmore argued in 1904 against an impeachment jurisprudence that relies on the dictum "that a usually bad man will usually lie and a usually good man will usually tell the truth,"[358] calling the assumption "a mark of a primitive stage of

353 LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY 110 (2011).

354 *Id.*

355 WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 14–16 (1985) (describing "standard elements" in rationalist theories of evidence).

356 *Id.* at 14.

357 *Id.*

358 2 WIGMORE, *supra* note 15, at § 921. That Wigmore is also known for employing his

culture."[359] And while some realists, like Bentham, would err on the side of admitting as much evidence as possible given efficiency and resource constraints, there is nothing in their approach that supports the notion that reference to outdated conceptions of social worthiness is a good or even legitimate way to ground admissibility determinations in the area of credibility.

Of course realism is only one account of evidence law. Kenneth Graham lambasts the realists for failing to understand that the courtroom is not a science lab but rather an exercise in political theater that "both presents and re-presents power relationships."[360] According to Graham, the rules of evidence manage the power dynamic in this theater and should be criticized from a perspective of fairness.[361] From this perspective as well, impeachment jurisprudence fails. Credibility proxies are fraught with inconsistencies that are blatantly unfair to those on the losing end. The origin story of these proxies highlights not just the incoherence in today's caselaw, but the heavy footprint of old assumptions about race, gender, and class. The judges and attorneys who framed early evidence jurisprudence did so against a background of belief about the indicia of honesty, beliefs that included overt negative assumptions based on race and deviations from gender norms.[362] With worthiness as our guide, we have created a system where it is more likely that a black defendant will be successfully impeached with evidence of a prior conviction than a white defendant[363] and in which prostitution can be used to impeach a female witness.[364] Yet there is simply no support for the notion that prior crimes introduced to impeach credibility do anything other than help juries make decisions about guilt in close cases.

From a law and economics perspective, Alex Stein argues that "[a]ll evidentiary rules, except privileges, are geared toward accomplishing case specificity, cost minimization," and equal protection

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"common-sense" to inveigh against the credibility of rape victims suggests how fallible even those committed to seeking "truth" through rational adjudication are to the lure of social stereotypes.

359 *Id.*

360 Kenneth W. Graham, Jr., *"There'll Always Be an England": The Instrumental Ideology of Evidence*, 85 MICH. L. REV. 1204, 1232 (1987).

361 *See id.* at 1232–33.

362 *See supra* Sections I.B.2–4.

363 As discussed in Part I, this is for a trifecta of reasons. More blacks have prior convictions, judges seem more likely to admit those convictions into evidence, and juries seem more likely to find a prior conviction significant if the defendant is black.

364 *See, e.g.*, Foy v. Lopez, No. 2:10–cv–2322–TJB, 2012 WL 439620, at *1 (E.D. Cal. Feb. 9, 2012), *aff'd sub nom.* Foy v. Gipson, 609 F. App'x 903 (9th Cir. 2015).

from error across defendants.[365] By this account, credibility proxies could be defended for their role in promoting plea bargains. Yet because of their disparate impact on black defendants, it cannot be argued that they accomplish equal protection and even-handed administration of justice.

Charles Nesson's account may come closest to offering a justification for impeachment jurisprudence. He argues that many evidence rules are a result of privileging legitimacy over other concerns.[366] Nesson posits that the system is designed to promote stable verdicts by making it difficult for the public to question a jury's decision.[367] As discussed in more detail below,[368] by this reasoning, a guilty verdict against a defendant impeached with a prior conviction may promote the acceptance of verdicts by a public inclined to believe that once a wrongdoer always a wrongdoer. By the same reasoning, acquittal of a defendant with prior convictions may be destabilizing if the public knows of the defendant's prior crimes but the jury does not. Even this account, however, only justifies admitting prior crimes so the jury can draw conclusions about guilt. It cannot account for why we would do so under the veneer of credibility. It also does not explain the centrality of status to the rules or address the problem of evidence rules that essentially operate as norm enforcers.

Theories of law and morality are arguably more helpful, but only by analogy because these theories have ignored evidence law. From Aristotle and Cicero to Devlin, Hart, and Fuller, scholars have debated the source of the law's authority and the extent to which it is defined by, transcends, or shapes fundamental tenets of morality. Much of this debate has occurred in the context of the criminal law where, for example, classification standards such as *malum in se*, *malum prohibitum*, infamous, noninfamous, and *crimen falsi* rely on the idea of "moral wrongfulness" or "the degree to which an act violates a moral norm."[369] Where these norms should or do come from, be it natural law, religion, or social consensus—to name only a subset of possible sources—has always been controversial, as is the appropriate role of moral norms in the criminal law.

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365 Alex Stein, *The New Doctrinalism: Implications for Evidence Theory*, 163 U. PA. L. REV. 2085, 2088 (2015).

366 Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1372–75 (1985).

367 *See id.* (examining the stability of verdicts under the hearsay rules).

368 *See infra* Section II.C.

369 Stuart P. Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of* Crimen Falsi, 90 J. CRIM. L. & CRIMINOLOGY 1087, 1090 (2000).

H.L.A. Hart, for example, famously argued that "[t]he use of legal punishment to freeze into immobility the morality dominant at a particular time in a society's existence . . . contributes nothing to the survival of the animating spirit and formal values of social morality and may do much to harm them."[370] Although his point speaks to how we justify criminal law and evaluate the moral beliefs that undergird it, it has applications for evidence law. If we should be wary of freezing a dominant morality in our penal statutes, we should be doubly wary of doing so through evidence rules that seem unrelated to moral questions but may have effects on the outcome just as potent as a penal statute.

While we can debate the justification for a decision to criminalize particular conduct or to impose a harsh punishment, the moral "immobility" perpetuated through modern credibility doctrine is largely hidden from view. It is a certainty that many judges treat the doctrine as a taken-for-granted matter of procedure. The danger is that this body of doctrine that should determine neutral "rules of the game" has a subtext of moral norm enforcement that creates advantages or disadvantages for certain players.[371] This is a problem only under a theory of evidence that considers neutral adjudication and truthseeking to be among its important goals. Under Nesson's theory, by contrast, a system squishy with old biases, some of which still seem salient, may be desirable because public perception that verdicts are fair is the sine qua non of legitimacy.

Ironically, many scholars defend the institution of the jury for precisely the reason that a group of ordinary citizens can serve as a check on the system of dominant moral beliefs reflected in contemporary criminal codes.[372] By this logic, many characteristics of judges—their overwhelming whiteness, educational credentials, and generally privileged place in society[373]—arguably make them the wrong people to arbitrate who should or should not be believed if that decision will be made based on popular conceptions of status, or worthiness of belief. If we accept these relative strengths of jury and judge, then it is a

370 H.L.A. HART, LAW, LIBERTY AND MORALITY 72 (1963).

371 *Id.*

372 *See, e.g.*, Jenny E. Carroll, *The Jury's Second Coming*, 100 GEO. L.J. 657, 659–60 (2012) (arguing that citizen jurors allow law to account for shifting communal values).

373 In 2009, for example, 29.2% of state court judges were women and only 12.6% were minorities. *See* Malia Reddick et al., *Racial and Gender Diversity on State Courts: An AJS Study*, 48 JUDGES' J., Summer 2009, at 28, 28. In the federal courts, the figures are similar. *See* Sherrilyn A. Ifill, *Judicial Diversity*, 13 GREEN BAG 2D 45, 46 (2009).

mistake to have judges determine at the outset what prior bad acts, reputational information, or crimes are admissible to impeach.

Theories of law and morality might thus leave us with the jury or the legislature as our guides to who should be marked as a potential liar. But if the solution is for jurors to learn as much as possible about a witness in order to bring up-to-date community norms to bear on credibility assessments, we run into another problem. In practice, jurors do not seem to use impeachment information to assess credibility at all.[374] And this, in turn, highlights the problems with an impeachment jurisprudence founded on a tautology of worthiness. If a person is unworthy of belief because social norms deem her unworthy, should it surprise us that jurors have trouble separating worthiness in general (or guilt) from worthiness of belief? The role of status in impeachment jurisprudence presents a problem from a law and morality perspective because even bringing our status norms up to date cannot overcome the circular nature of a status inquiry. No matter how current, any method for impeaching that relies on status will inevitably return to worthiness and get entangled in notions of guilt and innocence, good and bad.

C. Propensity and Legitimacy

Scholars have long been critical of impeachment jurisprudence.[375] From the difficulty of identifying lies and liars[376] to the problems with using prior crimes and reputation as credibility proxies,[377] calls for stricter tailoring of the rules have been nearly unanimous.[378] Yet, despite this criticism and a dearth of evidence of their efficacy, the credibility rules have endured with little change since the system first adopted them. One important question is: Why? Why do we cling to age-old impeachment rules when it has long been clear that our stan-

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374 *See supra* Section I.C.1.

375 *See, e.g.*, Rand, *supra* note 16, at 72 ("[M]ost jurors' common sense would lead them to focus on . . . fallacious stereotypical correlates of deception.").

376 *See, e.g.*, Kassin & Fong, *supra* note 17, at 511–13 (1999) (reporting experimental finding in a mock interrogation setting that "training in the use of verbal and nonverbal cues" to detect lying "did not improve judgment accuracy").

377 *See, e.g.*, Blinka, *supra* note 18, at 401.

378 *See, e.g.*, Carodine, *supra* note 21, at 503–04; Kurland, *supra* note 19, at 147–49 (describing current consensus among psychological researchers that behavior is a function of "mutual interaction between situation and an individual's 'psychic structure' "); Natapoff, *supra* note 21, at 1461. *But see* Ronald J. Allen, *A Proposed Evidence Law*, 33 B.U. INT'L L.J. 359, 382 (2015) (proposing rules of evidence for Tanzania that provide: "the credibility of a witness may . . . be attacked . . . [b]y testimony about the witness's reputation for having a character for truthfulness or untruthfulness").

dard credibility proxies have little efficacy or even relation to truthfulness or lying?

There are several answers to this question. Most obviously, although these rules have drawn sustained criticism from scholars, they rarely attract public attention. Rulemakers and judges therefore are unlikely to feel pressure to change the law in this area. This basic fact accounts for much stasis in evidence law in general, which is no stranger to outmoded rules.[379] Similarly, legislatures with opportunities to take a fresh approach to evidence rules, such as in states in the process of codification, have little incentive to depart from traditional credibility rules. An impeachment jurisprudence that most obviously disadvantages people with prior criminal convictions, a bibliographic detail not usually shared by members of the bar or the legislature, is not a jurisprudence likely to capture attention absent outside political pressure.[380] Even legislators who recognize the problems with prior conviction impeachment may fear political backlash precisely because of the deeply engrained "common sense" link between a criminal record, unworthiness, and propensity to lie. In addition, the ability to impeach with prior convictions is a standard tool for prosecutors seeking plea bargains. Any attempt to curtail this avenue for admitting negative information about defendants would doubtless be fiercely opposed by government attorneys. To the extent that many judges today are former prosecutors, they may be sympathetic to those concerns.[381] Finally, those who might devote resources to advocating reform, such as criminal justice organizations, may not see impeachment rules as a

379 Hearsay jurisprudence, for example, has also been the subject of sustained critiques. *See, e.g.*, Laurence H. Tribe, Comment, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 957 (1974) (noting sustained scholarly criticism of hearsay rule as result of "historical accident"). Rules like the exception for dying declarations are now clearly based on false assumptions about the added reliability of words uttered near death, yet they remain deeply ingrained in the law. At the same time, unlike impeachment jurisprudence, the hearsay rules have both defenders and detractors. *See, e.g.*, Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 194–95 (2006); Michael L. Siegel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 B.U. L. REV. 893 (1992) (arguing for rule maximizing information provided to fact-finders by admitting much hearsay evidence, but maintaining some hearsay protections); Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CAL. L. REV. 1339, 1342 (1987) (developing foundation fact approach as alternative to broad exceptions).

380 Members of the bar are unlikely to have a criminal conviction because convictions must be disclosed in bar applications and are considered signs of bad moral character. *See, e.g.*, Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 496 (1985).

381 *See, e.g.*, *Broadening the Bench: Professional Diversity and Judicial Nominations*, ALLIANCE FOR JUSTICE 8 (Mar. 18, 2016), http://www.afj.org/wp-content/uploads/2014/11/Professional-Diversity-Report.pdf (finding that 42% of President Obama's nominees to the federal district courts have been former prosecutors while only 15% were public defenders).

feasible target for the reasons just outlined. Or they may simply believe that substantive reform in the area of sentencing and penal law is more pressing.

These are familiar causes of stasis in the legal system. Yet another barrier to reform is unique to impeachment. As many have observed, impeachment jurisprudence provides a significant exception to the prohibition on propensity evidence.[382] While a prior crime cannot be introduced to prove guilt,[383] it can be introduced for purposes of impeachment.[384] Prior crimes may also be admitted to prove motive, intent, plan, preparation, or modus operandi, for example, but those routes around the propensity prohibition present a higher bar in the sense that the advocate needs a theory beyond propensity for why the information is relevant.[385] To impeach credibility, however, no such theory is needed. Congress has decreed that all felonies are relevant to credibility based on the assumption that "felons" are rule-breakers who are more likely to lie. An attorney who wants to use a prior conviction to impeach, therefore, need only convince the judge that the particular conviction's probative value meets a balancing threshold as compared with its potential for prejudice.[386] Although that hurdle may seem significant given the obviously prejudicial nature of prior convictions, courts often strike the balance in favor of admissibility.[387] If the proponent can show that the prior conviction involved a dishonest act or false statement, there will be no balancing at all and the judge must admit the evidence no matter how prejudicial it may be.[388]

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382 *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, 296 (2008) (describing scholarly consensus that prior conviction impeachment is "nothing more than a thinly veiled effort by prosecutors . . . to introduce otherwise prohibited evidence of a defendant's criminal propensities"); Note, *Procedural Protections of the Criminal Defendant–A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime*, 78 HARV. L. REV. 426, 440 (1964) ("The admission of character evidence for the purpose of impeaching the defendant's credibility seems wholly inconsistent with the principle of the propensity rule.").

383 FED. R. EVID. 404(a)(1).

384 FED. R. EVID. 608(a).

385 FED. R. EVID. 404(b)(2).

386 *See* FED. R. EVID. 609(a)(1)(B) (describing balancing of probative value with prejudice for prior felonies).

387 *See* Eisenberg & Hans, *supra* note 201, at 1373–75 (finding that juries learned of a prior conviction over 50% of the time if a defendant with a prior conviction testified).

388 *See* FED. R. EVID. 609(a)(2) (mandating admission of prior conviction "if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement").

In sum, impeachment doctrine provides such a significant path for admitting propensity evidence that it has allowed us to declare our opposition to propensity evidence without having to face the consequences of such a prohibition. It is therefore possible that impeachment doctrine's role as a gateway for prior convictions and our concern about losing the gateway are a motivation for leaving the doctrine intact. The potential consequences if prior crimes, in particular, were no longer admissible for impeachment are easy enough to identify. First, the system might become overburdened because prosecutors could find it harder to secure plea bargains. Second, prosecutors might have to offer more favorable terms to secure plea bargains. And finally, it is possible that fact-finders might make more errors in the absence of the information about prior convictions.[389]

Charles Nesson's legitimacy theory offers another way to understand the potential benefits of prior crimes impeachment and the cost of changing the rules. Nesson argues that our evidence rules are structured to promote stable verdicts by obscuring the rationales for jury decisions and making it difficult to second guess those decisions after the fact.[390] Because juries deliberate in secret and do not need to offer reasons for their decisions, verdicts can be (and are meant to be) interpreted as statements about the events at issue rather than about the strength of the evidence.[391] By Nesson's account, cases that revolve around credibility determinations receive particular deference from the public.[392] This is because we believe that jurors are in the best position to hear from witnesses and make judgments about their truthfulness.[393] Several mechanisms, such as the prohibition on hearsay, reinforce verdict stability.[394] Because the hearsay rules generally prohibit anyone who is not in court from testifying, and presumably everyone who was in court and testified will want to maintain their own integrity (and avoid prosecution for perjury), they help protect the verdict in credibility cases from being undermined by recanted testimony after the fact.[395] If witnesses are unlikely to change their stories and the public tends to defer to jury assessments of credibility, in

389 Of course, the many other avenues of impeachment would remain intact, as is discussed below.

390 Nesson, *supra* note 366, at 1363–65.

391 *See id.* at 1365–66.

392 *Id.* at 1370.

393 *Id.*

394 *Id.* at 1372–75.

395 *See id.* at 1373.

the absence of new evidence, a jury verdict based on credibility judgments should be secure.

By analogy, it may be that an end run around the prohibition on propensity evidence helps promote verdict stability by exposing jurors to publicly-available information about a defendant's past. Recent changes in the propensity prohibition as applied to sex offenders indicate that in at least one context there is strong public sentiment in favor of allowing jurors to hear about a defendant's prior crimes.[396] A more fully-enforced propensity ban (which would follow from the elimination of prior-crime impeachment) could threaten to destabilize the system by making it more likely that the public will have damaging information about a defendant's past that is not available to the jury. In such circumstances, public deference to jury verdicts in credibility cases might suffer. For this reason, if no other, it could be argued that our continued use of credibility proxies is justified. In his own attack on character evidence, including certain credibility proxies, Richard Uviller highlights a similar defense of its continued use: if people accept the results produced by the system, it may be that "[g]reater—and needless—evil is done . . . by undermining basic props of a working system than by living with hidden fiaws [sic]."[397] After all, he suggests, it may be that "myth is the mortar of the justice system."[398]

Like Uviller's arguments, this Article does not discount that certain myths may be productive, or at least necessary, in a working justice system. Yet myths that are a source of discrimination and stereotype cannot be defended on the ground that they promote legitimacy. Arguably, such myths create even bigger problems for legitimacy by producing distorted outcomes and perpetuating systemic biases. Using credibility proxies as an important backdoor to propensity information does exactly that. If the consequences of excluding propensity evidence are too high, the solution is not to keep the door open to damaging information while claiming that it relates to credibility. Instead, the solution is to have a conversation about our commitment to excluding propensity evidence itself.

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396 Federal Rule of Evidence 413 provides that "[i]n a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault" and that the "evidence may be considered on any matter to which it is relevant." FED R. EVID. 413(a); *see also, e.g.*, JULIAN V. ROBERTS ET AL., PENAL POPULISM AND PUBLIC OPINION: LESSONS FROM FIVE COUNTRIES 141–42 (2003) (describing public support for measures to increase punishment of sex offenders, including eliminating the propensity prohibition).

397 Uviller, *supra* note 311, at 777.

398 *Id.*

D. Repeat-Player Impeachment

Today's impeachment jurisprudence does little to advance the search for truth and instead imports outdated notions of status and moral worthiness into the law through evidentiary rules. This Article has also suggested that using proxies for credibility is inevitable if we insist on looking for liars as opposed to lies. To remedy the problem with impeachment jurisprudence, then, we must suspend the search for liars and the attendant use of proxies until we can do so without resorting to stereotype, historical conceptions of honor, and the notion that all prior felons are liars. Although numerous scholars have advocated for tailoring impeachment jurisprudence so that we only impeach with evidence of prior lies or crimes involving deception, such tailoring depends on the false status-based assertion that one prior lie makes someone a liar. Instead, this Article's proposal would eliminate all credibility proxies, including reputation, opinion, and prior bad acts.

To be clear, this proposal would not end impeachment. It would simply end the practice of looking for lies by singling out supposed liars through proxies. The proposal would refocus impeachment on the lie in the courtroom itself. The legal system offers many tools for identifying such lies. Witnesses can be impeached with evidence of bias. They can be impeached with reference to inconsistent statements. They can be subjected to close questioning about their ability to perceive what they claim to have seen or their reason for having the knowledge they claim to possess. The jury can assess their demeanor and the consistency and coherence of their statements on the stand.

Of course, the methods just described have their own difficulties. Bad lawyering can render them toothless, and it is possible that jurors will draw little of use from demeanor. Indeed, status markers may still influence jurors who will draw conclusions from a witness's appearance, mode of speech, and background.[399] Still, these problems will exist whether or not we continue to use the crutch of impeachment with credibility proxies. If anything, eliminating that crutch will force attorneys to focus on exposing biases and inconsistencies that might otherwise go unexplored. And without distorting information about

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399 *See, e.g.*, Max Minzner, *Detecting Lies Using Demeanor, Bias, and Context*, 29 CARDOZO L. REV. 2557, 2559–66 (2008); *see also* DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007). Pager's research used testers to apply for jobs, revealing that employers tend to treat black applicants as if they had felony convictions, no matter what was listed on their job applications. The jury system is no doubt vulnerable to similar racially-biased assumptions in the absence of full information.

past bad acts and prior crimes, jurors may be able to make more accurate credibility assessments based on those other factors. What this Article proposes, therefore, is that we stop using the inference that a person who has previously lied or committed a bad act is a liar and therefore likely will lie while under oath. As this Article has shown, there is little to suggest that this brings jurors information of value, other than alerting them that a witness is a "bad person."[400] And there is much to suggest that jurors apply this information substantively on the issue of guilt rather than on the issue of credibility.[401]

There is one class of witness, however, who pose a unique threat to the integrity of courtroom proceedings and who might be able to do so with impunity if current impeachment rules were eliminated. These are repeat players who lie in court. Repeat players are important enough to the system that if we hope to keep them honest (and thereby reach accurate conclusions), we may need additional safeguards against the possibility that they will lie. For this reason, in the absence of impeachment rules we may need some mechanism by which to reveal the fact that the repeat witness has lied in similar circumstances before. Particularly in the case of players with institutional power, among them police officers who lie but are not sanctioned or charged with perjury, allowing that information to come to light in a subsequent trial may have salutary effects beyond fact-finding in court, such as incentivizing better behavior.

This Article therefore proposes a rule aimed at maintaining the integrity of repeat players in the absence of impeachment rules. The rule would read as follows:

> EVIDENCE OF LYING UNDER OATH. A witness, not the defendant, may be impeached with evidence that he or she was untruthful about a material matter when making a statement under oath within the past ten years. This provision does not apply to past testimony by a witness as a defendant.

For reasons described earlier, this rule would not apply to defendants.[402] Jurors will already assume that a guilty defendant is lying and will be too inclined to use information about prior lying for guilt rather than credibility. Similarly, if a witness was convicted of a crime

400 *See supra* Section I.C.

401 *See supra* notes 207–10 and accompanying text. The FRE currently allow evidence of truthful character to be admitted after a witness's character for truthfulness has been attacked. FED. R. EVID. 608(a). This proposal, by eliminating attacks on untruthful character, would also eliminate the need to rehabilitate that character with often-dubious evidence of a character for truth.

402 *See supra* Section II.A.

after testifying at his or her trial, it would not be enough to suggest that this means the witness lied under oath. The motive to lie to save oneself from conviction is too overpowering to suggest anything about what a person's inclination to lie might be when testifying not at his or her own trial.

The provision would apply to witnesses with a perjury conviction within the past ten years. It would also apply to repeat players, such as police officers, who are unlikely to have a perjury conviction but who may, like Officer Soto in *Whitmore*,[403] have been found to have lied during judicial proceedings. Another noteworthy repeat player to whom the rule might apply with some regularity is an expert who has been found to have been untruthful in past cases, either in a judicial proceeding or by a professional review board. Finally, the rule might be applied to parties who find themselves engaged in frequent litigation.

Whether a material lie did, in fact, happen under the rule is a matter of conditional relevance to be determined by the judge under Rule 104(b) or its state analogue, which requires proof "sufficient to support a finding that the fact does exist."[404] This is not a low bar in the sense that the proponent of the evidence would need to make a showing that the prior testimony was both material and untruthful. In keeping with the theory that this evidence is conditionally relevant, extrinsic evidence would be admissible to prove that the prior lie did, in fact, take place. Conditional relevance requires that a jury make its own finding about whether the prior act happened.[405] Thus, a jury will also have to be convinced that a prior material lie occurred. This provision is sufficiently limited that it will only be invoked in circumstances in which the prior lie is sufficiently relevant and important to warrant the introduction of some proof that it happened. It is sufficiently limited in scope, however, that coupled with judicial authority to limit the number of witnesses on a subject, it should not represent a substantial burden on trials. And any burden will be de minimis in comparison with the time spent and cost incurred currently by impeachment with prior crimes, bad acts, reputation, and opinion.

Of course, it may seem odd to provide for admission of evidence of what is, essentially, perjury by another name. Yet perjury is infrequently prosecuted and difficult to prove.[406] It may be that the role of

403 United States v. Whitmore, 359 F.3d 609, 614 (D.C. Cir. 2004).

404 FED. R. EVID. 104(b).

405 *See id.*

406 *See* Uviller, *supra* note 311, at 813–14 (describing effects of infrequent prosecution of

perjury in the system would change if credibility proxies were eliminated and prior perjurers could be exposed through the proposed rule. In today's world, however, perjury convictions are underinclusive and likely have more to do with angering prosecutors than with being untruthful in court.[407]

Mention should also be made of the time limit. The Federal Rules currently assume that ten years is an expiration date for the probativeness of many felonies.[408] While ten years is somewhat arbitrary, if a witness has not testified—or lied on the stand—in ten years, it suggests that he or she is not an important repeat player with a proclivity for lying on the stand. This time limit could be tailored in the future if research suggested such tailoring were warranted.

Finally, a word in response to those who suggest that unless they hear otherwise, jurors will assume that defendants, particularly black defendants, have prior convictions and will use that assumption as evidence of guilt.[409] Larry Laudan and Ronald Allen have made such a claim.[410] They have argued that in order to improve trial outcomes, all prior crimes should be admissible.[411] My proposal seems to take the opposite position, but it is not actually at odds with their argument. Laudan and Allen suggest that juries use assumed prior crimes as evidence of guilt.[412] If that is true, then we should think carefully about how to address this propensity assumption. But the place where that assumption is relevant is the prohibition on using propensity evidence to prove guilt. Whatever the merits of the argument, the problem cannot be solved through the credibility rules, which are intended not to help jurors assign guilt, but only to decide whom to believe. If we modify the impeachment rules in the way that I have suggested, it will perhaps make the problem that Laudan and Allen describe worse: ju-

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witnesses and criminal defendants for perjury); Chris William Sanchirico, *Evidence Tampering*, 53 DUKE L.J. 1215, 1244, 1260–61 (2004) (describing difficulty in assessing underenforcement of perjury and factors making it difficult to prove).

407 *See, e.g.*, Lisa Kern Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 CAL. L. REV. 1515, 1523 (2009) (describing costs when prosecutors stray from objective of protecting integrity of criminal justice system in enforcing perjury and false statement statutes).

408 *See* FED. R. EVID. 609(b)(1) (admitting a criminal conviction after ten years only if "its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect").

409 *See, e.g.*, Laudan & Allen, *supra* note 223, at 523 (arguing jurors consider prior crimes as evidence of guilt whether told of them or not and therefore all prior crimes should be admissible).

410 *Id.*

411 *See id.* at 493.

412 *See id.* at 495–96.

rors will learn even less about prior convictions. But using credibility proxies to bandage over prejudicial assumptions by jurors provides an imperfect solution to one problem while creating many others. It might be that fixing the problem of credibility proxies will help us see our way to improvements in other areas. Leaving it alone, however, perpetuates a search for liars that is resource-intensive and of dubious value other than in imposing an outdated and biased vision of the liar.

Conclusion

Status is at the heart of American impeachment jurisprudence. That jurisprudence seeks out liars through credibility proxies that reflect a historical belief that honesty was congruent with status, as defined by norms of honor as well as gender and race. This system may have made sense at a time of cultural homogeneity when elites who shaped the rules had a shared allegiance to norms of honor and decorum and accepted a link between those norms and credibility. The origin story of these proxies and their modern-day vitality highlights not just an incoherence in today's caselaw but the continued presence of old assumptions about race, gender, and class. The judges and attorneys who framed early evidence jurisprudence did so against a background of belief about the indicia of honesty, beliefs that included overt negative assumptions based on race and deviations from gender norms.[413] While such assumptions have been discarded as a doctrinal matter, the credibility proxies they helped cement still operate today. With worthiness as our guide, we have created a system where it is more likely that a black defendant will be successfully impeached with evidence of a prior conviction than a white defendant, and in which prostitution can be used to impeach a witness. Yet there is simply no support for the notion that prior crimes are predictive of lying or that they do anything other than help juries make decisions about guilt in close cases. Until we find a better way to look for liars, we should discard the practice and focus on looking for lies.

413 *See supra* Section I.C.