Are All Felons Liars? Reexamining Federal Rule of Evidence 609 Under the Lens of Equal Protection

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INTRODUCTION

By the end of 2016, the Bureau of Justice Statistics estimated that state and federal corrections departments had jurisdiction over at least 1,506,800 prisoners with sentences of more than one year, with imprisonment rates at 582 per 100,000 residents aged eighteen or older.[1] Of those prisoners, 487,300 of them were estimated to be Black, accounting for 32% of the overall prison population.[2] To put these numbers in context, the Census Bureau estimated the population of the United States in July of 2019 to be 328,239,523 people, with 13.4% of the population identifying as Black.[3] This disparity between the percentage of Black people in the general population and the percentage of Black people in prison is not an unknown issue in the world of criminal law.[4] The very existence of this discrepancy demonstrates that the procedures of the criminal system will and do disproportionately impact the Black population of this country.[5]

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[1] Prisoners in 2016, NJC No. 251149, at 1 (DOJ Bureau of Just. Stat. Jan. 2018), https://perma.cc/L5HE-2UCD; Prisoners in 2018, NCJ No. 253516, at 1 (DOJ Bureau of Just. Stat. Apr. 2020), https://perma.cc/CZZ3-HDJ5 (noting that the number of prisoners under state and federal jurisdiction at the end of 2018 was 1,465,200).

[2] Prisoners in 2016, *supra* note 1, at 5; see Prisoners in 2018, *supra* note 1, at 6 (noting that the number of Black prisoners under state and federal jurisdiction was 465,200).

[3] *Quick Facts*, U.S. CENSUS BUREAU, https://perma.cc/734C-4KBQ (last visited Dec. 6, 2021).

[4] *See* Floyd D. Weatherspoon, *The Mass Incarceration of African-American Males: A Return to Institutionalized Slavery, Oppression, and Disenfranchisement of Constitutional Rights*, 13 TEX. WESLEYAN L. REV. 599, 604–05 (2007).

[5] *See* DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE xiv (2003) ("Police decisions to stop, search and arrest, and prosecutorial decisions to charge, clearly have a massively disproportionate

Individuals convicted of serious criminal offenses punishable by more than a year are often referred to simply as "felons."[6] While the number of felons currently in the correctional system is carefully tracked and estimated, the number of released felons in the general population of the United States remains unknown.[7] Studies suggest that because more than six hundred thousand convicts are released from prison every year, there may be as many as twenty million formerly incarcerated felons attempting to live out their lives "as fathers and mothers, as breadwinners, as citizens—as people who make the most of a second chance."[8] Yet, what kind of a second chance are they given, when statistics demonstrate that an overwhelming number of them reenter the mechanisms of the criminal system within three years of being released?[9] What kind of a second chance are the formerly incarcerated given when their past records are used against them to paint them all as liars, as witnesses that a jury should give no credence to?[10] Furthermore, if the prior convictions used to challenge the truthfulness of felons are themselves questionable, how can the use of past convictions to impeach a witness's credibility rationally be allowed?[11] All of these questions lead to the conclusion that there must be a re-examination of how the Federal Rules of Evidence, and Rule 609 in particular, deal with the formerly incarcerated.[12]

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impact on black Americans."); *Mass Incarceration*, ACLU, https://perma.cc/R6G9-FBDM (last visited Dec. 6, 2021) ("One out of every three Black boys born today can expect to go to prison in his lifetime, as can one of every six Latino boys—compared to one of every 17 white boys.").

[6] *See, e.g.*, Nicholas Eberstadt, *Why is the American Government Ignoring 23 Million of its Citizens?*, WASH. POST (Mar. 31, 2016), https://perma.cc/TAE5-L68H; Gary Fineout, *Florida Loses Appeals Court Ruling on Felon Voting Law*, POLITICO (Feb. 19, 2020, 11:17 AM EST), https://perma.cc/CU8Q-KQPW.

[7] Eberstadt, *supra* note 6.

[8] Eberstadt, *supra* note 6.

[9] *See* 2018 Update on Prisoner Recidivism: A 9-Year Follow-Up Period (2005-2014), NJC No. 250975, at 1 (DOJ Bureau of Just. Stat. May 2018), https://perma.cc/VPK5-6KTN [hereinafter 2018 Update] (noting that four out of nine state prisoners released in 2005 were arrested again at least once during the first year after release, and one out of three were arrested during the third year after release).

[10] *See* FED. R. EVID. 609; *see also* Timothy R. Rice, *Restoring Justice: Purging Evil from Federal Rule of Evidence 609*, 89 TEMP. L. REV. 683, 685–86 (2017).

[11] *See* DRIPPS, *supra* note 5, at xiv ("[O]ur criminal process is not punishing enough of the guilty, exonerating enough of the innocent, or doing equal justice under the law."); Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563, 567 (2014).

[12] *See* DRIPPS, *supra* note 5, at xvii–xviii ("Invidious discrimination in policing, charging, or jury selection is unconstitutional, but the defendant has to prove invidious discrimination and can rarely do so simply by proving disparate impact . . . . The long history of discrimination in the criminal law, and the profoundly disturbing disparate impact of the criminal justice system, suggest . . . a turn away from the Bill of Rights to the Fourteenth Amendment [that] would promote legitimacy, reliability, and equality."). *See generally* Jeffrey Bellin, *The Evidence Rules*

This Note will argue that Federal Rule of Evidence 609(a)(1), which allows parties to introduce past convictions to impeach the truthfulness of character witnesses,[13] must be re-evaluated under the Equal Protection Clause of the Fourteenth Amendment to the U. S. Constitution. This Note will illustrate how Rule 609(a)(1) relates to and separates felons as a distinct class, how it impacts minority felons in particular, and how it works against the purpose of the Equal Protection Clause. Part I of this Note will introduce the language, purpose, history, and application of Rule 609 leading up to its current iteration. Part I will also address the history and language of the Equal Protection Clause of the Fourteenth Amendment and how the U.S. Supreme Court has applied this clause toward various classes of individuals. Part II will argue that Rule 609(a)(1) undermines the rights of criminal witnesses, criminal defendants, and people of color, therefore failing to uphold the constitutional values laid out in the Thirteenth and Fourteenth Amendments to the U. S. Constitution. Part III will examine Rule 609(a)(1) under an Equal Protection Clause analysis, viewing felons as a suspect or quasi-suspect class. Finally, Part IV will demonstrate that Rule 609(a)(1) may be challenged in the alternative based on the jurisprudence of *Oregon v. Mitchell* or an enhanced rational basis test as demonstrated in *City of Cleburne v. Cleburne Living Ctr*. This Note will conclude that Rule 609(a)(1) must therefore be rejected as unconstitutional.

I. Background

A. *Federal Rule of Evidence 609—The Language of the Rule*

When a witness takes the stand in a federal courtroom, in general, that witness's character is initially immune from attack except for one aspect: either party may challenge that witness's character for truthfulness.[14] Because the purpose of a trial is to determine the truth, it is highly relevant to a jury or judge whether the witness has a tendency to lie.[15] However, even when challenging the truthful character of a witness, outside or extrinsic evidence generally may not be introduced to prove or disprove the answers

that Convict the Innocent, 106 CORNELL L. REV. 305 (2021) (discussing how the Innocence Movement and data on wrongful conviction necessitates a reevaluation of the Federal Rules of Evidence).

[13] FED. R. EVID. 609(a)(1). For a discussion of the problematic nature of Fed. R. Evid. 609(a)(2), see Jesse Schupack, Note, *The Liar's Mark: Character and Forfeiture in Federal Rule of Evidence 609(A)(2)*, 119 MICH. L. REV. 1031 (2021).

[14] FED. R. EVID. 607.

[15] *See* 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, 1108 (2000) ("[T]he pursuit of truth is more important than most every other value in adjudication.").

a witness gives when questioned about specific instances of truthfulness.[16] There is an exception to this general rule—Federal Rule of Evidence 609 allows parties to introduce past convictions to impeach a witness's character for truthfulness.[17]

Federal Rule of Evidence 609 categorizes how evidence of past convictions may be introduced against a witness based on four factors: (1) what type of conviction it was, (2) whether the witness is a defendant or not, (3) how much time has passed, and (4) whether the conviction occurred when the witness was a juvenile.[18] Evidence of a witness' juvenile conviction is only admissible under limited conditions.[19] For non-juvenile convictions, however, if the elements of the underlying offense intrinsically relate to dishonesty (such as with the offenses of perjury or embezzlement), then the prior conviction must be admitted without applying a judicial balancing test.[20] Yet, Rule 609 not only allows for the introduction of convictions related to *crimen falsi* (crimes of dishonesty) but also for the introduction of *any* conviction where the underlying offense was punishable by more than a year in prison or by death.[21] Section (a)(1)(A) of Rule 609, which applies to non-defendant witnesses in civil or criminal trials, states that a judge determining whether to admit the evidence of a past conviction must analyze it under the standard set forth by Federal Rule of Evidence 403: whether the prejudicial effect of the evidence substantially outweighs its value in proving a relevant fact of the case.[22] As any criminal lawyer will tell you, though, Rule 403 favors admissibility.[23]

Section (a)(1)(B) of Rule 609 applies to defendant witnesses only.[24] Under this section, evidence of a defendant's past conviction must be

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[16] FED. R. EVID. 608(b).

[17] *Id.* ("Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness.").

[18] FED. R. EVID. 609; *see* Roberts, *supra* note 11, at 569.

[19] FED. R. EVID. 609(d) (stating that juvenile convictions are admissible only if "offered in a criminal case," for a witness "other than the defendant," where "an adult's conviction for that offense would be admissible," and "admitting the evidence is necessary to fairly determine guilt or innocence"); Roberts, *supra* note 11, at 568.

[20] FED. R. EVID. 609(a)(2); James McMahon, Note, *Prior Convictions Offered for Impeachment in Civil Trials: The Interaction of Federal Rules of Evidence 609(a) and 403*, 54 FORDHAM L. REV. 1063, 1075 (1986) ("For all witnesses, *crimen falsi* are automatically admissible for impeachment purposes.").

[21] FED. R. EVID. 609(a)(1); Roberts, *supra* note 11, at 567.

[22] FED. R. EVID. 403; FED. R. EVID. 609(a)(1)(A).

[23] *See* McMahon, *supra* note 20, at 1078.

[24] FED. R. EVID. 609(a)(1)(B).

admitted *only if* the evidence passes almost a reverse Rule 403 analysis—proponents must demonstrate that "the probative value of the evidence outweighs its prejudicial effect."[25] In determining the admissibility of prior convictions, judges often look to factors such as the type and nature of a conviction and its similarity to the current charge (as outlined by Justice Burger in *Gordon v. United States*), but it still remains within each trial judge's personal discretion as to whether to admit the evidence.[26] As a consequence, judges have applied these factors in inconsistent and contradictory ways, and even though the Rule 609(a)(1)(B) test should not favor admissibility, judges generally admit prior convictions for impeachment purposes.[27] As a final matter, Rule 609 states that prior convictions are admissible as long as it has been less than ten years since a witness's release from prison, which means Rule 609 affects a vast number of cases involving defendants that were formerly incarcerated.[28]

B. *The Purpose and History Behind the Rule on Impeachment by Prior Convictions*

Rule 609 does not clarify why crimes unrelated to dishonesty are useful in determining a witness's character for truthfulness, but there is a simple rationale behind it: because these witnesses were convicted of a serious crime, they will not abide by an oath to tell the truth.[29] In other words, the law favors the use of felony convictions to prove the assumption that "all felons are liars."[30] Previously under the common law, felons were not even

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[25] *Id.*; Roberts, *supra* note 11, at 567; McMahon, *supra* note 20, at 1075–76 ("The balancing test of Rule 609(a) is much more exclusionary than that of Rule 403.").

[26] *See* 383 F.2d 936, 940 (D.C. Cir. 1967); Tarleton David Williams, Jr., Comment, *Witness Impeachment by Evidence of Prior Felony Convictions: The Time Has Come for the Federal Rules of Evidence to Put on the New Man and Forgive the Felon*, 65 TEMP. L. REV. 893, 900 (1992) (noting the *Gordon* factors as "the type and nature of the criminal conviction . . . ; the amount of time that had passed since the conviction; the similarity between the proffered conviction and the crime with which the defendant was charged; and, the importance of the defendant's testimony."); *see also, e.g.*, United States v. Paige, 464 F. Supp. 99, 100 (E.D. Pa. 1978) (explicating further on judicial discretion in allowing past convictions); United States v. Brewer, 451 F. Supp. 50, 53–54 (E.D. Tenn. 1978) (demonstrating how to use the *Gordon* factors).

[27] FED. R. EVID. 609(a)(1)(B); *see* Jonathan Hurt, Note, *A Textual Structure of Confusion: Problems with the Federal Rules Governing Impeachment by Evidence of Criminal Conviction*, 67 ALA. L. REV. 1237, 1238–40 (2016) (describing federal cases with similar facts but contrary decisions as to admitting conviction for impeachment); Roberts, *supra* note 11, at 569–70.

[28] FED. R. EVID. 609(b); *see* 2018 Update, *supra* note 9, at 1 (noting that five out of six prisoners released in 2005 were arrested at least once within nine years after their release).

[29] McMahon, *supra* note 20, at 1066.

[30] *See* McMahon, *supra* note 20, at 1066.

allowed to testify,[31] but this changed as courts and legislatures began to give greater importance to the ability of criminal defendants to tell their side of the story.[32] However, as jurisdictions began to grant the formerly incarcerated the right to testify in their own defense, states and courts maintained a wide variety of statutory and common law regarding whether past convictions could be introduced to impeach these defendants and other witnesses.[33]

One of the seminal cases in this area of the law was *Luck v. United States*, which opined that trial judges should be allowed to exercise judicial discretion in determining whether to admit prior convictions as impeachment evidence.[34] In *Luck*, the Appellate Court of the District of Columbia determined that a statute allowing for the impeachment of witnesses by prior conviction did not *require* these convictions to be automatically admitted into evidence.[35] Rather, the Court stated that convictions could be excluded or admitted depending on the trial judge's determination of whether "the cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction."[36] However, even with this guideline, judges demonstrated wildly different understandings and applications of the *Luck* doctrine.[37] This led to enormous inconsistency in the trial courts and across the federal circuits in the admission of prior convictions for impeachment purposes.[38]

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[31] Alan D. Hornstein, *Between* Rock *and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 VILL. L. REV. 1, 20 (1997) ("At early common law, persons who had been convicted of committing a crime were disqualified from testifying. The disqualification, however, had a limited effect as most felons were hanged.").

[32] *See* Rock v. Arkansas, 483 U.S. 2704, 2714 (1987) (holding that Arkansas's blanket ban on hypnotically refreshed testimony was impermissible given defendant's constitutional right to testify in her own defense); *see also* 1 KENNETH S. BROUN, GEORGE E. DIX, EDWARD J. IMWINKELREID, DAVID H. KAYE, & ELEANOR SWIFT, MCCORMICK ON EVIDENCE § 42 (Robert P. Mosteller ed., 8th ed. 2020) [hereinafter MCCORMICK ON EVIDENCE]; Carl McGowan, *Impeachment of Criminal Defendants by Prior Convictions*, 1970 LAW & SOC. ORD. 1, 14 (1970) (noting that a defendant "may not be guilty of the particular crime for which he has been picked up" and "[h]is only defense may be his own story, and sometimes at least that story may be a plausible one.").

[33] *E.g.*, Commonwealth v. Bonner, 97 Mass. 587 (1867) (allowing for impeachment of defendant witnesses); *see* MCCORMICK ON EVIDENCE, *supra* note 32, § 42; McGowan, *supra* note 32, at 4–5.

[34] 348 F.2d 763, 768 (D.C. Cir. 1965); Hornstein, *supra* note 31, at 22–23.

[35] 348 F.2d at 767–68.

[36] *Id.* at 768; McGowan, *supra* note 32, at 3.

[37] McGowan, *supra* note 32, at 3–4 nn.12–13.

[38] McGowan, *supra* note 32, at 3–4 nn.12–13.

By the end of the 1960s, federal judges hoped clarification would come from the Federal Rules of Evidence then being crafted by the U.S. Supreme Court and the Advisory Committee on the Federal Rules of Evidence.[39]

As noted by the Advisory Committee, Rule 609 was specifically modeled after § 133(a) of Public Law 91-358, D.C. Code § 14-305(b)(1).[40] Before it was enacted in 1975, Rule 609, first drafted by the Supreme Court, went through the U.S. House of Representatives, the Senate, and the Conference Committee.[41] Within these illustrious bodies, there was enormous disagreement as to whether Rule 609 should be included because of the high likelihood that admission of past convictions would create impermissible prejudice against witnesses, especially criminal defendants.[42] The result was a compromise designed to include a balancing test that the Conference Committee hoped would prevent unfair prejudice to criminal defendants in particular, but which still allowed for the use of past convictions as an impeachment device based on the discretion of trial judges.[43]

Due to the heavy focus on Rule 609's impact on criminal defendants, much confusion remained as to how it should apply to other types of witnesses, especially in the context of civil trials.[44] The Supreme Court's 1989 ruling in *Green v. Bock Laundry Machine Co.* did not clarify the matter, as the Court indicated that "all prior convictions except those that adversely affect a criminal defendant are mandatorily admissible."[45] The year following this decision, the Supreme Court sought to amend Rule 609 to better illuminate how it was to be applied and to reimplement the use of a Rule 403 balancing test for non-defendant witnesses in criminal and civil trials.[46] Rule 609 has

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[39] *See* McGowan, *supra* note 32, at 5.

[40] *See* H.R. COMM. ON THE JUDICIARY, REPORT ON THE FEDERAL RULES OF EVIDENCE, H.R. REP. NO. 93-650, at 7085 (1973).

[41] McMahon, *supra* note 20, at 1070–73.

[42] *See Federal Rules of Evidence: Hearings on H.R. 5463 Before the Comm. on the Judiciary*, 93d Cong. 25, 124–25, 150–51 (1974).

[43] *See* Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 1982–83 (2016) [hereinafter *Conviction by Prior Impeachment*] ("The FRE 609 rules on impeachment of criminal defendants represented a political compromise: the House of Representatives wanted only convictions involving dishonesty or false statements to be admissible, while the Senate wanted felony convictions to be admissible."); McMahon, *supra* note 20, at 1073; Hornstein, *supra* note 31, at 8.

[44] *See generally* McMahon, *supra* note 20, at 1076–77.

[45] Mark Voigtmann, Note, *The Short History of a Rule of Evidence that Failed (Federal Rule of Evidence 609,* Green v. Bock Laundry Machine Co. *and the New Amendment)*, 23 IND. L. REV. 927, 937 (1990); *see* Steven J. Hippler, Green v. Bock Laundry—*Rule 609(a)(1) in Civil Cases: The Supreme Court Takes an Imbalanced Approach*, 1990 UTAH L. REV. 613, 614. *See generally* Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989).

[46] Voigtmann, *supra* note 45, at 944, 944 n.110.

continued to undergo changes in language (it was last restyled in 2011), but even with updated language and organization, the underlying assumption of Rule 609(a) that "all felons are liars" remains unchanged.[47]

C. *The Language and History of the Equal Protection Clause*

Section One of the Fourteenth Amendment to the U.S. Constitution declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[48] The Equal Protection Clause was drafted as part of the Fourteenth Amendment at the conclusion of the Civil War by members of the Thirty-Ninth Congress.[49] In order for the states that had seceded to be readmitted to the Union, they were required under the Reconstruction Act of March 1867 not only to submit new state constitutions to Congress for approval, but also to adopt the Fourteenth Amendment.[50] Such requirements were designed to ensure that "the rebel states should adopt universal suffrage, regardless of color or race, excluding none, white or black"; in exchange, military rule would be lifted, and the seceded states would once more have representation in Congress.[51]

The Supreme Court's determination of what "equal protection of the laws" might mean has undergone a drastic evolution since the initial adoption of the Fourteenth Amendment, fortunately moving away from the horrific doctrine of "separate but equal" established by the majority in *Plessy v. Ferguson*,[52] and moving toward the proposition set forth by Justice Harlan's dissent in that case:

> But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as

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[47] *See* FED. R. EVID. 609; *Conviction by Prior Impeachment*, *supra* note 43, at 1999 ("Courts, rule drafters, and commentators . . . reason that impeachment by prior conviction is a necessary tool for the prosecution because if a defendant with a criminal record testifies in the absence of this form of impeachment, the jury will be misled into thinking that the defendant is blameless, blemish-free, or as trustworthy as 'Mother Superior.'").

[48] U.S. CONST. amend. XIV, § 1.

[49] Richardson v. Ramirez, 418 U.S. 24, 49–50 (1974).

[50] *Id.*

[51] *Id.* at 50–51.

[52] *See generally* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119–27 (1997) (explaining the historical, social, and legal contexts of the *Plessy v. Ferguson* decision).

guaranteed by the supreme law of the land are involved.[53]

This ideology of a color-blind and class-free Constitution was nowhere so strongly embraced as in the case overruling *Plessy v. Ferguson*: *Brown v. Board of Educ. of Topeka*.[54] In *Brown*, even though Black students in the school district had physical facilities of equal quality to white students, the separation of Black students into a different class was in and of itself determined to violate the Equal Protection Clause.[55] The Supreme Court held that intangible considerations, such as students of color experiencing "a feeling of inferiority as to their status in the community that may affect their hearts and minds," were a sufficient demonstration that segregation in public schools should be rejected as unconstitutional.[56] In coming to this conclusion, the Court noted that, "in approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation."[57]

The Supreme Court's analysis in *Brown* demonstrates two important points regarding the Equal Protection Clause: (1) an analysis under the Equal Protection Clause may be triggered by differential treatment of a particular class of people by the state or federal government *regardless* of whether the effects of this treatment are tangible or intangible, and (2) the Court's determination of what types of classes the Equal Protection Clause may apply to will continue to evolve as American society changes.[58] Separately, the Supreme Court has made clear that the Equal Protection Clause applies to all people within the territories of the United States.[59]

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[53] 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954); *see Brown*, 347 U.S. at 488 (noting that *Plessy v. Ferguson* had established that "equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate").

[54] *See* 347 U.S. at 494–95.

[55] *Id.* at 495.

[56] *Id.* at 493–94.

[57] *Id.* at 492–93.

[58] *See id.*; Ben Geiger, Comment, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CALIF. L. REV. 1191, 1230–31 (2006) ("*Carolene Products* and subsequent cases have been the basis for judicial intervention in the name of minority protections ranging from desegregation of public schools to giving resident aliens welfare benefits on the same terms as U.S. citizens, protections clearly beyond the specific visions of the framers of the Fourteenth Amendment.").

[59] Plyler v. Doe, 457 U.S. 202, 214–15 (1982) (quoting Senator Howard on the objectives of the 14th Amendment: "The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal

D. *The Application of an Equal Protection Clause Analysis*

An Equal Protection Clause analysis is triggered only when the states or the federal government act in a discriminatory fashion against a particular class of people.[60] The judicial test that will be applied depends on two factors: whether a law is facially discriminatory or facially neutral, and whether the class of people is suspect.[61] If state or federal action is discriminatory on its face against a "discrete and insular minority," then the government's actions require a "more searching judicial inquiry."[62] Given the history of the Fourteenth Amendment as an effort to protect the rights of newly freed Black Americans, the Supreme Court has traditionally held that race is always a "discrete and insular minority" so that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," and the courts "must subject them to the most rigid scrutiny."[63] Other than race, a suspect class may be established as one that has an immutable characteristic, a tradition of little to no political power or influence, and a history of experiencing oppression and prejudice.[64] If the government acts against a suspect class in a facially discriminatory way, the test of strict scrutiny demands that the state "demonstrate that its

protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another . . . . It will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction"); Yick Wo v. Hopkins, 118 U.S. 356, 368–69 (1886) (holding the Equal Protection Clause applied to Chinese nationals being excluded from laundry licenses in San Francisco, because the provisions of the 14th Amendment "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws").

[60] *See* Mass. Board of Ret. v. Murgia, 427 U.S. 307, 312 (1976) (noting that an Equal Protection Clause analysis may also be triggered when there is interference with a fundamental right, but this branch of case law will not be examined in this Note's argument).

[61] *See* Washington v. Davis, 426 U.S. 229, 240–41 (1976).

[62] United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

[63] *Id.*; Johnson v. California, 543 U.S. 499, 505–06 (2005); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 214–16 (1995); Korematsu v. United States, 323 U.S. 214, 216 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

[64] *See* Lyng v. Castillo, 477 U.S. 635, 638 (1986); *see also Plyler*, 457 U.S. at 216 n.14, 220 (noting that suspect classes usually have been set aside due to some immutable characteristic such as race, "some classifications are more likely than others to reflect deep-seated prejudice," and that these suspect groups "have historically been 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process'"); Geiger, *supra* note 58, at 1206 (noting that "national origin" and "alienage" also receive strict scrutiny).

classification has been precisely tailored to serve a compelling governmental interest."[65]

Other than when a suspect class has been facially discriminated against, the Supreme Court held that strict scrutiny will not apply, with some limited exceptions.[66] Strict scrutiny may still be appropriate when a law that seems neutral on its face either: (1) only applies to a singular suspect class (such as a specific race or national origin), or (2) can be demonstrated to have both a disparate impact against a suspect class *and* a discriminatory intent as evidenced by its legislative and procedural history.[67] As established in *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, however, even if the legislative and procedural history of a government action suggests invidious discrimination, the government still may offer a race-neutral, non-discriminatory explanation for its action to avoid a test of strict scrutiny.[68]

If a class of individuals possesses some, but not all, of the characteristics of a suspect class, it is deemed a quasi-suspect class.[69] Quasi-suspect classes identified by the U.S. Supreme Court include gender and undocumented children seeking public education, but some state supreme courts have also recognized that sexual orientation may constitute a quasi-suspect class.[70] When a law facially discriminates against a quasi-suspect class, the courts must apply intermediate scrutiny, which requires the government to show that the discrimination serves "important governmental objectives" and that the discriminatory action is "substantially related to the achievement of those objectives."[71] An important governmental interest is more likely to be found legitimate if there is significant evidence behind it, meaning that discrimination against a quasi-suspect class cannot just be based on general, archaic stereotypes.[72]

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[65] *Plyler*, 457 U.S. at 217.

[66] *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 259, 265–66 (1977); Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886).

[67] *See Arlington Heights*, 429 U.S. at 265–66; *Yick Wo*, 118 U.S. at 373–74 ("Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.").

[68] *See* 429 U.S. at 265–66.

[69] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 574 (1996); *Plyler*, 457 U.S. at 217–18.

[70] *See, e.g.*, *Virginia*, 518 U.S. at 532–33; *Plyler*, 457 U.S. at 223–24; Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 431-32 (Conn. 2008) (recognizing sexual orientation as a suspect class); Varnum v. Brien, 763 N.W.2d 862, 895–96 (Iowa 2009) (holding discrimination based on sexual orientation requires heightened scrutiny).

[71] *Virginia*, 518 U.S. at 516.

[72] *See* Craig v. Boren, 429 U.S. 190, 198 (1976).

If a court determines that a class is neither suspect nor quasi-suspect, then the rational basis test will apply.[73] A class that all U.S. residents will one day be a part of, such as the elderly, is, by its very nature, not a suspect class.[74] Economic or social classes are also not generally suspect or quasi-suspect classes (although the indigent may be a class if a benefit is absolutely deprived in a way that interferes with an essential right).[75] Under the rational basis test for non-suspect classes, if the government can provide a reason for the classification, whether that reason has merit or not, then the law survives judicial scrutiny.[76] In very rare instances, a type of enhanced or heightened rational basis requiring evidentiary support for the government's classification may apply if all the reasons given by the state subjectively revolve around the characteristic that is the basis for the discrimination.[77]

II. The Issue Being Addressed

The U.S. Constitution and tradition of law regard nothing so highly as the rights of the criminal defendant, as evidenced by the rights enshrined in the original articles of the Constitution and in its first ten amendments.[78] These rights include: the right to issue a writ of habeas corpus; the right to a

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[73] *See, e.g.*, N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568, 591–92 (1979); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 491 (1955).

[74] *See* Mass. Board of Ret. v. Murgia, 427 U.S. 307, 313–14 (1976) (rejecting age as a suspect classification because old age "marks a stage that each of us will reach if we live out or normal span").

[75] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 27–28 (1973) (holding wealth was not a suspect classification in terms of per-pupil spending related to property taxes); *Williamson*, 348 U.S. at 491; Jones v. Governor of Fla., 950 F.3d 795, 800 (11th Cir. 2020) (holding that a law requiring released felons to pay fines prior to the restoration of their voting rights essentially punished the indigent as a class and was subject to a heightened scrutiny); *see also* Geiger, *supra* note 58, at 1206–07. *But see* Raysor v. DeSantis, 140 S. Ct. 2600, 2600–03 (2020) (mem.) (Sotomayor, J., dissenting) (outlining the subsequent history of *Jones v. Governor of Fla.* And related cases).

[76] *See Williamson*, 348 U.S. at 491.

[77] *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–50 (1985), *superseded by statute*, Fair Housing Act, 42 U.S.C. § 3604, *as recognized by* Human Res. Research and Mgmt. Grp., Inc. v. County of Suffolk, 687 F. Supp. 2d 237, 255–56. In *City of Cleburne*, all of the city's reasons for denying a permit for a home for the mentally impaired revolved around stereotypes and other spurious claims regarding the mental impairment of the residents. Subsequently, the Fair Housing Act prohibited this type of discrimination against disabled individuals, and federal circuit courts have applied heightened scrutiny as a result. This does not negate the import of the Court's reasoning in *City of Cleburne* regarding the improper use of stereotypes as the basis for governmental discrimination.

[78] *See generally* U.S. CONST. amend. I–X.

trial by jury; the requirement of a grand jury indictment for capital or serious crimes; the prohibition against trying a defendant twice for the same crime (double jeopardy); the right to due process of law; the right to a speedy and public trial; the right to know the charges brought; the right to confront witnesses; the right to present witnesses in defense; the right to assistance by counsel; and the prohibitions against excessive bail, excessive fines, and cruel and unusual punishment.[79] Understanding that these rights already existed in the text of the U.S. Constitution and the Bill of Rights, the Fourteenth Amendment guaranteed the "equal protection of the laws" for "any person" within the jurisdiction of the United States.[80] Along with the Fifteenth Amendment, the Fourteenth Amendment sought to grant the rights and privileges already enjoyed by persons within the United States to the formerly enslaved.[81] But the Thirteenth Amendment, which purportedly codified the eradication of slavery first declared in the Emancipation Proclamation, still allowed for slavery or involuntary servitude "as a punishment for crime whereof the party shall have been duly convicted."[82]

The effect of this phrase in the Thirteenth Amendment was devastating,

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[79] *Id.* art. I, § 9 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); U.S. CONST. art. III, § 2 ("The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by Law have directed."); U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."); U.S. CONST. amend. VII ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the Common law."); U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[80] *Id.* amend. XIV, § 1.

[81] *Id.* amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); Richardson v. Ramirez, 418 U.S. 24, 50–51 (1974).

[82] U.S. CONST. amend. XIII; *see* The Emancipation Proclamation, Proclamation No. 95 (Sep. 22, 1862), *reprinted in* 1863 Presidential Proclamation No. 17, Proclamation No. 17, 12 STAT. 1268 (Jan. 1, 1863).

as it allowed the states that formerly relied on slavery to recreate a free source of labor by arresting and convicting a large number of newly freed slaves on charges as innocuous as loitering and vagrancy.[83] The subsequent history of higher rates of conviction and more severe punishments for Black Americans, along with the propagation of the myth of the "dangerous black man," call into question whether this country has ever truly provided the "equal protection of the laws" to Black individuals.[84] Nowhere is this more apparent than in the area of drug convictions, where data suggests that while usage rates of cocaine and marijuana are comparable, Black people are still multiple times more likely than white people to be convicted on charges relating to drugs.[85] Given the disproportionate number of Black people enmeshed in the criminal system, the procedural fairness of that system and the constitutionality of its rules of evidence could not be more vital.[86]

Recent cases involving the Confrontation Clause of the Sixth

[83] *See* Bryan Stevenson, *Slavery Gave America a Fear of Black People and a Taste for Violent Punishment. Both Still Define Our Criminal-Justice System.*, N.Y. TIMES (Aug. 14, 2019), https://perma.cc/26J3-MAX7 ("[W]hite policymakers invented offenses used to target black people: vagrancy, loitering, being a group of black people out after dark, seeking employment without a note from a former enslaver. The imprisoned were then 'leased' to businesses and farms, where they labored under brutal conditions. An 1887 report in Mississippi found that six months after 204 prisoners were leased to a white man named McDonald, dozens were dead or dying, the prison hospital filled with men whose bodies bore 'marks of the most inhuman and brutal treatment . . . so poor and emaciated that their bones almost come through the skin.'"). *See generally* 13TH (Netflix, Forward Movement, & Kandoo Films 2016); Weatherspoon, *supra* note 4, at 599–604 (outlining the effects of the "Black Codes" on newly freed black Americans).

[84] Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2275–76 (2017) ("Not long ago, police enforced discriminatory slave codes and Jim Crow laws and turned a blind eye to mob violence and lynchings against blacks, all of which contribute to racial minorities' history of distrusting the police. Today, African Americans are 3.6 times more likely to be subject to use-of-force by police and 2.5 times more likely to be shot and killed by police than are whites."); *see* John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557, 599–600 (1991) (part of *Symposium on Legalization of Drugs*); Stevenson, *supra* note 83 ("Hundreds of years after the arrival of enslaved Africans, a presumption of danger and criminality still follows black people everywhere . . . . Children as young as 13, almost all black, are sentenced to life imprisonment for nonhomicide offenses. Black defendants are 22 times more likely to receive the death penalty for crimes whose victims are white, rather than black—a type of bias the Supreme Court has declared 'inevitable.'"). *See generally* Weatherspoon, *supra* note 4, at 608–11; 13TH, *supra* note 83.

[85] DRIPPS, *supra* note 5, at xiv; *see* Weatherspoon, *supra* note 4, at 604–06, 608–11 (arguing that the "War on Drugs" is a continuation of the "Black Codes" of the post-Civil War); Powell & Hershenov, *supra* note 84, at 568 ("An astounding eighty to ninety percent of those who are eventually prosecuted for drug-related offenses are African-American males."). *See generally* 13TH, *supra* note 83.

[86] *See* Gonzales Rose, *supra* note 84, at 2272–73.

Amendment demonstrate the Supreme Court's openness to re-evaluating whether the Federal Rules of Evidence uphold constitutional principles.[87] The Confrontation Clause guarantees the right of criminal defendants to confront the witnesses presented against them, and the Supreme Court held that this right supersedes hearsay evidence regardless of other indicia of the evidence's reliability.[88] In other words, under a Confrontation Clause analysis, as Justice Scalia noted, the issue is not primarily whether an out-of-court hearsay statement can be trusted, but whether a criminal defendant's constitutional rights have been violated by its introduction.[89] The Confrontation Clause cases confirm that constitutional rights must and do supersede the Federal Rules of Evidence, and that the Supreme Court may upend any Federal Rules of Evidence that conflict with the values embodied in the U.S. Constitution.[90]

It is in this context that Federal Rule of Evidence 609 and in particular section (a)(1) must be examined.[91] The history of the law in this country has developed such that courts must convict based on whether a defendant has committed "this crime in this particular instance," but the prejudicial effect of Rule 609(a)(1) undermines this core value.[92] Further, by allowing for the impeachment of a witness's character for truthfulness based on past convictions, Rule 609(a)(1) holds onto an outdated and stereotypical view of felons, and its application negatively impacts the right to a fair trial for

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[87] *See, e.g.*, Williams v. Illinois, 567 U.S. 50 (2012); Bullcoming v. New Mexico, 564 U.S. 647 (2011); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Crawford v. Washington, 541 U.S. 36 (2004). *See generally* U.S. CONST. amend. VI.

[88] *See Crawford*, 541 U.S. at 61; *see generally* FED. R. EVID. 801(c) (defining hearsay as "a statement that: (1) the declarant does not make while testifying at the current trial; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.").

[89] *See Crawford*, 541 U.S. at 61.

[90] *See* Robert D. Dodson, *What Went Wrong with FRE Rule 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 23 N.C. CENT. L.J. 14, 51 (1997–1998) ("Our criminal justice system sacrifices accuracy in order to afford protection to criminal defendants . . . . Our system excludes all kinds of evidence which may help a jury to discover the truth, such as: privileged communications, hearsay exclusions, and exclusions because evidence was obtained in violation of the Fourth or Fifth Amendments of the Constitution."). *See generally Williams*, 567 U.S. at 50; *Bullcoming*, 564 U.S. at 647; *Melendez-Diaz*, 557 U.S. at 305; *Crawford*, 541 U.S. at 36.

[91] *See generally* DRIPPS, *supra* note 5, at xvii ("It turns out that the right place to look for criminal procedure doctrine is right there in the text of the Fourteenth Amendment. Due process means no punishment without a fair trial, and equal protection means no racial discrimination in criminal justice. The current reliance on the Bill of Rights has meant that due process and equal protection have been marginalized, even if they have not yet fallen into complete desuetude.").

[92] *See* McGowan, *supra* note 32, at 14; Dodson, *supra* note 90, at 51.

defendant witnesses.[93] Additionally, because Black people are disproportionately convicted and punished, it follows that Rule 609(a)(1) has a disproportionate effect on them.[94] If the goal of the Fourteenth Amendment really was, as Justice Harlan wrote, to ensure that the laws of this country do not create different classes and castes of people, then a Federal Rule of Evidence that brands members of a class as liars based on previous encounters with a prejudicial criminal system must undergo an Equal Protection Clause analysis.[95]

ANALYSIS

III. Federal Rule of Evidence 609(a)(1) Must Be Rejected Because Felons Are a Suspect or Alternately a Quasi-Suspect Class

A. *The Facially Discriminatory Nature of Rule 609(a)(1) Against the Class of Felons*

When the state or federal government acts in a way that discriminates against a particular class of people, the courts must apply an Equal Protection Clause analysis to determine the constitutionality of the governmental action.[96] As previously discussed, the test applied under such an analysis depends on whether or not the action is facially discriminatory and if the class being discriminated against is a suspect class.[97] Federal Rule of Evidence 609(a)(1), as a rule of procedure determining the admission of evidence in a federal courtroom, clearly separates felons from other types of witnesses.[98] The Rule states that those who have been convicted of crimes punishable by more than a year (or by death) may have their past convictions introduced as a means of impeaching their truthful character as witnesses.[99] This exception stands in stark contrast to the general proposition of the Rules of Evidence that extrinsic evidence should not be admitted for the purposes of demonstrating the propensity of a witness to act in a certain

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[93] *See* McGowan, *supra* note 32, at 4; Dodson, *supra* note 90, at 56.

[94] *See* DRIPPS, *supra* note 5, at xiv; *Conviction by Prior Impeachment*, *supra* note 43, at 2004–05 ("[B]y compounding the racial disparity embodied within patterns of criminalization, prior conviction impeachment contributes to the racial disparity found throughout the criminal justice system.").

[95] *See* Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J. dissenting), *overruled by* Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954).

[96] *See supra* Part I(D).

[97] *See supra* Part I(D).

[98] *See* FED. R. EVID. 609(a)(1).

[99] *Id*.

matter.[100] In this way, Federal Rule of Evidence 609(a)(1) facially discriminates against felons.[101]

However, to resolve whether this facial discrimination survives a constitutional challenge, the appropriate judicial test must still be determined.[102] If felons are a suspect class, then Federal Rule 609(a)(1) must undergo a test of strict scrutiny.[103] The case for felons as a suspect class relies on three factors: whether felons as a class have an immutable characteristic, a lack of political power and influence, and a history or tradition of being oppressed and discriminated against.[104] If some, but not all, of these factors apply, felons may still be a quasi-suspect class, and the proper test for Rule 609(a)(1) would be one of intermediate scrutiny.[105]

The type of immutable characteristic that the courts recognize in suspect and quasi-suspect classes often has to do with some trait, like race, that a class is born with or that a class acquires through no fault of that class's members.[106] Because the class is not at fault for this immutable characteristic, it is legally objectionable to discriminate against class members for it.[107] This accounts for why children cannot be discriminated against for the wrongdoings of their parents—children have no choice in who their birth parents are or how their parents act—and also why a lack of citizenship cannot be a basis for the denial of certain state benefits.[108] Immutable characteristics like race or gender have little to no connection with individual responsibility or culpability, and the Supreme Court has thus held discrimination based on stereotypes about race and gender to be unconstitutional.[109]

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[100] *See* FED. R. EVID. 608.

[101] *See* FED. R. EVID. 609(a)(1); *see also* Hornstein, *supra* note 31, at 6 ("As impeachment by evidence of the defendant/witness's poor character for veracity, it is the most general form of impeachment, tending to show that the defendant is unworthy of belief regardless of context. Beyond that, however, it requires that the factfinder draw an inference from prior conduct to the defendant's character, an inference our jurisprudence generally forbids.").

[102] *See supra* Part I(D).

[103] *See supra* Part I(D).

[104] *See supra* Part I(D).

[105] *See supra* Part I(D).

[106] Geiger, *supra* note 58, at 1211.

[107] Geiger, *supra* note 58, at 1211.

[108] *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 226 (1982); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972); Graham v. Richardson, 403 U.S. 365, 376 (1971). The prohibition of discrimination against noncitizens generally only applies *outside* of the context of immigration law. Immigration officials have large discretion and noncitizens have very few legal rights during the process of admission into and deportation out of the United States. *See generally* IMMIGRATION NATION (Netflix television series 2020).

[109] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 209–10 (1976); Reed v. Reed, 404 U.S. 71, 76–77 (1971).

Unlike members in a suspect class of race or quasi-suspect class of gender, felons were not born as criminal offenders.[110] However, once they become felons, criminal offenders cannot choose to leave that class.[111] Even in states where a felon can expunge or seal criminal records, this process can take years, meaning that "a formerly incarcerated person wears a digital scarlet letter."[112] Yet, once felons have been released from prison, under any theory of punishment they have unquestionably served their debt to society, and therefore governmental discrimination that punishes felons beyond their prison sentences is not justified.[113]

The argument against considering those convicted of crimes punishable by more than a year (or by death) as a suspect class has been that "ex-offenders are both responsible for their membership in their classification and morally culpable for it."[114] If felons are the cause of the immutable characteristic that sets them apart, the contention is that this characteristic should not be taken into account when determining whether felons are a suspect class.[115] However, this argument falls short in two important ways.[116] First, it contradicts Supreme Court jurisprudence that establishes the importance of "the relevance between *individuals'* responsibility for their membership in a group and the legal burden imposed upon the group."[117] Arguing that felons cannot be considered a suspect class because they are the architects of their own convictions creates a fundamental unfairness—this argument essentially claims that *all* felons, regardless of the type of

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110 *See* Geiger, *supra* note 58, at 1222.

111 *See* Geiger, *supra* note 58, at 1218–19.

112 Geiger, *supra* note 58, at 1200; *see, e.g.*, *Find Out If You Can Seal Your Criminal Record*, MASS.GOV, https://perma.cc/7MZ7-4KJ8 (last visited Dec. 6, 2021) (noting that in Massachusetts you must wait until "7 years after you were found guilty or after any jail or prison time, whichever is later" before you can request to seal your criminal record); *Find Out If You Can Expunge Your Criminal Record*, MASS.GOV, https://perma.cc/HU3S-FS48 (last visited Dec. 6, 2021) (noting that you must wait seven years after you were found guilty of a felony to request an expungement, and certain crimes cannot be expunged).

113 *See* Fineout, *supra* note 6 (describing a recent appeals court decision in *Jones v. Governor of Florida* where the court held released felons must be allowed to vote without having to pay additional fees); Geiger, *supra* note 58, at 1219–20.

114 Geiger, *supra* note 58, at 1192.

115 Geiger, *supra* note 58, at 1192.

116 Geiger, *supra* note 58, at 1192.

117 Geiger, *supra* note 58, at 1192; *see* Enmund v. Florida, 458 U.S. 782, 800 (1982) ("As for retribution as a justification . . . , we think this very much depends on the degree of . . . culpability."); Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality) (noting in the plurality that "an immutable characteristic determined solely by the accident of birth" would contradict "the basic concept of our system that legal burdens should bear some relationship to individual responsibility").

crime committed or the rehabilitation efforts of each individual, should be equally burdened by laws such as Federal Rule 609 without relief from the Equal Protection Clause.[118] Such an argument promotes inequity and must be rejected.[119]

Second, the claim that felons are responsible for their own class membership fails to recognize that felons are perhaps *not* entirely to blame for the immutable characteristic of their convictions.[120] The effects that socioeconomic factors play in the lives of those who were convicted cannot be underestimated,[121] nor can we ignore the disproportionate targeting and conviction of Black individuals.[122] In fact, there is every indication that convictions cannot be fairly relied upon as indicative of individual culpability given the "growing body of data on wrongful convictions, for example, and on disparities in law enforcement, and on the nature and dominance of plea-bargaining."[123] Consider as well that whether an offense is punishable by more than a year is governed statutory provisions and federal sentencing guidelines coupled with judicial discretion.[124] Thus, the

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[118] Geiger, *supra* note 58, at 1192, 1219–20.

[119] *See* Jones v. Governor of Fla., 950 F.3d 795, 812 (11th Cir. 2020) ("Whatever interest the State may have in punishment, this interest is surely limited to a punishment that is applied in proportion to culpability.").

[120] *See* Geiger, *supra* note 58, at 1222 ("The notion that criminals deviate from social norms due to an evil nature is in tension with the belief that criminals are the product of their socioeconomic circumstances and political shortcomings.").

[121] *See* Geiger, *supra* note 58, at 1222; *See generally* The Lucas Bros, *Our Brother Kaizen*, VULTURE (June 4, 2020), https://perma.cc/7VQR-JFKM ("[W]e all suffered from acute post-traumatic stress disorder as a result of growing up in a war-torn inner city. We were both exposed to violence, which had an insidious impact on our psychological health. . . . Our issues with depression, suicide, and substance abuse materialized during our time in law school, at Duke and NYU; Kaizen's did on the streets of Newark.").

[122] *See* Powell & Hershenov, *supra* note 84, at 599–600 ("[H]aving helped to create the [drug] problem, law enforcement efforts then target minority populations for surveillance, arrest, prosecution, and incarceration."); *see also* SIR THOMAS MOORE, UTOPIA (Henry Morley ed. 2000) (1516), https://perma.cc/2EYJ-UJZV ("[I]t is a vain thing to boast of your severity in punishing theft, which, though it may have the appearance of justice, yet in itself is neither just nor convenient . . . what else is to be concluded from this, but that you first make thieves and then punish them?").

[123] Roberts, supra note 11, at 563; *see* INNOCENTS WHO PLEAD GUILTY, NAT'L REGISTRY OF EXONERATIONS 1 (2015), https://perma.cc/4ECS-A5EA ("About 95% of felony convictions in the United States . . . are obtained by guilty pleas, . . . [a]nd innocent defendants who plead guilty almost always get lighter sentences than those who are convicted at trial—that's *why* they plead guilty—so there is less incentive to pursue exoneration."). *See generally* Anna Roberts, *Convictions as Guilt*, 88 FORDHAM L. REV. 2501, 2531–39 (2020) (highlighting how legal scholars conflate legal and factual guilt).

[124] *See* United States v. Booker, 543 U.S. 220, 245 (2005) (holding that the U.S. Sentencing

immutable characteristic of being a felon cannot be negated by arguing that it is entirely the fault of the offenders.[125]

The lack of political power that felons suffer cannot be more clearly seen than in the fact that the U.S. Constitution itself enshrines the right of the government to strip convicted persons of their ability to vote in the same amendment that guarantees equal protection of the law.[126] The states have embraced this constitutional provision wholeheartedly.[127] Felons in all but two states have been legally disenfranchised during or after incarceration, with eleven states permitting indefinite disenfranchisement.[128] To be clear, constitutional *permission* for felon disenfranchisement should not be confused with constitutional *approval* of prejudice against the felons so disenfranchised.[129] Although Section Two of the Fourteenth Amendment allows for disenfranchisement "for participation in rebellion, or other crime," there is no such language in Section One allowing for the denial of equal protection of the law for felons.[130] While the structure of the U.S. Constitution revolves around the establishment of the powers of the federal and state governments, the Amendments establish distinct and numerous protections for individuals against the political and legal power of these governments.[131] In this way, the U.S. Constitution and its Amendments predict the existence of political majorities and minorities, but while "[p]olitical inequality is clearly accepted in American constitutionalism;

Commission Guidelines are advisory; the federal sentencing statute "requires a sentencing court to consider the Guidelines ranges, . . . but it permits the court to tailor the sentence in light of other statutory concerns as well").

125 *Conviction by Prior Impeachment*, *supra* note 43, at 1993–94 ("[I]n an age of wrongful convictions, and mass production of convictions, it cannot be taken as a given that a conviction correlates to commission of the crime . . . . [S]ixteen percent of the [exonerated] convictions included in the National Registry of Exonerations were the result of a guilty plea."); Geiger, *supra* note 58, at 1192.

126 U.S. CONST. amend. XIV, § 2; *see* Richardson v. Ramirez, 418 U.S. 24, 54–55 (1974).

127 U.S. CONST. amend. XIV, § 2; *see Felon Voting Rights*, NCSL: NAT'L CONF. OF ST. LEGISLATURES (June 28, 2021), https://perma.cc/Z35K-A657.

128 *Felon Voting Rights*, *supra* note 127; *see* Geiger, *supra* note 58, at 1191. *See generally* CHRISTOPHER UGGEN, RYAN LARSON & SARAH SHANNON, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016 (2016), https://perma.cc/SG7K-MA3G (defining "felony disenfranchisement" as "laws restricting voting rights for those convicted of felony-level crimes" and detailing the staggering number of disenfranchised felons).

129 Geiger, *supra* note 58, at 1192, 1232; *see* Hunter v. Underwood, 471 U.S. 222, 233 (1985) (noting that the decision in *Richardson v. Ramirez* allows disenfranchisement laws but does not permit disenfranchisement enacted for the purpose of racial discrimination).

130 U.S. CONST. amend. XIV, §§ 1, 2.

131 *See* Geiger, *supra* note 58, at 1232–34.

inequality of oppressive legal burdens . . . is not."[132]

Besides experiencing disenfranchisement, felons have also been restricted from serving on juries, holding office, and testifying in court.[133] State legislatures often create statutes and regulations that prohibit the ability of felons to fully reenter into society, and the passing of such laws speaks to the inability of convicts to protect themselves in the political arena.[134] State regulations affect whether felons can find employment and housing, receive welfare benefits, access higher education, get drivers' licenses, and, as mentioned, vote.[135] Additionally, private employers may have access to the court and criminal records of prospective employees, either through free government access online to such records or by paying fees to private companies like LexisNexis and Westlaw.[136] The federal government regulates felons, as well, by barring anyone convicted of a drug-related felony from receiving federally-funded cash assistance and food stamps.[137] The federal government has also, through its spending power, incentivized states to suspend the licenses of individuals convicted of drug offenses.[138] The formerly incarcerated have little political wherewithal to change or even challenge the laws discriminating against them, because "the forces of social stigma incentivize political silence" for felons.[139]

Beyond political powerlessness, there is a long history in American culture of social prejudice against those with criminal histories.[140] More

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[132] Geiger, *supra* note 58, at 1234.

[133] Geiger, *supra* note 58, at 1225.

[134] *See* Geiger, *supra* note 58, at 1195, 1198 ("Upon release, it is not unusual for a formerly incarcerated person to possess nothing more than a bus ticket and $125.").

[135] Geiger, *supra* note 58, at 1198; *see* Weatherspoon, *supra* note 4, at 616.

[136] *See* Geiger, *supra* note 58, at 1199; *see also, e.g.*, *LexisNexis Public Records*, LEXIS NEXIS, https://perma.cc/F6JA-T26E (last visited Dec. 6, 2021); *PeopleMap on Westlaw*, THOMSON REUTERS, https://perma.cc/YN4T-VMC6 (last visited Dec. 6, 2021); *Public Case Search*, COMMONWEALTH OF MASS. APP. CTS., https://perma.cc/E9Y4-CNE4 (last visited Dec. 6, 2021). *See generally Privacy/Public Access to Court Records State Links*, NCSC: NAT'L CENTER FOR ST. CTS., https://perma.cc/HL7L-YVES (last visited Dec. 6, 2021).

[137] Geiger, *supra* note 58, at 1205. *See generally* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2168 (1996); Making Essentials Available and Lawful (MEAL) Act of 2020, H.R. 5915, 116th Cong. (2020) (seeking to remove the portion of Pub. L. No. 104-193 that makes incarcerated individuals ineligible for assistance and introduced in the Senate during the 117th Congress).

[138] *See* Geiger, *supra* note 58, at 1205. *See generally* Department of Transportation and Related Agencies Appropriations Act of 1992, Pub. L. No. 102-388, 106 Stat. 1520 (1992).

[139] Geiger, *supra* note 58, at 1227. *See generally* M. Eve Hanan, *Invisible Prisons*, 54 U.C. Davis L. Rev. 1185, 1213-16 (2020) (discussing the epistemic injustice that discredits the testimony of the incarcerated).

[140] *See* Geiger, *supra* note 58, at 1191.

importantly, this prejudice against felons and other ex-offenders has worsened since the early 1970s.[141] Incarceration rates since the beginning of the so-called "War on Drugs" have increased dramatically.[142] Political incentives lead prosecutors to be "tough on crime," and financial incentives ensure private prisons continue to fill their jails.[143] The "War on Drugs" and the "tough on crime" movement of the 1990s have led political representatives at the state and national levels to demean and denigrate criminal offenders.[144] Felons have fared no better at the hands of the media, which has thrived by covering crime and criminals on late night news channels.[145] Besides this, the number of fictional and true crime programs that focus on sensationalizing aspects of crime and the criminal mind serve to further prejudice the general public against the convicted[146] In the end, "[i]n the public eye, the generic criminal is likely to be the worst kind, and deserving legislative sanction."[147]

B. *The Injury Caused by Rule 609(a)(1)*

While felons may be a suspect class under the jurisprudence of the Supreme Court, the damage caused by Rule 609(a)(1) must be made clear in order to establish an Equal Protection Clause claim in a court of law.[148] Rule 609(a)(1) creates an inordinate number of injuries: it generally prejudices judges and juries against felons that are witnesses (indeed, that is the point of the rule); it denies felons the right given to other witnesses to not have propensity evidence used against them; and, most significantly, it impacts the testimonial ability and trial outcomes of criminal defendants.[149] Given

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[141] *See* Geiger, *supra* note 58, at 1191, 1194.

[142] *See* Geiger, *supra* note 58, at 1194; *see also* Powell & Hershenov, *supra* note 84, at 569. *See generally* Weatherspoon, *supra* note 4, at 606–07.

[143] *See* Roberts, *supra* note 11, at 600–01 ("[O]ne commentator has asserted that '[t]here is little doubt that admission of prior conviction evidence makes a prosecutor's job easier.' That would unquestionably be true if the prosecutor's job were to score a conviction by any means necessary."); *see also* Weatherspoon, *supra* note 4, at 611–12; 13TH, *supra* note 83.

[144] Geiger, *supra* note 58, at 1197; *see, e.g.*, Andrew Kaczynski, *Biden in 1993 Speech Pushing Crime Bill Warned of 'Predators on Our Streets' Who Were 'Beyond the Pale'*, CNN (Mar. 7, 2019), https://perma.cc/BBR4-PXT8. *See generally* 13TH, *supra* note 83.

[145] *See* Geiger, *supra* note 58, at 1197.

[146] *See e.g.*, *Criminal Minds* (CBS television series 2005–2020), *CSI: Crime Scene Investigation* (CBS television series 2000–2015), *NCIS* (CBS television series 2003-present), *Law & Order* (NBC television series 1990–2010), *Making a Murderer* (Netflix television series 2015–2018), *Conversations with a Killer: The Ted Bundy Tapes* (Netflix television series 2019).

[147] Geiger, *supra* note 58, at 1223; *see* Elizabeth Hinton, *Why We Should Reconsider the War on Crime*, TIME (Mar. 20, 2015, 7:00 AM EDT), https://perma.cc/8V7R-HQU2.

[148] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

[149] *See* FED. R. EVID. 607; FED. R. EVID. 609(a)(1); Hornstein, *supra* note 31, at 33–34. *See*

the heavy constitutional weight given to the rights of criminal defendants, the strongest argument against Federal Rule 609(a)(1) is the harm that it does to this group of felons.[150]

The ability of prosecutors to impeach a witness's character for truthfulness with prior convictions dramatically impacts the trials of criminal defendants that are felons.[151] First and foremost, regardless of any other outcome, Federal Rule 609(a)(1) directly affects whether criminal defendants will choose to testify.[152] The prejudicial effect of impeachment evidence can be significant, but if a defendant chooses not to testify, a jury may improperly assume that the defendant's silence is an indication of guilt.[153] Thus, the felon defendant loses what has been the primary argument for allowing felons to testify in the first place—the ability to tell their side of the story.[154] If the defendant chooses not to testify after past convictions are admitted, or if a defendant chooses to testify about past convictions during direct examination to lessen their prejudicial effect, the defendant loses the right to appeal the admission of this conviction evidence, creating a "damned if you do, damned if you don't" dilemma.[155] Given this

generally Roberts, *supra* note 11.

[150] *See* Hornstein, *supra* note 31, at 38–40 (outlining the development of the defendant's right to testify on his or her own behalf). *See generally* U.S. CONST. amend. I–X.

[151] *See* Roberts, *supra* note 11, at 600–01 ("Prosecutors are frequently obtaining permission to impeach—defendants are impeached in over seventy percent of cases . . . . [P]rosecutors are thought to proffer this evidence *with the intention* that it be used for unauthorized purposes."); Hornstein, *supra* note 31, at 4–5.

[152] *See* Roberts, *supra* note 11, at 564 ("[I]n one recent study of exonerated defendants, the most common reason given for their decision not to testify was their fear of prior conviction impeachment."); *Conviction by Prior Impeachment*, *supra* note 43, at 1978–79 ("Like Odysseus, defendants must attempt to sail between Scylla and Charybdis, choosing whether to waive their right to testify, and thus either plead guilty or remain mute at trial, or to take the witness stand and risk the demolition of their testimony through the use of their criminal records. . . . [A]ll too often, the result of impeachment—actual or threatened—is virtually automatic conviction.").

[153] *See* Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 407–09 (2018); Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 861–63 (2016); Roberts, *supra* note 11, at 574.

[154] *See* Roberts, *supra* note 11, at 575 ("Finally, it keeps the defendant from experiencing one core aspect of procedural justice: the experience of having a voice in the proceedings."); Hornstein, *supra* note 31, at 19–20; McGowan, *supra* note 32, at 14 (noting that a defendant "may not be guilty of the particular crime for which he has been picked up" and "[h]is only defense may be his own story, and sometimes at least that story may be a plausible one").

[155] *See* Ohler v. United States, 529 U.S. 753, 755 (2000) (holding that if a defendant discusses his criminal record on direct examination, the defendant cannot appeal the evidentiary ruling); Luce v. United States, 469 U.S. 38, 42–43 (1984) (holding that if an evidentiary ruling permits impeachment and a defendant refrains from testifying, the defendant cannot appeal the evidentiary ruling); Roberts, *supra* note 11, at 573; *Conviction by Prior Impeachment*, *supra* note 43,

predicament, criminal defendants frequently choose to forego trial altogether and enter into plea bargaining with the prosecution instead.[156]

Some studies suggest that the introduction of past convictions in order to impeach increases the chance of further conviction.[157] It is certainly unrealistic to assume that jurors will always fully comprehend or fully abide by limiting instructions advising them to only consider past convictions for their ability to impeach a witness.[158] And while Rule 609(a)(1) rests on the assumption that past convictions reliably demonstrate a felon's character of truthfulness, in reality, past convictions may be anything but reliable evidence of a defendant's character given the high levels of wrongful conviction and racial discrimination within the criminal system.[159] The assumption that past convictions are a reliable indicator of moral culpability because they were the product of a "fair fight" is further undermined by the consistent lack of funding for public defenders and the pressures faced by those charged with a crime to plea out.[160] There are also significant indicators that the "War on Drugs" has created incentives for the judiciary itself to admit evidence that fails to adhere to the protections of the Bill of Rights, as courts have allowed "vague and over-inclusive search warrants" and "searches conducted in the absence of warrants and without either probable cause or individualized suspicion" in an effort to combat the drug crisis.[161]

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at 1986–87.

[156] Roberts, *supra* note 11, at 565.

[157] *See* Roberts, *supra* note 11, at 565.

[158] *See* Ted Sampsell-Jones, *Preventive Detention, Character Evidence, and the New Criminal Law*, 2010 UTAH L. REV. 723, 732; Ric Simmons, *An Empirical Study of Rule 609 and Suggestions for Practical Reform*, 59 B.C. L. REV. 993, 1013–18 (2018); Roberts, *supra* note 11, at 578; *Conviction by Prior Impeachment*, *supra* note 43, at 1997 ("[T]he word 'felony,' through its prejudicial effect, may prevent the jury from hearing anything else. In addition, the jury already has every reason to suspect that a defendant faced with the loss of liberty and perhaps life might shape his or her testimony in order to maximize the possibility of acquittal."); Bellin, *supra* note 153, at 403 ("If jurors used prior convictions as the law intends, past crimes that undermined the defendant's truthful character, such as perjury, would be the most damaging to defendants' chances of acquittal. Yet empirical research has shown that even when properly instructed, mock jurors convict most readily when presented with prior crimes that are similar to the charged crime . . . .").

[159] Roberts, *supra* note 11, at 566 ("Courts often assume that convictions are the product of a fair fight—despite the nature of plea-bargaining, the collapse of public defense, and the data on wrongful convictions. Moreover, courts often assume that convictions demonstrate relative culpability—despite the racial and other disparities that pervade law enforcement. And lastly, courts often assume that convictions connote moral culpability—despite the growth of prosecutions that require no culpable mental state."); *see Conviction by Prior Impeachment*, *supra* note 43, at 1995.

[160] *See* Roberts, *supra* note 11, at 580–85; Hornstein, *supra* note 31, at 10–12.

[161] Powell & Hershenov, *supra* note 84, at 578–79 ("Perhaps the judiciary's single most

The government may argue that Federal Rule 609(b) and Federal Rule 609(c) mitigate the injuries caused by Rule 609(a)(1) by encouraging a stronger balancing test for convictions older than 10 years and by disallowing the admission of convictions that have been the subjects of pardons by findings of innocence or certificates of rehabilitation.[162] However, the majority of offenders are arrested at least once *within* ten years of being released, seriously lessening the alleviating power of Rule 609(b).[163] Rule 609(c)'s ability to prevent the admission of convictions where the defendant has been found innocent or rehabilitated provides little recompense to Rule 609(a)(1) given the difficult and lengthy processes of overturning wrongful convictions and obtaining certificates of rehabilitation.[164] Even Rule 609(a)(1)'s balancing tests, specifically designed to moderate the prejudicial effect of past convictions, still allow judges to admit these prior convictions in a way that permits the continuation of injustice.[165]

C. *Federal Rule 609(a)(1) Fails a Test of Strict Scrutiny*

Because Federal Rule 609(a)(1) acts against the suspect class of felons in a facially discriminatory manner, the test of strict scrutiny must be applied to determine if the federal government's action has been narrowly tailored to serve a compelling governmental interest.[166] Unlike other suspect classes, the class of felons is one that the government has many reasons to regulate.[167]

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destructive contribution to the drug war has been its creation of the 'drug exception to the Constitution.'").

[162] *See* FED. R. EVID. 609(b); FED. R. EVID. 609(c).

[163] 2018 Update, *supra* note 9, at 1 (noting that five out of six prisoners released in 2005 were arrested at least once within nine years after their release).

[164] *See generally* MARGARET LOVE & APRIL FRAZIER, CERTIFICATES OF REHABILITATION AND OTHER FORMS OF RELIEF FROM THE COLLATERAL CONSEQUENCES OF CONVICTION: A SURVEY OF STATE LAWS (2006), https://perma.cc/N8A7-NPHR (surveying various states to understand the process of obtaining rehabilitation certificates); *All Cases*, INNOCENCE PROJECT, https://perma.cc/76MF-HMWD (last visited Dec. 6, 2021) (listing clients who have had wrongful convictions overturned after years in prison); *Wrongful Conviction*, EQUAL JUSTICE INITIATIVE, https://perma.cc/2V8K-SYE5 (last visited Dec. 6, 2021) (noting that those exonerated of wrongful convictions spent an average of almost nine years in prison).

[165] Roberts, *supra* note 11, at 565 ("[A] vicious cycle continues to be perpetuated: convictions that may have been the product of something less than a fair fight may help to make the next fight less fair, and convictions that may not have been based on culpability may help bring about more convictions of the same kind."); *see Conviction by Prior Impeachment*, *supra* note 43, at 2006–07 (outlining how prior conviction impeachment is a "collateral consequence" that heightens the risk of additional convictions).

[166] *See* Johnson v. California, 543 U.S. 499, 505 (2005); Plyler v. Doe, 457 U.S. 202, 217 (1982).

[167] Geiger, *supra* note 58, at 1229.

However, this does not give the government unlimited license to determine all felons to be "members of an unreformable class" that cannot be trusted as witnesses.[168] Because Rule 609(a)(1) has not been narrowly tailored to serve a compelling governmental interest, Rule 609(a)(1) fails the test of strict scrutiny and therefore must be held as unconstitutional.[169]

The government interest at stake here, while not directly stated in Rule 609(a)(1), is the interest at stake in every trial, whether civil or criminal: the quest for truth and justice.[170] Rule 609(a)(1) allows prior convictions to be admitted only to impeach the character of a witness for truthfulness.[171] The ability of juries and judges to determine a witness's credibility ensures the overall goal of the Federal Rules of Evidence—clearly a compelling interest.[172]

However, Federal Rule 609(a)(1) is by no means narrowly tailored to achieve this objective.[173] The Rule permits for the impeachment of *all* felons for crimes specifically *not* related to truthfulness (as those are admitted under Federal Rule 609(a)(2)).[174] Federal Rule 609(a)(1) paints all felons with a broad brush, treating them the same regardless of type of crime or evidence of efforts to rehabilitate.[175] Rule 609(a)(1) does not consider whether a conviction is punishable by incarceration for a year and a day, ten years, or by death—under the Rule, all felony convictions are considered equally reliable indicia of a witness's character for truthfulness.[176]

The drafters and federal government may argue that the admission of prior conviction impeachment under Rule 609(a)(1) is narrowly tailored to each individual witness through the use of the judicial balancing tests included in the Rule.[177] Yet, the language of each of the balancing tests lacks any real specificity.[178] Each judge must decide for herself what it means for a piece of evidence to have probative value or prejudicial effect.[179] In fact, the

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[168] Geiger, *supra* note 58, at 1229.

[169] *See Johnson*, 543 U.S. at 499.

[170] FED. R. EVID. 102 ("These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."); *see* Green, *supra* note 15, at 1108.

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

[172] *See* FED. R. EVID. 102.

[173] *See* FED. R. EVID. 609(a)(1).

[174] *Id.*; FED. R. EVID. 609(a)(2).

[175] *See* FED. R. EVID. 609(a)(1).

[176] *See id.*

[177] *See id.*

[178] *See id.*

[179] *See id.*

language of Rule 609(a)(1) is *purposefully* vague to allow for the kind of judicial discretion encouraged by *Luck v. United States* and *Gordon v. United States*.[180] This general vagueness, however, has resulted in judges exercising discretion in vastly different ways.[181] For example, judges have used the *Gordon* factors of interpretation to weigh the similarity of past convictions to current charges both for *and* against admissibility.[182]

Federal Rule 609(a)(1) is imprecise in its text and application, and so it clearly does not meet the "narrowly tailored" standard set by the jurisprudence of the Supreme Court.[183] Narrowly tailored means the government must not use the immutable characteristic of a suspect class in a way that is outcome determinative.[184] In cases regarding affirmative action, for example, the Court has found that race, as a suspect classification, cannot be the dispositive factor in college admissions.[185] Universities that gave too much weight to race in an effort to achieve greater diversity in higher education—a compelling interest—were found to have unconstitutional admission policies.[186] Comparing these affirmative action cases to the application of Rule 609(a)(1), most federal judges, in trying to interpret and apply the balancing tests of the Rule, rely on the *Gordon* factors to weigh the probative value versus prejudicial effects of past conviction evidence.[187] Each of these *Gordon* factors relates to details of the very convictions that define defendants or witnesses as felons.[188] In other words, under Rule 609(a)(1), there are no factors a judge could consider and no outcomes on admissibility that are distinct from a felon's immutable characteristic.[189]

Finally, Rule 609(a)(1) cannot be considered to be narrowly tailored because there are plenty of other means to achieve the government's

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[180] *See id.*; 348 F.2d 763, 768 (D.C. Cir. 1965); Williams, *supra* note 26, at 900.

[181] Roberts, *supra* note 11, at 569–70.

[182] *See* Roberts, *supra* note 11, at 569; Williams, *supra* note 26, at 900; *Conviction by Prior Impeachment*, *supra* note 43, at 2001.

[183] *See* FED. R. EVID. 609(a)(1); Gratz v. Bollinger, 539 U.S. 244, 270 (2003).

[184] *See, e.g.*, Fisher v. Univ. of Tex., 570 U.S. 297, 311–12 (2013); Grutter v. Bollinger, 539 U.S. 306, 338–39 (2003); *Gratz*, 539 U.S. at 270; Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978).

[185] *See, e.g.*, *Fisher*, 570 U.S. at 311–12; *Grutter*, 539 U.S. at 338–39; *Gratz*, 539 U.S. at 270; *Bakke*, 438 U.S. at 315.

[186] *See, e.g.*, *Fisher*, 570 U.S. at 311–12; *Grutter*, 539 U.S. at 338–39; *Gratz*, 539 U.S. at 270; *Bakke*, 438 U.S. at 315.

[187] FED. R. EVID. 609(a)(1); Roberts, *supra* note 11, at 569; *see* Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967).

[188] *See Gordon*, 383 F.2d at 940; Roberts, *supra* note 11, at 569.

[189] *See* FED. R. EVID. 609(a)(1); Roberts, *supra* note 11, at 569.

compelling interest of attaining truth and ensuring justice is done.[190] There are other Rules of Evidence by which parties may impeach the credibility of a witness, including ample other reasons under Rule 404(b) for which prosecutors may introduce past convictions, such as proving bias or motive.[191] Because Federal 609(a)(1) is not narrowly tailored to meet the compelling interest of ascertaining truth and securing justice, it must fail a strict scrutiny test and therefore be deemed unconstitutional.[192]

D. *Alternately, Federal Rule 609(a)(1) Fails a Test of Intermediate Scrutiny*

As argued, felons should fit within the Supreme Court's jurisprudence regarding the identification of suspect classes.[193] However, the point raised that felons are the creators of their own immutable characteristic may be used by a court to determine that they should be considered a quasi-suspect rather than suspect class.[194] Indeed, the Supreme Court has been reluctant to create new suspect classes beyond race, national origin, and alienage, but in instances where a class almost meets the criteria for being a "discrete and insular minority," the Supreme Court has recognized it as quasi-suspect.[195] When government action facially discriminates against a quasi-suspect class, courts must apply the test of intermediate scrutiny, which requires that discriminatory action be substantially related to the furtherance of important governmental objectives.[196] Federal Rule 609(a)(1) fails this test.[197]

The important governmental objective is the same under intermediate scrutiny and strict scrutiny–the ultimate goals of litigation are truth and justice.[198] This Note has already challenged the government's employment of Federal Rule 609(a)(1) as overly broad rather than narrowly tailored, but

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[190] *See* FED. R. EVID. 102; FED. R. EVID. 609(a)(1).

[191] FED. R. EVID. 404(b); FED. R. EVID. 608(a) (allowing for impeachment by reputation or opinion); FED. R. EVID. 608(b) (allowing inquiry into specific incidents related to truthfulness on cross-examination); FED. R. EVID. 613 (allowing for extrinsic evidence of a prior inconsistent statement); FED. R. EVID. 801(d)(1)(A) (allowing the introduction of prior inconsistent statements into evidence); *see* Roberts, *supra* note 11, at 576–77.

[192] *See* FED. R. EVID. 609(a)(1); Gratz v. Bollinger, 539 U.S. 244, 270 (2003).

[193] *See supra* Part III(A).

[194] *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 219–20 (1982) (illustrating that if a class does not meet all the characteristics of a suspect class, they may be treated as a quasi-suspect class).

[195] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 533 (1996) (affirming gender as a quasi-suspect class requiring intermediate scrutiny); *Plyler*, 457 U.S. at 230 (establishing that undocumented children, whose immutable characteristic of illegality could be changed only upon their maturation, were a quasi-suspect class in terms of access to public education).

[196] *Virginia*, 518 U.S. at 516.

[197] *See infra* Part III(D).

[198] FED. R. EVID. 102.

the question remains as to whether the rule is "substantially related" to achieving the government's objective.[199] The answer must assuredly be no, for the Supreme Court has made it clear that facial discrimination of a quasi-suspect class cannot be based on general stereotypes, but must have a foundation in actually significant data.[200] In *Craig v. Boren*, for example, the Court's majority found the rationale that young men drink and drive more than young women to be insufficient justification for a law prohibiting the sale of light beer to eighteen to twenty-year-old men (but not to women of the same age).[201] The Court struck down the Oklahoma statute, holding that the goal of traffic safety, while an important objective, was not furthered given the insignificant differential between men and women's tendency to drive under the influence of alcohol.[202] The Court found the statistics offered by Oklahoma to be unconvincing, concluding that "the showing offered by the appellees does not satisfy us that sex represents a legitimate, accurate proxy for the regulation of drinking and driving."[203]

Felons under Federal Rule 609(a)(1) are analogous to eighteen to twenty-year-old men in *Craig v. Boren* in that the assumption that a past conviction indicates a willingness to lie under oath is an archaic stereotype.[204] The courts and drafters of Rule 609(a)(1) concluded that because felons broke the law once, they will be more likely to break the law of perjury—in other words, felons are "ready and willing to do evil."[205] Social science specifically rejects the stereotypical rationale behind Rule 609(a)(1) that "all felons are liars."[206] Furthermore, not all felony convictions require the demonstration

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[199] *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

[200] *See id.* at 198–99.

[201] *Id.* at 199.

[202] *Id.* at 199–201 (noting that .18% of females versus 2% of males aged 18 to 20 were arrested for driving under the influence, an inadequate "basis for employment of a gender line as a classifying device").

[203] *Id.* at 202–04.

[204] *See* FED. R. EVID. 609(a)(1); *Craig*, 429 U.S. at 200–01. *See generally* Julia Simon-Kerr, *Credibility by Proxy*, 85 GEO. WASH. L. REV. 152, 155–58 (2017) (arguing impeachment rules estimate the credibility of witnesses based on reputation and compliance with "norms of worthiness" to society more than on actual truthfulness).

[205] Walden v. Georgia-Pacific Corp., 126 F.3d 506, 523 (3d Cir. 1997) (noting that Rule 609 is "premised on the common sense proposition that one who has transgressed society's norms by committing a felony is less likely than most to be deterred from lying under oath."); Roberts, *supra* note 11, at 587; *see* Hornstein, *supra* note 31, at 13–14 (outlining the inferential chain required by Rule 609(a)(1)'s assumption).

[206] Teree E. Foster, *Rule 609(a) in the Civil Context: A Recommendation for Reform*, 57 FORDHAM L. REV. 1, 5 (1988); Robert D. Okun, *Character and Credibility: A Proposal to Realign Federal Rules of Evidence 608 and 609*, 37 VILL. L. REV. 533, 545–46 (1992) ("[O]ur common sense tells us that a convicted murderer would be more likely to lie on the witness stand than Mother

of a culpable mental state, with the result that not all felons have been legally demonstrated to have criminal intent at all.[207] In addition, if convictions are the result of plea bargaining, there is no proof beyond a reasonable doubt that a defendant broke the law in the first place, meaning that many convictions are much more indicative of a felon's estimation of the outcome of a trial than a felon's moral bankruptcy and willingness to lie.[208] In the end, Rule 609(a)(1) acts in opposition to the government's own goals of "ascertaining the truth and securing a just determination" by encouraging juries to discount the testimony of felon witnesses.[209] Thus, Federal Rule 609(a)(1) cannot be said to be substantially related to the furtherance of an important governmental objective, and as it fails a test of intermediate scrutiny, it is therefore unconstitutional.[210]

IV. In the Alternative, Federal Rule 609(a)(1) Must Be Rejected Based on *Oregon v. Mitchell* or Under an Enhanced Rational Basis Test

A. *Federal Rule 609(a) Appears Facially Neutral Under the* Arlington Heights *Factors but Should Be Rejected Based on* Oregon v. Mitchell

The Supreme Court established in *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.* that even if government action seems neutral on its face, strict scrutiny may still apply if the government action can be shown to have been the product of invidious discrimination.[211] Discriminatory impact alone will not warrant a determination of invidiousness.[212] In addition to disproportionate impact, the discriminatory

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Theresa. . . . Nonetheless, a large body of scientific research has been developed over the last thirty years that calls into question this common sense notion . . . ."); Roberts, *supra* note 11, at 576.

[207] Roberts, *supra* note 11, at 588.

[208] Roberts, *supra* note 11, at 590–91; *see* Thea Johnson, *Fictional Pleas*, 94 Ind. L. J. 855, 885 n.156 (2019); Hornstein, *supra* note 31, at 10 ("[T]here is a real question about whether the reasonable doubt standard serves to assure the integrity of the underlying convictions that may be used to impeach when a very substantial majority of all criminal convictions are not the result of trial determinations, but of plea bargains.").

[209] FED. R. EVID. 102; *see* FED. R. EVID. 609(a)(1); *Conviction by Prior Impeachment*, *supra* note 43, at 2003 ("[T]he silencing of the criminal defendant has troubling consequences for both the fact finder and the pursuit of truth. . . . While prior conviction impeachment offers some information about the defendant's past, when it chills defendant testimony it deprives jurors of information that may be important in order for them to fulfill their roles as fact finders.").

[210] *See* United States v. Virginia, 518 U.S. 515, 555–57 (1996).

[211] 429 U.S. 252, 265–66 (1977).

[212] Washington v. Davis, 426 U.S. 229, 242 (1976). *But cf.* Charles R. Lawrence III, *The ID, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322–24 (1987) (arguing that the *Washington v. Davis* decision requiring intentional, invidious discrimination

intent of government action may be inferred from its historical background, the sequence of events leading up to it, any departures from normal procedure, substantive departures from procedure, and the legislative or administrative history behind a government action.[213] However, the government still has an opportunity to demonstrate that a nondiscriminatory rationale would have produced the same action and result:

> To establish a violation of the [F]ourteenth [A]mendment in the face of mixed motives, plaintiffs must prove by a preponderance of the evidence that racial discrimination was a substantial or motivating factor. . . . They shall then prevail unless the registrars prove by a preponderance of the evidence that the same decision would have resulted had the impermissible purpose not been considered.[214]

Under the *Arlington Heights* test, the Supreme Court determined in *Hunter v. Underwood* that a provision of the Alabama Constitution disenfranchising those convicted of crimes of "moral turpitude" violated the Equal Protection Clause.[215] While the language of the provision was neutral, the legislative history indicated that the motivating factor behind the provision was a desire to disenfranchise Black citizens of Alabama—white delegates to the constitutional convention in 1901 sought to include in the definition of crimes of "moral turpitude" specifically crimes believed to be "more frequently committed by blacks."[216]

The disparate impact of Federal Rule 609(a)(1) lies in the fact that Black individuals are disproportionately arrested, convicted, and incarcerated in the United States; therefore any rule that relies upon past convictions will disproportionately target Black people.[217] However, the procedure by which the Federal Rules of Evidence were created and the Advisory Committee notes on Rule 609(a)(1) do not demonstrate evidence of discriminatory intent

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does not fully address the "common historical and cultural heritage in which racism has played and still plays a dominant role").

[213] *Arlington Heights*, 429 U.S. at 268.

[214] Hunter v. Underwood, 471 U.S. 222, 225 (1985); *Arlington Heights*, 429 U.S. at 270.

[215] 471 U.S. at 222–23.

[216] *Id.* at 227.

[217] *See* Weatherspoon, *supra* note 4, at 606–12 (relating the number of Black men in federal prisons, state prisons, and local jails); Gonzales Rose, *supra* note 84, at 2272–73 ("[U]sing Rule 609 against a defendant of color encourages fact-finders to rely implicitly on racial character evidence . . . 'as most Americans associate Blacks with crime, revealing a Black defendant's prior convictions under Rule 609 reinforces widely held stereotypes about Blacks and encourages jurors to engage in *reasonable* racism.'"). *See generally* 13TH, *supra* note 83.

against one race.[218] Without demonstrating some evidence of the *Arlington Heights* factors beyond disparate impact, the argument might be that invidious discrimination cannot be proven in the drafting of Rule 609(a)(1), and therefore strict scrutiny does not apply.[219]

However, even if strict scrutiny does not apply under *Arlington Heights*, an earlier line of Equal Protection Clause jurisprudence regarding literacy tests and voting rights illustrates that proof of invidious discrimination can be demonstrated outside of a singular government action.[220] In *Gaston County v. United States*, for example, the Supreme Court held that because Gaston County had "systemically deprived its Black citizens of the educational opportunities it granted to its white citizens," even a neutral "administration of the literacy test today would serve only to perpetuate these inequities in a different from."[221] The Supreme Court went even further in *Oregon v. Mitchell*, upholding Congressional legislation being challenged by the state of Arizona that prohibited the use of literacy tests altogether.[222] Even without evidence that the literacy test was drafted or administered with invidious intent, and despite the fact that Arizona's education system was found to be nondiscriminatory, the Supreme Court held that because of the widespread discrimination against Black citizens throughout the United States "the use of literacy tests anywhere within the United States has the inevitable effect of denying the vote to members of racial minorities whose inability to pass such tests is the direct consequence of previous governmental discrimination in education."[223]

Under the type of analysis utilized in *Oregon v. Mitchell* and *Gaston County*, Federal Rule 609(a)(1) need not, by itself, be drafted with invidious intent or be administered in a discriminatory manner to be rejected.[224] Instead, invidious discrimination against Black individuals can be found in the history of the mass incarceration of Black people in this country.[225] The

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[218] *See* H.R. COMM. ON THE JUDICIARY, REPORT ON THE FEDERAL RULES OF EVIDENCE, H.R. REP. NO. 93-650, at 11 (1973); *Federal Rules of Evidence: Hearings on H.R. 5463 Before the Comm. on the Judiciary*, 93d Cong. 25, 124–25, 150–51 (1974).

[219] *See* Washington v. Davis, 426 U.S. 229, 242 (1976); 429 U.S. at 265–66.

[220] Gaston County v. United States, 395 U.S. 285, 297 (1969).

[221] *Id.*

[222] 400 U.S. 112, 118 (1970), *superseded by Constitutional amendment*, U.S. CONST. amend. XXVI, *as recognized by* Johnson v. Bush, 405 F.3d 1214 (11th Cir. 2005) (affirming a ban on literacy tests but rejecting the lowering of the voting age in state elections from 21 to 18; Amendment XXVI superseded the case only in establishing 18 as the voting age and not in the decision's rejection of literacy tests).

[223] *Id.* at 235.

[224] *See id.* at 209; *see also Gaston*, 395 U.S. at 287.

[225] Powell & Hershenov, *supra* note 84, at 569–70 ("[Y]oung black men compromise fully half

criminal system disproportionately targets and convicts Black individuals and gives them harsher sentences than white criminal defendants,[226] and the laws created by states following the Thirteenth Amendment were specifically designed to incarcerate Black people.[227] State legislatures further crafted disenfranchisement laws with the specific intent of discriminating against Black people in order to render them politically powerless, as noted in *Hunter v. Underwood*.[228] Federal Rule 609(a)(1) thus further perpetuates the inherent discrimination and injustices of the criminal system.[229] Therefore, based on *Oregon v. Mitchell*, Rule 609(a)(1) may be challenged as unconstitutional despite the *Arlington Heights* factors not being met, and Congress has not only the power, but the obligation, to reject it.[230]

B. *Alternately, Federal Rule 609(a) Fails an Enhanced Rational Basis Test*

When a class is found to be neither suspect nor quasi-suspect, the discrimination against that class usually undergoes the judicial test of rational basis—if the government can provide any reason at all for its discriminatory intent, then the law withstands judicial scrutiny.[231] In very limited circumstances, however, an enhanced rational basis test requiring evidence supporting the government's rationale may apply.[232] The Court

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of the total inmate population in the United States—despite the fact that they constitute only about five percent of the country's population. . . . Black men are now four times more likely to be incarcerated in the United States than they are in South Africa. . . . Currently there are more African-American men in prison than in college."). *See generally* Weatherspoon, *supra* note 4; 13TH, *supra* note 83.

226 Stevenson, *supra* note 83; Powell & Hershenov, *supra* note 84, at 609–12.

227 *See generally* Weatherspoon, *supra* note 4; 13TH, *supra* note 83.

228 471 U.S. 222, 228–29 (1985); *see, e.g.*, Cotton v. Fordice, 157 F.3d 388, 391 (5th Cir. 1998) (noting the Mississippi offender provision in effect from 1890 to 1968 "was motivated by a desire to discriminate against blacks") (quoting *Hunter*, 471 U.S. at 233); Ratliff v. Beale, 74 Miss. 247, 247 (1896) (explaining that the Mississippi constitutional convention "swept the circle of expedients to obstruct the exercise of the franchise" by Black individuals).

229 *See* Hornstein, *supra* note 31, at 10–12.

230 *See* 400 U.S. 112, 235–236 (1970), *superseded by Constitutional amendment*, U.S. CONST. amend. XXVI, *as recognized by* Johnson v. Governor of Fla., 405 F.3d 1214 (11th Cir. 2005); *see also* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp. (Arlington Heights), 429 U.S. 252, 266–68 (1977) (setting out factors to determine invidious discrimination but not rejecting the conclusion of *Oregon v. Mitchell* that Congress has the power under Section 5 of the 14th Amendment to enforce the Equal Protection Clause of Section 1).

231 *See supra* Part I(D).

232 *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–50 (1985), *superseded by statute*, Fair Housing Act, 42 U.S.C. § 3604, *as recognized by* Human Res. Research and Mgmt. Grp., Inc. v. County of Suffolk, 687 F. Supp. 2d 237, 255–56. As discussed in *note 77*, while the Fair Housing Act now statutorily prohibits discrimination against disabled individuals, *City of*

utilized this type of heightened analysis in *City of Cleburne v. Cleburne Living Ctr.*, where all of the reasons given by the City of Cleburne to deny a permit for a home for the mentally impaired revolved around subjective and irrational beliefs about the mentally impaired.[233] The Supreme Court determined that because the City of Cleburne could not provide a rationale untainted by prejudice that its actions failed an enhanced rational basis test.[234] The Court held that the government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational," and a "desire to harm a politically unpopular group" is not a legitimate state interest.[235] As the Supreme Court noted, "private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[236]

Rule 609(a)(1) purportedly serves the legitimate governmental interest of ascertaining truth and seeking justice.[237] However, the assumption beneath the rule that "all felons are liars" is clearly prejudicial and arbitrary.[238] Social science rejects a connection between past conviction and veracity, and, as this Note has argued, past convictions may have little to do with criminal intent and the character for truthfulness of an individual.[239] The fact that Rule 609(a)(1) distinguishes felons as a class based on their past convictions is remarkably analogous to the situation in *City of Cleburne*.[240] The Rule, rather than providing any truly rational reason why prior convictions should be allowed to impeach felons, codifies the bias against ex-offenders ever present in American culture.[241] Because the rationale behind Rule 609(a)(1) irrationally discriminates against felons in this manner, it fails an enhanced rational basis test.[242]

Cleburne may still be used as an example of an enhanced rational basis test.

[233] *See id.* at 447–51 (listing the city's reasons for denying the permit, such as a conjecture that the junior high school students across the street from the home might harass the residents, all of which rested on an "irrational prejudice" against the mentally impaired).

[234] *Id.* at 450.

[235] *Id.* at 446–47; *see also* Jones v. Governor of Fla., 950 F.3d 795, 814 (11th Cir. 2020).

[236] *City of Cleburne*, 473 U.S. at 448 (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)).

[237] *See* FED. R. EVID. 102; FED. R. EVID. 609(a)(1).

[238] *See City of Cleburne*, 473 U.S. at 446–47; *Conviction by Prior Impeachment*, *supra* note 43, at 2015–16 (noting that Rule 609 encourages propensity evidence specifically rejected by other rules of evidence, but perhaps it remains because the idea of a convicted individual being "by nature a 'criminal'" permeates the entire criminal legal system).

[239] *See supra* Part III(B) (discussing how plea bargaining, strict liability felonies, wrongful incarceration, and socioeconomic factors, including systemic racism, all contribute to felony convictions).

[240] *See* FED. R. EVID. 609(a)(1); *City of Cleburne*, 473 U.S. at 450.

[241] *See generally* Roberts, *supra* note 11.

[242] *Cf. City of Cleburne*, 473 U.S. at 450.

CONCLUSION

Given the arbitrary rationale, inconsistent application, and damaging consequences of Federal Rule 609(a)(1), it must be rejected under an Equal Protection Clause analysis and consequently stricken from Federal Rule of Evidence 609. Rule 609(a)(1) separates and punishes felons as a class without consideration for the individual culpability and rehabilitative efforts of the formerly incarcerated. Felons, as a suspect (or quasi-suspect) class, have been historically discriminated against, and, as a result of widespread disenfranchisement, they lack the political power to combat the restrictive laws they encounter on a daily basis. An analysis of Rule 609(a)(1) under a test of strict scrutiny, or even intermediate scrutiny, demonstrates that Rule 609(a)(1) violates the Equal Protection Clause because it is not narrowly tailored or substantially related to the governmental objective of seeking truth and justice. Rule 609(a)(1) even fails under *Oregon v. Mitchell* and an enhanced rational basis test for one simple reason: *not* all felons are liars. To treat them as such, especially given the disproportionate targeting and conviction of Black individuals by the criminal system, counteracts the very point of the Fourteenth Amendment—that all individuals should be treated equally under the law.