

10-1-2014

This Is Your Sword: How Damaging Are Prior Convictions to Plaintiffs in Civil Trials?

Kathryn Stanchi

Deirdre Bowen

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THIS IS YOUR SWORD: HOW DAMAGING ARE PRIOR CONVICTIONS TO PLAINTIFFS IN CIVIL TRIALS?

Kathryn Stanchi* & Deirdre Bowen**

Abstract: The conventional wisdom in law is that a prior conviction is one of the most powerful and damaging pieces of evidence that can be offered against a witness or party. In legal lore, prior convictions seriously undercut the credibility of the witness and can derail the outcome of a trial. This Article suggests that may not always be true.

This Article details the results of an empirical study of juror decision-making that challenges the conventional wisdom about prior convictions. In our study, the prior conviction evidence did not have a direct impact on the outcome of the civil trial or the credibility of the witness with the conviction. Moreover, we tested prior conviction evidence with a white witness and an African-American witness and saw no difference in results.

The prior conviction evidence did, however, change the trial in a substantial, but indirect, way. Rather than the direct effect on outcome that we might have expected, the introduction of the prior conviction evidence changed the mental decision-making process of the jurors. Specifically, the evidence seemed to subconsciously lead the jurors to conclude that to decide liability, they had to believe one party over the other. The prior conviction evidence thus turned the trial into a zero-sum credibility contest wherein believing the plaintiff's story necessarily meant disbelieving the defendant's (and vice versa). This "zero-sum" effect did not appear in the control version of the trial.

* Professor of Law, Temple University Beasley School of Law. J.D. 1990. This paper was generously supported by grants from both Temple Law School and Drexel Law School. It took a village to do this study. I want to express my deep thanks to: Daniel Rendine and the Philadelphia Jury Commission, who were unfailingly gracious with our intrusion into their orderly jury selection process; all the lawyers who gave us excellent critique on the trial transcripts (Eddie Ohlbaum, Sara Jacobson, John Mitchell, Rich Barrett, Daniel Rendine); Kip Williams, an expert on trial studies who took time to review our transcript; Linda Berger, Sara Gordon, Laura Little, and Greg Mandel, who generously gave comments on prior drafts; and my brave and dogged research assistants Tam Tran, Sumble Manzoor, Libra McNeese, and Penni Winberg (who persevered with the study in the face of indifference and worse from some dismissed Philly jurors). I would like to dedicate this Article to my friend and colleague, Eddie Ohlbaum, who shared his extensive trial knowledge with us at every stage of this process and who generously gave us the support of Temple's Trial Team to make the videos. Eddie passed away in March 2014. He was one of the best trial lawyers I have ever had the privilege of knowing and I learned something from him every time we spoke.

** Associate Professor of Law, Seattle University School of Law. J.D. 1990; Ph.D. 2002. Many thanks to the wonderful people at the Snohomish County Courthouse, especially Kathy Haggerty, who was incredibly supportive throughout our months of data collection. I am deeply grateful to my superb research assistants, Sarah Albertson and Valerie Quesada. However, a special thank you goes to my research assistant, Peter Rudolf, whose dedication to this project has gone beyond any reasonable call of duty.

In sum, the results of our experiment suggest that while prior convictions are highly noticeable and powerful pieces of evidence, they may not always be the bane that lawyers think they are. Nevertheless, the introduction of this evidence has the potential to change a civil trial by changing the juror decision-making process.

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INTRODUCTION

Embedded in the law are strong beliefs about prior criminal convictions and their impact on a witness and a trial. In this Article, we describe the results of an experiment that explored the validity of those

beliefs.

The story the law tells about prior conviction evidence starts with the practicing bar. Overall, lawyers consider prior conviction evidence to be very damaging. A good metaphor for how lawyers view prior crimes evidence is that the evidence is like a bomb: extremely damaging to the direct target (the credibility of the witness) but with potentially devastating collateral damage well beyond that target (the outcome of the case, other witnesses, damage awards).¹ As a result, lawyers may go to great lengths to keep prior conviction evidence out of the case, including counseling clients not to testify in their own defense.²

The law's story about prior conviction evidence is also apparent in the rules of evidence, which single out prior convictions with a special rule governing their admissibility, a testament to their *sui generis* status.³ Rule 609 unequivocally reifies the notion that a convicted criminal is likely to be a liar because it allows the admission of prior conviction evidence to impeach the credibility of the witness.⁴ It is no surprise, therefore, that lawyers fear this prejudicial evidence. Lawyers especially fear prior conviction evidence when offered against a witness who is African-American, because of worries about enduring prejudice against African-American men and criminality.⁵

1. See *infra* notes 24–27 and accompanying text.

2. See *infra* notes 9–11 and accompanying text. Under Rule 609, prior conviction evidence may only be offered against a witness, so if a person does not testify, that prior conviction may not be admitted. FED. R. EVID. 609. In criminal cases, for example, lawyers often counsel clients not to testify in order to avoid the introduction of prior conviction evidence. As risky and damaging as it is for defendants to fail to take the stand and defend themselves, lawyers consider the introduction of a prior criminal record to be worse.

3. See FED. R. EVID. 609.

4. FED. R. EVID. 609. Indeed, the notion that criminals are more likely to lie underlies the rule. See H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 803–04 (1993) (referring to the notion that a convicted criminal is more likely to lie as an “ancient assumption”). On the other hand, this “ancient assumption” has made Rule 609 one of the most controversial of the Federal Rules of Evidence. Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2295 (1994) (“No provision of the Federal Rules of Evidence has sparked more controversy than Rule 609”); Alan D. Hornstein, *Between Rock and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 VILL. L. REV. 1, 6 (1997) (“The issue [of impeachment through prior convictions] is perhaps one of the most controversial in the law of evidence.”). While lawyers largely assume that jurors believe the notion that a prior conviction shows a propensity to lie, most legal commentators reject that the notion is accurate or true. See *infra* notes 14–31 and accompanying text.

5. The enduring nature of these stereotypes is well documented. See, e.g., Pamela Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors' Implicit*

But are these beliefs, held so strongly by lawyers and reflected in the Rules of Evidence, valid? This Article summarizes a recent study, the intriguing results of which upset some of the assumptions embedded in the story the law tells about prior convictions.

Our study is unique in that it tested the impact of prior conviction evidence in a trial scenario designed to be as realistic as possible. Our study differed from prior studies in a number of ways designed to maximize realism. For example, we used a video of a trial that had been vetted by several experienced practitioners, our mock jurors were drawn from two actual jury pools, and our evidence was a realistic prior conviction and not a “smoking gun.”⁶

We discovered an effect that was more complex and nuanced than the story told by the law. First, in our study, the admission of a prior conviction for a crime involving dishonesty was not the explosive bomb depicted in legal lore; it did not directly change the outcome of the case in any statistically significant way. Moreover, our juror subjects generally denied that the prior conviction evidence hurt the credibility of the witness. Despite lawyers’ fears about the devastating effect of prior conviction evidence, the jurors in our study were able to stay focused on the merits of the case despite the introduction of the evidence and its explicit use by defense counsel. The study also shows an interesting and surprising result with regard to race: juror use of the prior conviction evidence did not differ in a statistically significant way between the African-American and white plaintiffs.

The prior conviction evidence did, however, change the trial. It just changed the trial in a way that was more nuanced than the simplistic story told by lawyers and the rules. In our study, the introduction of the prior conviction evidence had a subconscious effect on the jurors that led them to turn the trial into a zero-sum credibility contest in which believing one side meant disbelieving the other. Jurors who heard the

Racial Biases, 115 W. VA. L. REV. 305 (2012) (describing studies that show people associate Black males with anger, violence, and guns); Mona Lynch, *Stereotypes, Prejudice, and Life and Death Decision-Making: Lessons from Laypersons in an Experimental Setting*, in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 182, 188 (Charles J. Ogletree & Austin Sarat eds., 2006) (describing stereotypes of African-American males as violent and criminally inclined as “one of the most pervasive, well-known and persistent stereotypes in American culture”). See Adeno Addis, *Recycling in Hell*, 67 TUL. L. REV. 2253, 2263 (1993) (arguing that the media paints a picture of the Black criminal such that “‘crime’ has virtually become a metaphor to describe young [B]lack men”).

6. By “smoking gun,” we mean prior conviction evidence that is so damaging and so related to the merits of the case that jurors are likely to misuse it. A good example here might have been if we had given the plaintiff a prior conviction for driving while intoxicated, reckless driving, or vehicular manslaughter.

prior conviction evidence resolved the case by first deciding which party to believe, and then deciding who won. This zero-sum credibility effect happened only in the trials in which the prior conviction was admitted. The jurors who saw the trial with no prior conviction evidence were more focused on the merits and could believe one party or both parties equally.

In sum, the results of our experiment suggest that prior convictions may not be as directly damaging to the outcome of the case or the witness as legal lore suggests. But the introduction of this evidence does have the potential to change juror decision-making in a trial from a process that weighs the merits of the case to a credibility contest about which side to believe.

This Article addresses the effect of prior convictions on jury decision-making in four parts. Part I reviews the literature, from law and social science, about juror decision-making and prior conviction evidence. Part II outlines the methodology of our study. Part III describes the results of the experiment. Part IV discusses the implications of the results.

I. LITERATURE REVIEW

Most of the attention from legal scholars and psychologists has focused on jurors' use of prior conviction evidence against defendants in criminal trials. Although prior convictions are also admissible in civil trials, less attention has been focused on how jurors use this evidence in civil cases.

Looking at both civil and criminal trials, a majority view about prior conviction evidence is apparent: that is, prior conviction evidence can be quite damaging to the outcome of both civil and criminal cases.⁷ This majority view is largely supported by the empirical studies.⁸

In the following sections, we first review the story lawyers tell about prior conviction evidence by summarizing the scholarship about prior

7. A recent article, however, has offered a different view. Professors Larry Laudan and Ronald J. Allen assert that in criminal cases, the admission of prior conviction evidence is not as damaging as most lawyers believe. Larry Laudan & Ronald J. Allen, *The Devastating Impact of Prior Crimes*, 101 J. CRIM. L. & CRIMINOLOGY 493, 494 (2011). They hypothesize that it is the mere existence of a defendant's prior conviction in a criminal case that changes the outcome, not whether that prior conviction is admitted in evidence. *Id.* While Laudan and Allen's article represents an important refinement in the conventional wisdom, for a number of reasons their hypothesis is limited to criminal cases.

8. See *infra* notes 36–37 and accompanying text.

convictions. We then look at the empirical data about the admission of prior crimes evidence in trials.

A. *Legal Scholars and Lawyers*

As noted earlier, lawyers tell the story that prior conviction evidence is inflammatory and very damaging.⁹ Even those who dissent from this view acknowledge the ubiquity and pertinacity of prior crimes evidence.¹⁰ In criminal cases, lawyers consider a prior conviction so prejudicial to criminal defendants that they will often make serious changes in trial strategy to keep the evidence out. For example, they may discourage criminal defendants from testifying or decline to call character witnesses.¹¹

While less attention has been paid to prior convictions in civil cases, lawyers similarly believe that this evidence can do significant damage to all aspects of a civil trial.¹² The most common concerns in civil cases are that prior conviction evidence can unduly harm the credibility of the witness, turn the outcome of the case against that witness, and infect the overall fairness of the trial process itself.¹³

In some ways, the rules of evidence can be blamed for creating this

9. Quentin Brogdon, *Admissibility of Criminal Convictions in Civil Cases*, 61 TEX. B.J. 1112, 1112 (1998) (noting that prior conviction evidence is among the most “potent” evidence and causes “irreparable” damage); Margaret Meriwether Cordray, *Evidence Rule 806 and the Problem of Impeaching the Nontestifying Declarant*, 56 OHIO ST. L.J. 495, 498–99 (1995) (“Rule 609 of the Federal Rules of Evidence provides one of the most potent, and potentially prejudicial, methods of impeachment. . . . In a criminal case, when the defendant is impeached with his prior convictions, it is widely recognized that the defendant faces a unique, and often devastating, form of prejudice.”); Teree E. Foster, *Rule 609(a) in the Civil Context: A Recommendation for Reform*, 57 FORDHAM L. REV. 1, 20–21 (1988) (calling prior conviction evidence “inflammatory”); David A. Sonenshein, *Circuit Roulette: The Use of Prior Convictions to Impeach Credibility in Civil Cases Under the Federal Rules of Evidence*, 57 GEO. WASH. L. REV. 279, 281–82 (1988) (noting that admission of this evidence, in both criminal and civil cases, can lead to “unfair prejudice” and can significantly affect outcome). Even a recent dissenting view acknowledges the “widely-shared” belief about the devastating effect of prior conviction evidence. Laudan & Allen, *supra* note 7, at 494.

10. Laudan & Allen, *supra* note 7, at 494. Laudan and Allen dispute whether the admission of prior crimes is really so damaging to criminal defendants, but nevertheless note the “substantial handwringing about the difficult choice defendants face about taking the stand in their own defense: if a defendant takes the stand, he risks being destroyed by his prior convictions; if he does not take the stand, he is destroyed by his silence in the face of plausible accusations.” *Id.* at 494–95.

11. Sonenshein, *supra* note 9, at 281; *see also* Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1373 (2009) (noting that defendants who testify risk having their prior records revealed).

12. Sonenshein, *supra* note 9, at 281.

13. *Id.* at 281–82 (arguing that more attention should be paid to admission of criminal conviction evidence in civil cases); *see also* Foster, *supra* note 9, at 20–24.

view of the danger posed by prior convictions. The Federal Rules of Evidence, and most state rules of evidence, single out prior convictions for special rules governing their admissibility, suggesting that prior convictions are uniquely dangerous.¹⁴ Federal Rule of Evidence 609 is also one of the few rules of evidence that incorporates an additional explicit requirement that the probative value of the prior conviction evidence must outweigh the prejudicial impact.¹⁵ This is noteworthy for its redundancy: All evidence under the federal rules is subject to the balancing test of Rule 403 (probative value must outweigh prejudicial effect).¹⁶ Rule 609 contains an additional, similar balancing test for felony convictions not involving dishonesty.¹⁷ With respect to admission of non-dishonesty felony crimes, the drafters apparently believed that a special danger existed of prejudicial effect outweighing probative value.¹⁸

Interestingly, the additional balancing is not required for the admission of crimes involving dishonesty, which suggests a judgment

14. Federal Rule of Evidence 609 states:

(a) IN GENERAL. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence *must be admitted* if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.

FED. R. EVID. 609. (emphasis added). The rules of evidence of more than half the states include a rule identical to Federal Rule 609, or include something very similar. Montré D. Carodine, *"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 538–39 nn.93–94 (2009).

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

16. FED. R. EVID. 403.

17. Prior convictions are admissible if: (1) they are felony convictions and the probative value of the evidence outweighs its prejudicial effect, or (2) they are convictions for crimes involving dishonesty or false statement. FED. R. EVID. 609. Indeed, Rule 609's slightly different balancing test is generally read as tilting *against* admission of prior conviction evidence. See Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 309 (2008).

18. Bellin, *supra* note 17, at 293 ("On its face, Rule 609 is unflinchingly hostile to the use of prior convictions for impeachment."). Professor Bellin notes that the additional balancing test in Rule 609 should "favor the defense in the vast majority of cases." *Id.*

that dishonesty crimes are highly probative of credibility, and unlikely to be outweighed by prejudicial effect.¹⁹ Indeed, Rule 609 singles out crimes involving dishonesty for their own rule separate from other crimes. Unlike other crimes, which have to be felonies to be admitted, any crime involving dishonesty, felony or misdemeanor, must be admitted.²⁰ The message seems to be that crimes involving dishonesty are probative of credibility no matter how petty.²¹

While Rule 609 in some ways treats prior conviction evidence as powerfully damaging, it nevertheless allows it to be admitted. To mitigate the damage, Rule 609 allows the admission of prior conviction evidence only for the narrow purpose of impeaching the credibility of the witness.²² The evidence is not meant to show that the witness is simply a bad person, more likely to have committed other crimes, or somehow less deserving of justice or damages.²³

Nevertheless, part of what lawyers fear most about prior conviction evidence is the blurriness of the distinction between offering the evidence to show a lack of credibility (or propensity to lie) versus showing bad character.²⁴ Lawyers fear the “collateral damage” of this evidentiary bomb: that jurors will not be able to understand and implement this distinction, and will use the evidence to conclude that a witness with a prior conviction is not a good person.²⁵ While the bulk of

19. *Id.* The conference report on Rule 609 confirms this view. Admission of prior convictions involving dishonesty are not within the court’s discretion; they are particularly probative of credibility and must be admitted. H.R. REP. NO. 93-1597, at 9 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7103.

20. *Id.*

21. *See* FED. R. EVID. 609.

22. Sonenshein, *supra* note 9, at 291.

23. *Id.* at 291 (“Impeachment is the only permissible purpose for the evidence, and this purpose is only served by evidence tending to make the witness less worthy of belief.”).

24. The underlying rationale for the rule is that a person who has committed a crime is more likely to be lying than a person who has not because that person has shown a tendency toward social deviance. The distinction between showing a witness has a tendency toward social deviance and asserting he has a bad character is a fine one. The distinction is even harder to see with crimes involving dishonesty, as the basis for the rule seems to be “once a liar, always a liar.” Foster, *supra* note 9, at 18 (“The validity of prior convictions as an indicator of veracity at trial depends upon a double inference: first, an individual who has engaged in serious criminal activity has manifested utter disregard for governing social norms; and second, an individual so bereft of integrity and respect for ‘the social norms evidenced by positive law’ is more likely to lie than other witnesses.”); Sonenshein, *supra* note 9, at 294; *see also* Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637 (1991); Abraham P. Ordovery, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b), and 609(a)*, 38 EMORY L.J. 135 (1989).

25. Foster, *supra* note 9, at 20. Professor Foster argues that the distinction between lack of credibility and bad character can be difficult for even seasoned lawyers to understand; it is likely

the criticism is about the admission of prior convictions in criminal cases, critics also argue that prior conviction evidence can be particularly harmful in civil cases in which the stories of the plaintiff and the defendant differ in material respects, because in those cases the credibility of the parties is most starkly at issue.²⁶ Indeed, one commentator specifically argued that a prior conviction in a civil case can divert jurors from their job of weighing the merits in a neutral way by focusing their attention on the “moral qualifications” of the parties.²⁷

Legal commentators have also argued that the view of human nature underlying Rule 609—that criminals are more likely to lie—is simply untrue.²⁸ By permitting the admission of prior conviction evidence to show a propensity to lie, Rule 609 and its counterparts create and reinforce a false view of human nature.²⁹

Finally, lawyers and commentators seem convinced that once a party has been impeached with prior conviction evidence, the damage is close to irreparable.³⁰ They believe that no amount of framing or artful

impossible for even the most conscientious lay jurors. *Id.* (arguing jurors will use prior conviction to conclude that witness is “morally reprehensible” and “undeserving of justice”); *see also* Teneille R. Brown, *The Affective Blindness of Evidence Law*, 89 DENV. U. L. REV. 47, 131 (2011) (arguing that it is impractical to believe that jurors can compartmentalize or ignore reactions caused by emotionally evocative evidence); Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1, 43 (1999) (“In short, jurors draw impermissible inferences from prior convictions.”); Sonenshein, *supra* note 9, at 293 (“Common sense and experience tell us that jurors likely cannot ignore the impermissible purpose of the conviction.”). This fear exists even though judges will almost always offer a limiting instruction, telling the jury the proper use of the evidence. Lawyers are largely dismissive of the effects of the limiting instruction to control juror use of prior conviction evidence. Lisa Eichhorn, *Social Science Findings and the Jury’s Ability to Disregard Evidence Under the Federal Rules of Evidence*, 52 J.L. & CONTEMP. PROBS. 341, 344–45 (1989); Foster, *supra* note 9, at 23–24.

26. Foster, *supra* note 9, at 20.

27. *Id.* at 21 (suggesting that evidence diverts jurors from the merits and their “obligation of neutrality”).

28. Backed by empirical data, these commentators argue that there is no link between prior criminality and propensity to lie. *Id.* at 5, 27–29 (arguing that efforts to prove scientifically that people have innate, consistent traits, like a propensity to lie, have “failed utterly.”); *see also* Robert G. Lawson, *Credibility and Character: A Different Look at an Interminable Problem*, 50 NOTRE DAME LAW. 758, 766–89 (1975); David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 25–31 (1986); Miguel Angel Mendez, *California’s New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1042–60 (1984); Robert G. Spector, *Rule 609: A Last Plea for Its Withdrawal*, 32 OKLA. L. REV. 334, 349–54 (1979).

29. Foster, *supra* note 9, at 5.

30. Brogdon, *supra* note 9, at 1112; Foster, *supra* note 9, at 22–24 (calling the civil litigant

rehabilitation of the witness will reverse the damage. Moreover, at least one commentator thinks that the civil litigant may have fewer options for repairing the damage than the criminal defendant, because civil litigants usually cannot avoid testifying.³¹

One gap in the critiques of Rule 609, however, has been race. Virtually all legal commentators critique Rule 609 “as if it operates in a race neutral manner.”³² One recent critique, however, argues that African-American criminal defendants suffer greater damage under Rule 609 than white defendants. The critique focuses on the disparate impact of the rule because of the “staggering” numbers of African-American men with criminal convictions.³³ In particular, the critique argues that Rule 609 serves to damage Black witnesses unduly because it perpetuates the most pervasive stereotype of young Black men—that they are criminals.³⁴

B. Empirical Data on Prior Convictions

Until the current study, the empirical data largely supported the notion that prior conviction evidence is highly damaging and likely to be misused by jurors, but it presents a more mixed picture of how jurors use the evidence.³⁵ Most of the data comes from mock juror studies, but some studies use data culled from trial and post-trial survey questionnaires of actual jurors and judges in real trials.

impeached by prior conviction evidence “hapless” and “powerless”).

31. Foster, *supra* note 9, at 22–23. After all, the criminal defendant can opt not to testify and can rely on the significant burden of proof shouldered by the prosecution. While this strategy certainly has its pitfalls, it will successfully avoid the introduction of the prior crimes; the civil litigant has no such option, as she must usually take the stand to tell her story. *Id.*

32. Carodine, *supra* note 14, at 522 (noting that while there are scores of critiques of Rule 609, legal scholars have critiqued the rule “as if it operates in a race neutral manner”).

33. *Id.* at 526, 530 (noting the problem for Black witnesses in our society, where “blackness often connotes bad character”). Professor Carodine argues that Rule 609, by permitting prior convictions to be admitted in evidence, looks like it operates in a race neutral manner, but in reality perpetuates and exacerbates the stereotypes of Black men as criminals who are unworthy of belief. *Id.* at 564–68 (arguing that Rule 609 perpetuates and exacerbates the racial bias of the criminal justice system by allowing prior convictions that are almost always tainted by race bias to be admitted in subsequent cases). Interestingly, Professor Carodine takes as given that a prior conviction for a criminal defendant is a devastating piece of evidence that all but ensures another conviction. *Id.* at 524–25.

34. See Addis, *supra* note 5, at 2263 (arguing that the media paints a picture of the Black criminal such that “‘crime’ has virtually become a metaphor to describe young [B]lack men”); FLOYD D. WEATHERSPOON, *AFRICAN AMERICAN MALES AND THE LAW* 1–2 (1998) (recounting enduring stereotype of young Black men as criminals).

35. See Laudan & Allen, *supra* note 7, at 500–01 (calling mock juror studies a “congeries of conflicting results”).

Almost all of the studies of prior conviction evidence test its impact in criminal cases. Only a few studies of civil trials exist. Of those civil trial studies, all of them studied the impact of prior conviction evidence on the defendant. Of all the studies, criminal and civil, only a couple test prior convictions for crimes involving dishonesty.

This section will first summarize how prior conviction evidence impacts the outcome of a trial, and will then turn to how that evidence affects the credibility of the witness against whom the prior conviction evidence is offered.

1. *Effect on Outcome of Trial*

Most studies show that admission of a defendant's prior conviction leads to more guilty verdicts in criminal trials, regardless of whether the jurors receive a limiting instruction.³⁶ The negative impact is, not surprisingly, more profound when the prior conviction is for a similar crime as the one with which the defendant is charged, but a detrimental impact exists even for prior dissimilar crimes, including crimes involving dishonesty.³⁷

A study by Roselle Wissler and Michael Saks, for example, tested

36. See, e.g., Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 L. & HUM. BEHAV. 67, 73 (1995); Valerie P. Hans & Anthony N. Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 CRIM. L.Q. 235, 243 (1976); Martha A. Myers, *Rule Departures and Making Law: Juries and Their Verdicts*, 13 LAW & SOC'Y REV. 781, 785, 792-93 (1979) (noting that an analysis of 980 criminal defendants and their journey through the criminal justice system showed that "juries were more likely to convict if the defendant had numerous prior convictions"); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 L. & HUM. BEHAV. 37, 41 (1985). Limiting instructions were largely ineffective in stopping jurors from using prior conviction evidence as evidence of guilt. Indeed, in some studies, prior conviction evidence plus a limiting instruction actually led to more unfavorable verdicts than prior conviction evidence without the instruction. Thus, the instruction seemed to backfire and increase the prejudicial nature of the prior conviction evidence. Sarah Tanford & Michele Cox, *The Effects of Impeachment Evidence and Limiting Instructions on Individual and Group Decision Making*, 12 LAW & HUM. BEHAV. 477, 482-83, 486-87 (1988) (suggesting that jurors judged civil defendant more likely to be negligent when he had prior perjury conviction and jury given limiting instruction); Sharon Wolf & David A. Montgomery, *Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgments of Mock Jurors*, 7 J. APPLIED SOC. PSYCHOL. 205, 212-13 (1977) (noting more guilty verdicts against defendant with prior conviction when jury given limiting instruction). See generally Sara Gordon, *Through the Eyes of Jurors: The Use of Schemas in the Application of "Plain-Language" Jury Instructions*, 64 HASTINGS L.J. 643, 645 (2013) (compiling research showing that jurors are largely befuddled by jury instructions).

37. Sally Lloyd-Bostock, *The Effects on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study*, 2000 CRIM. L. REV. 734, 737 (2000).

whether guilty verdicts increase when the jury hears that a criminal defendant has had a prior conviction.³⁸ Wissler and Saks tested several types of prior convictions: a conviction for the same crime currently charged, a conviction for a different crime, and a conviction for a crime directly related to dishonesty (perjury).³⁹ While the prior conviction for the same crime led to the highest conviction rate, overall, defendants with a prior record for any of the crimes had a significantly higher conviction rate than defendants with no criminal record.⁴⁰ The conviction rate was roughly the same for perjury and the prior different crime.⁴¹

In a few studies, however, the admission of prior conviction evidence had no detrimental effect on outcome. In the mock trial studies, these results were obtained when a prior conviction for a relatively petty crime is introduced against a defendant charged with a very serious crime.⁴² Similarly, one long range examination of actual criminal trials determined that jurors were likely to judge criminal defendants with prior convictions to be guilty whether their prior convictions were admitted in evidence or not.⁴³ The authors of this study posited that lawyers are so fearful of this evidence that they significantly alter their trial strategy to keep it out. The study concluded, however, that these alterations to trial strategy did nothing to reduce guilty verdicts, and might have hurt the clients' cases as much (or more) than the prior conviction evidence itself. In other words, the strategic "cures" that lawyers use to mitigate the damage of prior conviction evidence do not

38. Wissler & Saks, *supra* note 36, at 40–41.

39. *Id.* at 40.

40. *Id.* at 41.

41. *Id.* at 42–43.

42. E. Gil Clary & David R. Shaffer, *Effects of Evidence Withholding and a Defendant's Prior Record on Juridic Decisions*, 112 J. SOC. PSYCHOL. 237, 241 (1980); W.R. Cornish & A.P. Sealy, *Juries and the Rules of Evidence*, 1973 CRIM. L. REV. 208, 213 (1973) (crime of dishonesty in rape case); Wissler & Saks, *supra* note 36, at 40–41. In one study, for example, a defendant accused of armed robbery and murder is impeached with a prior juvenile conviction for attempted armed robbery. Jurors who heard the prior juvenile conviction did not render more guilty verdicts on the armed robbery and murder charges than jurors who heard no prior conviction evidence. In that study, researchers posited that jurors might have discounted the prior conviction evidence because it happened far in the past when defendant was a juvenile. Clary & Shaffer, *supra* note 42, at 243–45. This study is a good example of why lawyer input on trial studies is so important; a juvenile record would likely not be admissible under Rule 609.

43. In other words, for defendants with criminal records, whether the evidence of that prior conviction was admitted or excluded from the trial made no difference in the outcome. Laudan & Allen, *supra* note 7, at 506. The conviction rate for defendants whose prior record was disclosed to the jury was almost identical to the conviction rate for defendants whose prior record was excluded. *Id.*

work and might be worse than the disease.⁴⁴ This long-range study is an important demonstration, especially for our purposes, of the degree of lawyer alarm over the admission of prior conviction evidence.

In the civil context, one of the few mock juror studies suggested that a prior conviction may not have a significant effect on outcome, though here again the results are somewhat ambiguous. In that study, the defendant in a civil case had a prior conviction for a crime involving dishonesty (perjury), and this evidence was used to impeach the defendant's credibility. The evidence did not increase liability verdicts against the defendant, but it did lead jurors to believe that the defendant had a "propensity" for negligence and it hurt the defendant's credibility.⁴⁵

Finally, one piece of data from the Wissler and Saks study indicated some support for the hypothesis that introduction of a prior conviction for a less serious crime, such as auto theft, in a trial for a very serious crime, such as murder, can actually reduce the conviction rate.⁴⁶ Notably, this result happened with the admission of a prior conviction for auto theft in the murder case, but not with the prior conviction for perjury in the murder case.⁴⁷ Researchers could not state with certainty the cause of this seemingly anomalous result, but focused on the significant gap in seriousness between the prior conviction crime and the crime charged. The researchers theorized that the reduced conviction rate might have been the result of backlash from jurors who felt that the prosecution was trying to manipulate or distract them by introducing evidence of a "marginally relevant, less serious" crime.⁴⁸

44. Those machinations include, among other things: keeping the defendant from testifying and declining to offer character evidence. *Id.* Therefore, the hypothesis of this study depends on the choices and strategies peculiar to criminal defense lawyers and the results are not really applicable to the civil context.

45. Tanford & Cox, *supra* note 36, at 486.

46. Wissler & Saks, *supra* note 36, at 44. For example, in the mock murder trial conducted by Wissler and Saks, a prior conviction for auto theft *reduced* the conviction rate fifteen percentage points *below* the base rate of fifty percent. Compare this result with the introduction of a murder conviction in the murder case, which increased the conviction rate thirty-five percentage points above the base rate. *Id.* at 44; *see also* Cornish & Sealy, *supra* note 42, at 218 (finding that prior conviction for dissimilar crime reduced the conviction rate in statistically significant way). The Cornish and Sealy study did not involve United States' criminal procedure or evidence.

47. Cornish & Sealy, *supra* note 42, at 218. However, in the Cornish and Sealy study, a similar phenomenon occurred in a rape trial when the prior conviction was for an unspecified crime involving dishonesty. *Id.*

48. Wissler & Saks, *supra* note 36, at 44; *see also* Cornish & Sealy, *supra* note 42, at 218 (noting

2. *Effect on Credibility of Witness*

Affecting ultimate trial outcome is not the only way prior conviction evidence can impact a trial. Rule 609's rationale is that prior conviction evidence is probative of credibility. But, in this regard, the studies are also unclear. In some studies, prior conviction evidence had a detrimental impact on a criminal defendant's credibility; in other studies, it did not.⁴⁹

In Wissler and Saks, for example, none of the prior convictions, including those for crimes of dishonesty (perjury), had a detrimental effect on the defendant's credibility.⁵⁰ In the civil context, however, a prior perjury conviction did negatively affect the defendant's credibility, but paradoxically only when no limiting instruction was given that directed jurors to use the conviction to judge credibility.⁵¹

3. *Race*

Before the current study, none of the research on prior conviction evidence specifically studied whether the race of the defendant (or witness) affected the damage wrought by the prior conviction

that jurors may have discounted prior conviction for minor crime when introduced in trial for serious crime).

49. Tanford & Cox, *supra* note 36, at 477, 480 (noting that effects of impeachment evidence on credibility have been "mixed"). Compare Hans & Doob, *supra* note 36 (finding that introduction of prior conviction did not significantly increase amount of discussion among mock jurors about defendant's credibility), and Wissler & Saks, *supra* note 36, at 41 ("[C]redibility ratings of the defendant did not vary as a function of prior conviction."), with Greene & Dodge, *supra* note 36, at 73-74 (finding that defendant with prior conviction rated by jurors as less credible and more dangerous than defendant without prior conviction or defendant with prior acquittal), and Tanford & Cox, *supra* note 36, at 486 (noting that prior conviction for perjury produced lower credibility judgments).

50. This result was so even though jurors received a limiting instruction directing them to consider the evidence only for credibility purposes. Wissler & Saks, *supra* note 36, at 40. Indeed, the study results showed that mock jurors misused the prior conviction evidence overall, tending to use it to help them judge whether defendant committed the crime charged, not whether defendant was lying. *Id.* at 43-44. Another study reported a similar result even when mock jurors were permitted to "deliberate." Hans & Doob, *supra* note 36, at 239-42.

51. When jurors were given an instruction directing them to consider the perjury conviction only for credibility purposes, jurors were significantly less likely to find defendant untrustworthy. Tanford & Cox, *supra* note 36, at 486. Thus, the limiting instruction had the paradoxical effect of pushing jurors away from using the perjury conviction to draw negative inferences about defendant's credibility. *Id.*; see also *infra* note 86 and accompanying text (explaining why this study did not use a limiting instruction). Interestingly, the effect of prior conviction on credibility was more pronounced when mock jurors were permitted to deliberate. Tanford & Cox, *supra* note 36, at 495.

evidence.⁵² Nevertheless, a large body of research demonstrates that the trial system is infused with bias against African-American witnesses.⁵³ This bias taints everything from use of character evidence to verdicts and sentencing.⁵⁴ However, the research also shows that some factors can mitigate this bias. For example, in the criminal context, one study showed that both African-American and white defendants were more likely to be convicted if the crime charged was stereotypically associated with their race.⁵⁵ Moreover, some studies showed a “watchdog” effect in which mock jurors scrutinized evidence more carefully with respect to African-American witnesses as a means of guarding against their own possible racial bias.⁵⁶

52. One study of 980 criminal defendants and their experiences through the criminal justice process found that conviction rates did not seem to be influenced by the race of the defendant and the victim. Myers, *supra* note 36, at 793.

53. James D. Johnson et al., *Justice Is Still Not Colorblind: Differential Racial Effects of Exposure to Inadmissible Evidence*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 893 (1995); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007) (confirming that participants remembered and misremembered legally relevant facts in racially biased ways); Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621 (2005) (finding a small but significant bias against African-American defendants in terms of verdict and sentencing); Richard E. Petty et al., *Stigmatized Sources and Persuasion: Prejudice as a Determinant of Argument Scrutiny*, 76 J. PERSONALITY & SOC. PSYCHOL. 19 (1999); Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL’Y & L. 201, 220 (2001) (finding that when race was not salient in the trial, white mock jurors demonstrated bias against African-American defendants); Paul H. White & Stephen G. Harkins, *Race of Source Effects in the Elaboration Likelihood Model*, 67 J. PERSONALITY & SOC. PSYCHOL. 790, 794 (1994) (noting that participants were more persuaded by white source than African-American source); *see also* Jordan Abshire & Brian H. Bornstein, *Juror Sensitivity to the Cross-Race Effect*, 27 LAW & HUM. BEHAV. 471, 478 (2003) (discussing results indicating that the interaction between races of a witness and a juror can affect perceived credibility of witness).

54. *See* sources cited *supra* note 53. *See generally* IMPLICIT RACE BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., 2012).

55. Ronald Mazzella & Alan Feingold, *The Effects of Physical Attractiveness, Race, Socio-Economic Status, and Gender of Defendants and Victims on Judgments of Mock Jurors: A Meta-Analysis*, 24 J. APPLIED SOC. PSYCHOL. 1315, 1325 (1994) (noting that Blacks were punished more severely for negligent homicide and whites for fraud).

56. Petty et al., *supra* note 53, at 21, 26; Michael J. Sargent & Amy L. Bradfield, *Race and Information Processing in Criminal Trials: Does the Defendant’s Race Affect How the Facts Are Evaluated?*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 995, 1003 (2004); White & Harkins, *supra* note 53, at 800. In one study, in fact, Maeder and Hunt found that white mock jurors had a slightly *more favorable* impression of the Black defendant and witness than the white defendant and witness. They attributed this to guilt and/or social desirability bias. Evelyn M. Maeder & Jennifer S. Hunt, *Talking about a Black Man: The Influence of Defendant and Character Witness Race on Jurors’ Use of Character Evidence*, 29 BEHAV. SCI. & L. 608, 614 (2011).

II. OUR STUDY

The touchstone of our methodology was to explore the impact of prior conviction evidence in a realistic civil litigation scenario with actual jurors. Prior social science data left some noteworthy gaps in the knowledge about prior conviction evidence. Most notably, few of the studies took place in the civil context and very few tested the impact of crimes involving dishonesty.⁵⁷

Moreover, none of the studies tested the concerns of legal commentators that a prior conviction may make a jury dislike a civil plaintiff enough that jurors will deny the plaintiff redress. All the prior studies, both criminal and civil, attach the prior conviction evidence to the defendant.⁵⁸ It is also unclear whether the trial transcripts used in the prior studies were vetted by lawyers or what framing strategies, if any, were used to deal with the prior conviction evidence. Moreover, none of the experiments studied whether the race of the witness changed how jurors evaluated the prior crimes evidence.

Our study diverges from the prior literature in a number of ways. We sought to test the use of prior conviction evidence in a trial context that was as realistic as possible and to delve more deeply into the jurors' use of the evidence. To this end, our study is the only one that combines all the following elements: (i) the case is based on a real trial and the transcripts were vetted by several experienced lawyers and viewed by mock jurors in video format; (ii) the prior conviction is not a "smoking gun" but rather a conviction for a crime involving dishonesty that is of moderate seriousness; (iii) the conviction is attached to the plaintiff, not the defendant; (iv) our survey questions go beyond outcome and credibility to attempt to determine how jurors used the evidence; and (v) we looked at whether the race of the witness with the prior conviction made a difference.

A. *Realistic Trial Scenario*

As an initial step, we believed it was important to base the study on an actual trial, and to be explicit about this in our methodology, so we approximated as closely as possible how real lawyers act and strategize in introducing prior record evidence. Only one of the prior mock juror studies is explicit in using a real trial.⁵⁹ While one study used surveys

57. See *supra* notes 35–37 and accompanying text.

58. See *supra* notes 35–45 and accompanying text.

59. Green & Dodge, *supra* note 36, at 71. Some studies are explicit that they are based on

and questionnaires from jurors and judges in actual trials, that “looking back” methodology has a number of detriments.⁶⁰ To balance the pros and cons, we created a mock trial but used a real trial as our starting point and had several experienced trial lawyers vet the trial transcript and comment on the tactics used by the lawyers.⁶¹ It is unclear whether any of the prior mock trial studies involved vetting by experienced lawyers other than the researchers themselves.⁶²

We also purposefully chose a civil trial as our experimental context. This is a departure from most of the prior studies, which focused on criminal cases.⁶³ The impact of a prior conviction in a civil case had received less attention and the results were less clear.⁶⁴ Therefore, less was known about how prior convictions affected civil verdicts.⁶⁵ Even less is known about the impact of a plaintiff’s prior conviction on a civil trial’s outcome.⁶⁶ The area seemed ripe for further study.

In order to simulate a real trial as closely as possible, we developed a trial transcript based on a real negligence case that we adapted and edited. The resulting videos were roughly forty minutes long and included opening statements, closing arguments, plaintiff and defendant testimony, including direct, cross, and redirect examination, and most importantly, the introduction of prior conviction evidence.

Our goal was a simple trial that had, at its core, a conflict between the

hypothetical cases. *See* Wissler & Saks, *supra* note 36, at 41. Most of the studies, however, are unclear about whether they are based on real trials.

60. Because this study retroactively looked at real trials, it did not control the variables the jurors encountered and did not observe the trial the way jurors observed it. The study did not include a research design that the investigators created. Thus, the researchers could offer only a general guess about the outcomes and the reasons for them.

61. The transcript was vetted and commented upon by: Edward Ohlbaum (Professor of Law and Director of Trial Advocacy and Clinical Legal Education, Temple University Beasley School of Law); Sara Jacobson (Associate Professor of Law and Director of Trial Advocacy, Temple University Beasley School of Law); Richard Barrett, Esq. (Supervisory Assistant United States Attorney and Chief of the Corruption, Civil Rights, Tax and Labor Section for the Eastern District of Pennsylvania); John Mitchell (Professor of Law, Seattle University School of Law); and Daniel Rendine, Esq. (Jury Commissioner for the City of Philadelphia and criminal defense lawyer for thirty five years).

62. *See supra* note 42.

63. *Compare* Wissler & Saks, *supra* note 36, at 40 (criminal), *and* Green & Dodge, *supra* note 36, at 68 (criminal), *and* Clary & Shaffer, *supra* note at 42, at 241 (criminal), *with* Tanford & Cox, *supra* note 36, at 477 (civil).

64. *See supra* notes 35–37 and accompanying text.

65. Sonenshein, *supra* note 9, at 298; Tanford & Cox, *supra* note 36, at 477, 480.

66. *See supra* notes 35, 37 and accompanying text.

stories of the two parties. We chose a car accident case involving two witnesses who were also the parties in the case.⁶⁷ This made the litigation relatively simple and it put credibility at the forefront of the case. We wanted a “he said/he said” situation so that the prior conviction would be noticeable and potentially meaningful. Recall that this is just the type of civil case that legal commentators worried would lead jurors to misuse prior conviction evidence.⁶⁸

However, we also tried to make the evidence as even as possible between the two sides. The plaintiff claimed he hit a guardrail because the defendant, driving a tractor-trailer, veered suddenly into his lane.⁶⁹ But the defendant was not involved in the accident; indeed, he did not remember ever being in an accident.⁷⁰

We also believed that the stories of both parties had strengths and weaknesses in equal measure. To this end, the prior conviction evidence was but one piece of evidence in the whole of the litigation. Some evidence in the trial supported the plaintiff and other evidence undercut the plaintiff’s story. For example, the plaintiff is a combat veteran who serves in the Reserves.⁷¹ He was returning from a Reserve activity when he had the accident.⁷² The plaintiff testified that he was minutes from his home prior to the accident and had traveled the road on which the accident occurred many times.⁷³ On the other hand, the plaintiff could not remember important facts like whether he used his brakes before the accident, or whether he checked his mirror before veering away from the trailer.⁷⁴ The defense attorney cross-examined the plaintiff vigorously on these negative facts, as well as on facts related to the plaintiff’s speed and care while driving.⁷⁵

The defendant’s testimony also had strengths and weaknesses. He was an experienced truck driver who had never had an accident, and had traveled the road many times.⁷⁶ Because his trailer was not part of the accident, however, defendant could not remember exactly what happened on that day, and therefore could not testify about what

67. On file with author.

68. See, e.g., Foster, *supra* note 9, at 20.

69. On file with author.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

happened.⁷⁷ Thus, the defendant could only testify about his habitual behavior when driving on the road on which the accident occurred.⁷⁸

We thought it was important that the jurors see and hear the evidence (and the witnesses) as they would in a real trial. Most of the prior studies involved a paper record—either a summary of a trial or a paper record of testimony.⁷⁹ In our study, as in just one of the more recent studies of prior convictions, mock jurors watched a videotaped re-enactment of the trial.⁸⁰

We filmed six versions of the trial. In order to maximize control variables, all the actors played the same role in each video, and all actors were white and male, with the exception of the plaintiff in one set of videos, who was played by an African-American male.⁸¹ Where testimony was substantively the same (for example, defendant's testimony and defense counsel's opening), we spliced the identical film footage into all six videos.

Once a subject volunteered to participate in the study, we randomly assigned the "juror" to watch one of the six videos.⁸² Thus, as with all of

77. *Id.*

78. *Id.*; see also FED. R. EVID. 406.

79. Clary & Shaffer, *supra* note 42, at 240; Green & Dodge, *supra* note 36, at 68; Wissler & Saks, *supra* note 36 at 40.

80. See Tanford & Cox, *supra* note 36, at 482. In the Tanford and Cox study, actual lawyers played the role of lawyers in the videos and other members of the university community played the witnesses. In our study, members of Temple Law School's trial team played the role of the lawyers and the witnesses.

81. The plaintiff is a white male in three videos and an African-American male in the other three. We kept all the other players constant as to race and gender to the extent possible because we wanted to maintain consistency in race and gender so that we might explore how such variables may affect outcomes related to manipulation of "bad facts" in future studies. Research demonstrates that subconscious bias based on race or gender of a witness or lawyer can influence how jurors perceive facts. See Jordan Abshire & Brian H. Bornstein, *Juror Sensitivity to the Cross-Race Effect*, 27 LAW & HUM. BEHAV. 471, 478 (2003) (indicating that the interaction between races of a witness and a juror can affect perceived credibility of witness); White & Harkins, *supra* note 53, at 794 (finding participants were more persuaded by white source than African-American source).

82. Each juror watched the video on a laptop computer in a room in which other subjects were also watching a video. On occasion, two subjects had to share a laptop. Therefore, both parties watched the video together, but with separate sets of headphones. The investigator and research assistants remained in the room observing the subjects. By creating an environment in which jurors knew that we were observing them, that their peers were engaging in the same study, and that they would receive a gift card upon completion the study, we set out to develop a "high elaboration" condition, in which jurors would pay close attention to the merits of the case. See RICHARD E. PETTY & JOHN T. CACIOPPO, COMMUNICATION AND PERSUASION: CENTRAL AND PERIPHERAL ROUTES TO ATTITUDE CHANGE 7 (1986). The relative simplicity of the trial evidence also likely contributed to the high elaboration conditions. JENNINGS BRYANT & MARY BETH OLIVER, MEDIA

the prior mock trial studies, we placed the study subjects in the role of jurors and sought to have them render a verdict much like they would in real litigation.⁸³ The goal of the study was to mirror true-to-life juror decision-making after watching a videotaped mock trial. After viewing the entire video, the subjects filled out a survey in which they rendered and explained their “verdicts.”⁸⁴

Our study differed from a real trial in a couple of ways, however. As in most of the prior studies, our “jurors” rendered their verdicts individually; they did not deliberate with each other.⁸⁵ Also, for a variety of reasons, we decided against giving jurors a limiting instruction.⁸⁶

B. *Prior Conviction Evidence*

We also made a number of careful choices with respect to the prior conviction evidence. First, unlike all of the prior studies, which, whether criminal or civil, attached the prior criminal conviction to the defendant,

EFFECTS: ADVANCES IN THEORY AND RESEARCH 141–42 (Jennings Bryant & Mary Beth Oliver eds., 3d ed. 2008). Our goal here was, again, to mimic the experience that a juror would have in the courtroom setting, in which she or he would likely find themselves in a “high elaboration” condition. In order to keep track of each type of video without labeling them by the dependent variable, we color coded each video. In addition, we color coded each survey to correspond with the color of the video that the respondent viewed. While each survey was exactly the same, the color allowed us to track how many respondents we had viewing each of the videos in order to achieve as balanced a number of surveys as possible.

83. See Wissler & Saks, *supra* note 36, at 41; Green & Dodge, *supra* note 36, at 71.

84. After filling out the survey, respondents were given a five dollar Starbucks gift card in Everett or a five dollar Amazon gift card in Philadelphia.

85. Clary & Shaffer, *supra* note 42, at 242 (individually); Green & Dodge, *supra* note 36, at 71–72 (individually); Hans & Doob, *supra* note 36, at 240 (some jurors deliberated in groups while others rendered verdict individually); Tanford & Cox, *supra* note 36, at 489 (in second study subjects deliberated like actual jurors); Wissler & Saks, *supra* note 36, at 41 (individually).

86. See, e.g., Green & Dodge, *supra* note 36, at 73; Wissler & Saks, *supra* note 36, at 46. Recall, though, that in one civil trial study, the limiting instruction actually seemed to lead jurors *away* from using prior convictions for assessing credibility. Tanford & Cox, *supra* note 36, at 486. We excluded jury instructions from the video for several reasons. First, the video needed to remain at a reasonable length. Second, the case was simple enough that we believed jurors would be likely to understand a simple issue of who was at fault without instructions. Finally, we were mindful of the literature noting low juror comprehension of jury instructions. See generally Sara Gordon, *Through the Eyes of Jurors: The Use of Schemas in the Application of “Plain-Language” Jury Instructions*, 64 HASTINGS L.J. 643, 645 (2013) (compiling research showing consistent juror confusion over instructions); James R. P. Ogloff & V. Gordon Rose, *The Comprehension of Judicial Instructions*, in PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE 407 (Neil Brewer & Kipling D. Williams eds., 2005). See also Edith Greene & Michael Johns, *Jurors’ Use of Instructions on Negligence*, 31 J. APPLIED SOC. PSYCHOL. 840, 852 (2001) (finding jurors’ overall comprehension of instructions around sixty percent); Reid Hastie et al., *A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damages*, 22 LAW & HUM. BEHAV. 287, 304 (1998) (finding overall comprehension of instructions was less than ten percent).

we chose to attach the prior conviction to the plaintiff.⁸⁷ Although legal commentators had voiced concerns about how a prior conviction could hurt a plaintiff's case and lower potential damage awards,⁸⁸ no prior studies gave any insight as to whether a prior conviction would harm the plaintiff in a civil suit. In our case, for two years while he was sole proprietor of his own business, the plaintiff passed bad checks and cheated his suppliers and customers.⁸⁹

As a result of his passing bad checks, the plaintiff was convicted of theft by deception, a crime of dishonesty that is also a felony.⁹⁰ This ensured that the evidence would be admitted for impeachment under Rule 609.⁹¹ Theft by deception is a crime that potentially impacts credibility, but it is not a very serious crime.⁹² In the prior research of conviction evidence, very consistent results were demonstrated for serious prior crimes.⁹³ The results involving less serious crimes and crimes of dishonesty were a bit more ambiguous.⁹⁴ Choosing a relatively minor felony crime of dishonesty filled a gap in the prior literature and ensured that the conviction would not dominate the case like the "smoking gun" evidence used in some of the prior studies.⁹⁵ We also

87. *E.g.*, Clary & Shaffer, *supra* note 42, at 240–41 (defendant has prior conviction for attempted armed robbery); Tanford & Cox, *supra* note 36, at 482 (defendant in civil case has prior conviction for perjury); Wissler & Saks, *supra* note 36, at 40 (defendant in criminal case has various prior convictions).

88. Foster, *supra* note 9, at 20 (arguing jurors in civil cases may use prior conviction to conclude that witness is "morally reprehensible" and "undeserving of justice"); *see also* Sonenshein, *supra* note 9, at 282, 292–93 (voicing concern that jury will use prior conviction in civil case to conclude witness is "unsavory" and that this can affect liability and damages).

89. On file with author.

90. N.J. STAT. ANN. § 2C:20-4 (West 2014).

91. *See* FED. R. EVID. 609(2), which provides that: "(2) for any crime regardless of the punishment, the evidence *must be admitted* if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement." (emphasis added). Most courts hold that trial judges have no discretion under Rule 609 to exclude prior convictions for dishonesty. *E.g.*, *United States v. Tracy*, 36 F.3d 187, 192 (1st Cir. 1994); *United States v. Morrow*, 923 F.2d 427, 431 (6th Cir. 1991).

92. In some ways, theft is a classic type of prior conviction. *See* THOMAS A. MAUET, TRIALS: STRATEGY, SKILLS, AND THE NEW POWER OF PERSUASION 145 (Erwin Chemerinsky et al. eds., 2005) (using felony theft as an example of impeachment by prior conviction).

93. *See supra* notes 42–45 and accompanying text.

94. *See* Tanford & Cox, *supra* note 36, at 484 (prior perjury conviction had no significant impact on liability verdicts); Wissler & Saks, *supra* note 36, at 42–43 (prior conviction for perjury resulted in increased convictions).

95. *See, e.g.*, Wissler & Saks, *supra* note 36, at 40–41 (prior conviction for homicide admitted in homicide case).

chose to make the conviction seven years old. Under Rule 609, ten years is the cutoff for admissibility of prior conviction evidence.⁹⁶ In this way, we tried for balance: we wanted the conviction to be noticeable and a direct hit on credibility, but not to be overwhelming in its seriousness. And, we made the conviction old enough to allow for an argument that the plaintiff had turned his life around, but not so old as to make it stale under the Rules of Evidence.

In keeping with our goal to be as close to a real trial as possible, we also had the lawyers frame the evidence. We tried to make the frame as realistic as possible so that the trial was a real struggle between the lawyers for the upper hand in characterizing the prior conviction. The plaintiff, for example, presented his prior conviction as an anomaly in an otherwise law-abiding life and wholly irrelevant to the merits of the case at hand.⁹⁷ Plaintiff also testified that he made the situation as right as he could by paying back the victims hurt by his bad acts.⁹⁸ Defense counsel argues strenuously that the prior conviction makes plaintiff unworthy of belief—specifically, that it shows that plaintiff has a tendency to lie when he is in a difficult situation.⁹⁹ Both parties make arguments about the prior conviction in their closing arguments.¹⁰⁰

Our study was also unique among other studies in that it manipulated which side introduced the prior conviction evidence. We had three trial scenarios, two experimental versions and one control. The plaintiff's prior conviction is admitted only in the experimental versions of the trial; in the control, no prior conviction is presented. The two experimental versions differ in terms of which side raises the evidence. In one experimental version, the plaintiff's own attorney introduces the prior conviction to the jury on direct examination of his client and frames the bad facts in an attempt to neutralize them.¹⁰¹ In another experimental version, defendant's attorney raises the prior conviction on cross-examination, and the plaintiff's attorney attempts to rehabilitate the plaintiff on redirect examination.¹⁰² This difference separates this

96. FED. R. EVID. 609(b).

97. On file with author; *see, e.g.*, MAUET, *supra* note 92, at 145 (giving paradigm example of witness with prior conviction who has led otherwise law-abiding life).

98. On file with author.

99. *Id.*

100. *Id.*

101. *Id.*

102. This difference between the two experimental versions does not make any real substantive difference in the case. In both experimental versions, the same evidence comes out, plaintiff attempts to frame it the same way, and defendant attempts to argue its relevance the same way. The only difference is who first raises the prior conviction, plaintiff or defendant, and at what point in

study from several of the prior studies. Of those prior studies that involved an actual trial with direct and cross-examination of witnesses (as opposed to summaries or descriptions of a case), most had the evidence brought in by the opposing lawyer on cross-examination of the witness with the prior conviction.¹⁰³

C. *Subjects/Participants*

In terms of jurors, moreover, our study differed from most prior studies in that we pulled our “juror” subjects from actual jury pools in Philadelphia, Pennsylvania and Everett, Washington. Our study subjects were individuals who had been called to jury duty, but ultimately were dismissed. In most of the prior studies, subjects were either undergraduate students¹⁰⁴ or people culled from voter registration lists or randomly approached in public places.¹⁰⁵ Only one other study involved subjects pulled from an actual jury pool.¹⁰⁶

The data collected in this study also differed in that it came from two separate geographic sources—the Snohomish County Courthouse, located in Everett, Washington, thirty miles north of Seattle, and the Philadelphia Court of Common Pleas, located in the city center of Philadelphia, Pennsylvania.¹⁰⁷ None of the prior studies tested diverse

the trial it gets raised. However, the differences between the two experimental versions did create some strategic differences in the trial. For example, when plaintiff voluntarily discloses his own prior conviction, he argues in closing that he “came clean” with the jury, an argument he cannot, and does not, make in the version in which defendant first raises the prior conviction. Similarly, when defendant first raises the prior conviction, he argues in closing that plaintiff hid something from the jury, an argument that he cannot and does not make in the version in which plaintiff “comes clean.” Finally, in the version of the trial in which defendant raises the prior conviction on cross-examination, in keeping with the rules of evidence and trial practice, defense counsel is able to adduce only: (i) the fact of the conviction, (ii) the date, (iii) the offense, and (iv) the sentence. The defendant then goes into greater depth about the credibility implications of the prior conviction during re-cross and closing. On file with author.

103. *See, e.g.*, Clary & Shaffer, *supra* note 42, at 241; Tanford & Cox, *supra* note 36, at 482.

104. Clary & Shaffer, *supra* note 42, at 240; Hans & Doob, *supra* note 36, at 239.

105. Tanford & Cox, *supra* note 36, at 481 (voter registration lists); Wissler & Saks, *supra* note 36, at 39–40 (subjects approached at places such as laundromats and grocery stores).

106. Green & Dodge, *supra* note 36, at 70–71 (researchers contacted people who had been called to jury duty in a certain time period by phone and asked them to volunteer). Recall that the Laudan & Allen study, *supra* note 7, reviewed trial data from real trials, so clearly that study involved real juries.

107. Data taken from the American Community Survey and the 2010 National Survey showed that in Everett, Washington, the gender of the population is almost evenly split, the median age is thirty-four, and the population is seventy-five percent white, followed by approximately nine

geographic areas.

Our goal was to create a diverse pool of subjects from a larger urban area and a smaller urban area with varying socio-economic, race, age, gender, and religious characteristics. We collected data from at least 120 jurors in each location. Our final sample amounted to 247 subjects. The sample included over sixty percent white subjects, almost twenty percent African-American subjects, and the remainder of the sample included very small percentages of Latinos, Asian-American, mixed/multi-racial, Native Americans, Middle Eastern, and those who self-identified as “other.” The gender of the sample was not evenly split—fifty-seven percent female and forty-three percent male.¹⁰⁸ The subjects in the sample ranged in age from nineteen to eighty-one, with a mean age of forty-five, and a median age of forty-six.¹⁰⁹ Our sample was also quite well educated. Over a third of the subjects possessed a college degree, one quarter possessed some college education, and another quarter possessed a post-graduate degree.¹¹⁰

percent Latino. *Age and Sex*, 2012 AM. COMMUNITY SURV., <http://www.census.gov/acs/www> (follow “Age and Sex/Aging” hyperlink; then search “state, county or place (optional)” for “Everett city, Washington”; then select “AGE AND SEX” hyperlink). *Race and Ethnicity*, 2012 AM. COMMUNITY SURV., <http://www.census.gov/acs/www> (follow “Race and Ethnicity” hyperlink; then search “state, county or place (optional)” for “Everett city, Washington”; then select “RACE” hyperlink); *Snohomish County*, U.S. CENSUS, <http://quickfacts.census.gov/qfd/states/53/53061.html>. Well over a third of the population has some college or an associate’s degree, while over one quarter has a high school degree. *Education Attainment*, 2012 AM. COMMUNITY SURV., <http://www.census.gov/acs/www> (follow “Education” hyperlink; then search “state, county or place (optional)” for “Everett city, Washington”; then select “EDUCATIONAL ATTAINMENT” hyperlink). Philadelphia, Pennsylvania has slightly more females than males. *Age and Sex*, 2012 AM. COMMUNITY SURV., <http://www.census.gov/acs/www> (follow “Age and Sex/Aging” hyperlink; then search “state, county or place (optional)” for “Philadelphia city, Pennsylvania”; then select “AGE AND SEX” hyperlink). The median age is also about thirty-four. *Age and Sex*, 2012 AM. COMMUNITY SURV., <http://www.census.gov/acs/www> (follow “Age and Sex/Aging” hyperlink; then search “state, county or place (optional)” for “Philadelphia city, Pennsylvania”; then select “AGE AND SEX” hyperlink). Whites and African Americans each make up forty percent of the population, with Latinos making up approximately twelve percent. *Race*, 2012 AM. COMMUNITY SURV., <http://www.census.gov/acs/www> (follow “Race and Ethnicity” hyperlink; then search “state, county or place (optional)” for “Philadelphia city, Pennsylvania”; then select “RACE” hyperlink); *Philadelphia (city), Pennsylvania*, U.S. CENSUS, <http://quickfacts.census.gov/qfd/states/42/4260000.html>. Over one third of the population has only a high school degree, while about one fifth has only some college or associate’s degree. *Education Attainment*, 2012 AM. COMMUNITY SURV., <http://www.census.gov/acs/www> (follow “Education” hyperlink; then search “state, county or place (optional)” for “Philadelphia city, Pennsylvania”; then select “EDUCATIONAL ATTAINMENT” hyperlink).

108. Our sample is overrepresented by females compared to each city’s population.

109. Our median age sample is twelve years older than the median of the city populations.

110. Our sample represents a more educated group than the populations from which they were drawn.

D. *Race of Witness with Prior Conviction*

Finally, we also manipulated the race of the plaintiff—the witness with the prior conviction. In three of the videotaped trials, the plaintiff is a white male and in the other three the plaintiff is an African-American male of roughly the same age. We wanted to explore how race might affect the impact of the prior conviction on the outcome of the case and the credibility of the witness.

E. *Survey Questions*

We sought to measure four particular concepts. First, whether the jurors thought the defendant was “guilty”¹¹¹ of negligence; second, how confident the jurors felt about their belief in the defendant’s guilt or innocence on a scale of one to ten; third, how damaging the negative information was to the plaintiff’s case on a scale of one to ten;¹¹² and finally, how damaging the negative information was to the plaintiff’s credibility on a scale of one to ten.

We asked jurors to give us typical demographic information: their gender, age, race or ethnicity, and level of education. In addition, we asked jurors whether they identified with the plaintiff,¹¹³ whether they believed the defendant, whether they believed the plaintiff,¹¹⁴ and what evidence played the most significant role in determining the defendant’s

111. Technically, in legal parlance, the defendant is not found “guilty” in a civil proceeding, but rather “liable” or “not liable” for the tort of negligence. However, because we did not include jury instructions clarifying what the jury was to find, we used the term “guilty” (as well as the term “innocent” in later questions) to erase doubt about what we were asking.

112. Recall that all versions of the trial, control and experimental, contained negative information that went to the merits of the case. For example, plaintiff testified that he did not check his mirror before veering away from defendant’s truck and plaintiff also could not remember whether he used his brakes. Only the experimental versions contained the additional prior conviction evidence. But when we asked our survey question, we asked all groups, control and experimental, about the damage caused by the negative information *that they noticed in the trial*, whatever that negative information was.

113. To our knowledge, none of the other prior conviction studies asks this particular question. Our results indicate that it did not affect the outcome of the case.

114. Our goal here was to detect any differences in the general feelings the jurors had about believing one witness over another because the facts of the case created a credibility issue in which each party’s story conflicted with the other in some regard. Thus, the jurors had to reconcile one story as true and the other as not true—at least to some degree. Similar questions about credibility are asked in a number of the prior conviction studies. *See, e.g.*, Tanford & Cox, *supra* note 36, at 483 (jurors had to rate defendant’s credibility on nine-point scale); Wissler & Saks, *supra* note 36, at 41 (credibility of defendant on ten-point scale).

guilt or innocence.¹¹⁵ We also asked whether they observed either the defense or plaintiff's attorney elicit negative information from the plaintiff, and if so, what was the nature of that information.¹¹⁶ Finally, we asked whether the jurors noticed the race of the plaintiff.¹¹⁷

III. RESULTS

We report the results of the study in this section. Afterwards, we consider the significance of these results in the discussion section. The results are presented in five phases. First, we explore the trial outcomes for each of the groups: (i) the control, (ii) the experimental group in which the plaintiff reveals the prior conviction first, and (iii) the experimental group in which defense counsel reveals the prior conviction first.

Next, we report on how the prior conviction (in the experimental groups) and the other bad facts (in the control) appeared to affect the credibility of the plaintiff. Third, we examine how deeply the prior conviction/bad facts resonated with the jurors. Fourth, we analyze how important the bad facts/prior conviction seemed to be to: (i) the jurors' resolution of the case; and (ii) their assessment of the damage to the plaintiff's credibility. Finally, we end with an examination of the

115. Here, we attempted to determine the extent to which jurors identified and rationalized their decision based on the merits of the case. *See generally* SEAN G. OVERLAND, *THE JUROR FACTOR: RACE AND GENDER IN AMERICA'S CIVIL COURTS* (2009). Some of the other studies ask a similar question but in different ways. *See, e.g.*, Green & Dodge, *supra* note 36, at 72 (jurors asked whether prior conviction influenced decision); Tanford & Cox, *supra* note 36, at 483 (subjects asked to rank ten provided pieces of evidence in terms of importance); Wissler & Saks, *supra* note 36, at 41 (asking specifically whether prior conviction influenced verdict).

116. Most of the prior studies point out the prior conviction for mock jurors and ask about it specifically. *See, e.g.*, Green & Dodge, *supra* note 36, at 72 (jurors asked whether prior conviction influenced decision); Tanford & Cox, *supra* note 36, at 483 (subjects asked to rank ten provided pieces of evidence in terms of importance); Wissler & Saks, *supra* note 36, at 41 (asking specifically whether prior conviction influenced verdict). Our question was phrased in a more open-ended way that required jurors to write out in their answer, from memory, what "negative evidence" they noticed and how important it was to their decision-making. We did not feed them the prior conviction as the "bad evidence." This method gave us a unique insight into juror decision-making and allowed us to determine whether the prior conviction, of all the negative evidence, was most salient. In our trial, the prior conviction is for a relatively minor felony, and only one of the pieces of negative information in the trial. As with any real trial, however simple, our trial had lots of good and bad information for both sides. Therefore, it was particularly important to observe whether the jurors actually perceived the information as negative and whether they could recall it as *the* negative information we intended it to be. Compare Tanford & Cox, *supra* note 36, at 483, who conducted a similar study and asked a similar, though less open-ended, question about salience.

117. Other studies have suggested that the race of a witness could impact persuasion and decision-making. *See* Petty et al., *supra* note 53, at 25–26 (individuals give more scrutiny to messages from sources who are from stigmatized groups).

interaction effect of three variables: juror's belief in the witness's testimony, how damaging the bad facts were to plaintiff's credibility, and the case outcome.

A. *Trial Outcomes*

1. *Defendant's Liability*

We first analyzed whether any relationship existed between whether jurors heard the prior conviction evidence against plaintiff and whether they thought the defendant was liable.¹¹⁸ We asked two questions about defendant's liability in our survey. First, jurors had to answer whether defendant was "guilty" of negligence.¹¹⁹ Later in the survey, after respondents answered a number of questions related to the harmful information in the trial, we asked if the defendant was "innocent" of negligence.¹²⁰

Was Defendant "Guilty" of Negligence: Interestingly, the jurors in the control group—the group who did not hear evidence of plaintiff's prior conviction—contained the largest percentage of subjects who found the defendant "not guilty" of negligence. Put another way, those jurors in the experimental groups, who heard evidence of plaintiff's prior conviction, were somewhat more likely to find the defendant "guilty."¹²¹ The difference between the control and two experimental groups is not very great—a five to ten percent spread—but it is statistically significant.¹²² This result was consistent regardless of the race of the

118. We analyzed the data using the Statistical Product and Service Solutions software ("SPSS"), with each juror representing a unit of analysis. SPSS is one of the most widely used software packages for statistical analysis in scholarly articles. Robert A. Muechen, *The Popularity of Data Analysis Software*, R4STATS.COM, <http://r4stats.com/articles/popularity/> (last visited Aug. 26, 2014) ("SPSS is by far the most dominant package . . .").

119. On file with author.

120. *Id.* We asked this question twice in two different ways and at different points in the survey to see whether the responses of the jurors would change with the different phrasing, as time passed, or after they answered other survey questions.

121. In response to this question, there existed no statistically significant difference between the two experimental groups. That is, the results were the same whether the plaintiff or defendant first raised the prior conviction.

122. While the Pearson's *r*, the number which measures the strength of the relationship, is a quite weak $-.128$ (0 represents no relationship, while 1 represents two perfectly correlated variables, and negative values indicate an inverse correlative relationship) the chi square test, which measures whether differences occur by chance, is $p < .05$. That number states that less than a five percent chance exists that these results occurred merely by luck.

plaintiff; it did not matter whether the plaintiff was white or African-American. We were slightly surprised by this result. Based on the conventional wisdom of law as well as the empirical research, we expected that the prior conviction would reduce the plaintiff's credibility and lead jurors in the two experimental groups to reject plaintiff's claim at a greater rate than the control group.¹²³

Our expectation was not met. Overall, all of the jurors, experimental and control, were inclined to find the defendant "not guilty" of negligence, but the experimental groups were slightly less decisive in finding for the defendant. This interesting result may mean that introduction of the prior conviction could have resulted in a "backlash" effect that made the jurors gravitate toward a verdict for the plaintiff. This "backlash" effect could be the result of jurors feeling sympathy for the plaintiff or their feeling angry with defendant for harping on something they perceived as irrelevant, or some combination. Recall that Wissler and Saks had hypothesized that the prosecution's use of a prior conviction for a crime far less serious than the one charged in a criminal case might have resulted in a "backlash" effect against the prosecution.¹²⁴ It is possible something similar happened here.¹²⁵

Was Defendant "Innocent" of Negligence: The second question about defendant's liability appeared later in the survey. Here, we phrased the question differently. We asked jurors to judge whether the defendant was "innocent" of negligence. We wanted to assess whether jurors would alter their verdicts either because they had already answered a number of other survey questions or because the question was framed differently. Here, we saw no real variation. Jurors were largely consistent in their answers about liability. If a juror said that the defendant was "not guilty" of negligence, the juror was likely to say that the defendant was "innocent" of negligence. Again, this result was consistent for plaintiffs of both races.

123. This result was consistent regardless of the race of the plaintiff; it did not matter whether the plaintiff was white or African-American.

124. Wissler & Saks, *supra* note 36.

125. The basis for this hypothesis in our case is explored *infra* when we report additional results regarding the jurors' perception of the damage or importance of the prior conviction to the case.

Table 1. Guilt or Innocence of Defendant by Type of Trial Observed

	Control	#	π Reveals Conviction	#	Δ Reveals Conviction	#
Defendant (Guilty)						
Yes	20.0%	16	34.5%	29	30.1%	25
No	80.0%	64	65.5%	55	69.9%	58
Defendant (Innocent of Negligence)						
No	36.1%	26	41.8%	3	38.8%	31
Yes	63.9%	46	57.0%	45	61.3%	49

2. Juror Confidence Level in Verdict

Next, given that the results in terms of outcome were close between the experimental and control groups, we wanted to test whether the control and experimental jurors differed in their confidence levels about their verdicts. Thus, the second question asked in the survey, right after the question about whether defendant was “guilty” of negligence, was how confident jurors were in their verdict, on a scale of one to ten (with ten being very confident).

The difference here was negligible, but one statistically significant result emerged for a subset of the jurors. The jurors most confident in their finding that defendant was “not guilty” of negligence were those in the experimental group in which defense counsel first raises the prior conviction on cross-examination of the plaintiff in a kind of “gotcha” moment (Pearson’s r of .2**).¹²⁶ While not overwhelmingly strong, this result hints that a “gotcha moment” for defense counsel on a prior conviction can make jurors more confident that they reached the right

126. In statistics, the level of statistical significance is measured in three levels: .05, .01 and .001. The shorthand measure is to use * for $p < .05$, ** for $p < .01$, and *** for $p < .001$ when reporting the correlation coefficient and its level of statistical significance. Jan M. Hoem, *Reflection: The Reporting of Statistical Significance in Scientific Journals*, 18 DEMOGRAPHIC RES. 437, 438 (2008), available at <http://www.demographic-research.org/volumes/vol18/15/18-15.pdf>.

verdict. Again, this result appeared consistently in the trial involving the white plaintiff as well as the trial involving the African-American plaintiff.

3. *Prior Conviction Evidence Effect on Credibility*

Because we were most curious to understand how the prior conviction evidence might affect the credibility of the plaintiff, we also asked two questions testing credibility independent from trial outcome. First, we asked jurors whether they believed defendant's testimony. Next, we asked whether they believed plaintiff's testimony. Given that the trial was designed to place both parties' credibility at issue, these were critical questions. We were not sure what the results would be here, as prior studies had shown equivocal results regarding the effect of prior convictions on credibility.¹²⁷

Regardless of the prior studies, however, our lawyer instincts led us to three predictions. First, we predicted that the prior conviction would likely hurt the plaintiff's credibility. We expected to see more credibility damage to the plaintiff in both experimental groups as compared with the control group. Second, we anticipated a difference in the two experimental groups with regards to damage to plaintiff's credibility. We expected the plaintiff to suffer less credibility damage in the trial in which he voluntarily discloses his prior conviction—in which he essentially “comes clean” to the jury.¹²⁸ Finally, we predicted that the African-American plaintiff would suffer a greater credibility hit than the white plaintiff in all three groups, experimental and control, because of enduring biases against African-Americans. We pondered whether this credibility hit would be worse in the experimental trials, where the bad fact was a prior conviction, because of the enduring racial bias regarding black male criminality.¹²⁹

However, the results were somewhat surprising to us. In all the trials, control and experimental, jurors overwhelmingly tended to believe the defendant's testimony. Similarly, jurors in all trials exhibited much more ambivalence about the plaintiff's testimony. Indeed, whether jurors

127. *See supra* notes 49–51 and accompanying text.

128. The conventional wisdom of trial experts is that volunteering harmful information about your client or your witness in a trial is the most effective strategy. The theory is that volunteering harmful information boosts the witness's credibility with the jury, and gives the witness's lawyer the chance to frame the evidence early and effectively. THOMAS MAUET, *TRIALS: STRATEGY, SKILLS, AND THE NEW POWERS OF PERSUASION* 142 (2d ed. 2009); James W. McElhaney, *Stealing Their Thunder*, 13 *LITIG.* 59, 59 (1987).

129. *See* studies cited *supra* note 5.

believed the plaintiff was remarkably similar across all trials, control and experimental. Whether the jurors heard about the plaintiff's prior conviction simply did not seem to impact their belief in either party. Moreover, in the experimental groups, these results were the same whether jurors heard about the conviction first from the plaintiff who "came clean" or first from the defendant in a "gotcha" moment. And these outcomes were true for the white plaintiff and the African-American plaintiff. Overall, the jurors found the defendant more credible than the plaintiff no matter what.

Table 2. Believe in Plaintiff and Believe in Defendant Testimony

	Control	π Reveals Conviction	Δ Reveals Conviction
Believe Δ Testimony			
Yes	79.7%	79.3%	69.9%
No	20.3%	20.7%	30.1%
Believe π Testimony			
Yes	47.4%	49.4%	46.3%
No	52.6%	50.6%	53.7%

These results certainly seem consistent with those prior studies finding that jurors do not use prior convictions as an assessment of credibility—in direct contrast to the theory underlying Rule 609.¹³⁰ Thus, while the Rules of Evidence presume that prior convictions for crimes involving dishonesty show a lack of credibility, jurors do not seem to use the information that way. Recall here that in both experimental versions, defense counsel explicitly and strongly argues that plaintiff's prior conviction for theft by deception makes him prone to lie. Yet, the jurors in these two groups responded to the plaintiff's testimony in the same way as the control group, where the jurors did not hear anything about the plaintiff's prior conviction. These results suggest that the jurors did not credit this argument, regardless of the race of the plaintiff.

130. See, e.g., Wissler & Saks, *supra* note 36, at 41.

In sum, we found that none of our hypotheses regarding credibility were supported. First, the plaintiff did not suffer greater credibility damage in the experimental groups relative to the control groups. The prior conviction simply did not hurt plaintiff's credibility that much. Second, the plaintiff did not garner greater credibility points for "coming clean" before the defense counsel drew it out on cross-examination. With respect to which party to believe, it did not seem to matter to jurors when they heard about the conviction or from whom. Related to this second hypothesis, we noticed a small wrinkle that was exactly the opposite of what our lawyer instincts predicted. As Table 2 shows, the jurors who heard defense counsel first raise plaintiff's prior conviction tended to be less likely to believe defendant's testimony. Specifically, ten percent fewer jurors who saw the defense attorney reveal the prior conviction in a "gotcha" moment believed defendant's testimony as compared to the control group (no prior conviction raised at all) and the other experimental group (plaintiff's lawyer volunteers the prior conviction). While the ten percent difference is not statistically significant, it might suggest the possibility that defendant's introduction of plaintiff's prior conviction for theft could be associated with a very small portion of jurors choosing to disbelieve the defendant.¹³¹

This phenomenon is interesting because the jurors who heard defense counsel first raise plaintiff's prior conviction also heard the most aggressive closing argument from defense counsel about the impact of the conviction. In that closing, defense counsel not only argues that plaintiff is not worthy of belief because of the prior conviction, but also argues that plaintiff is also unworthy of belief because he tried to hide this conviction from the jury. The results seem to hint that jurors had a backlash reaction to defense counsel's "gotcha" moment with plaintiff's conviction and his strenuous argument about plaintiff's lack of credibility.

While we can only speculate about what happened in our study, prior studies have noted that jurors can have a backlash reaction when they believe the lawyers are being manipulative, unfairly harsh, or otherwise trying to bias their decision by raising or arguing evidence that the jurors

131. Notice that this result is not inconsistent with our finding about juror confidence, *supra*, though it is interesting when juxtaposed. Recall that the earlier result was that, of the subset of jurors who found defendant "not guilty" of negligence, those who experienced the defendant's "gotcha" moment with plaintiff's prior conviction were more confident in their verdicts. *See supra* p. 929-30. This is a little different from the finding discussed here, which is that overall, apart from their determination of guilt or innocence, jurors who heard the "gotcha" moment were less likely to believe defendant's testimony.

do not think is important.¹³² Something similar may have happened here.¹³³

Finally, contrary to our other hypothesis, the results held constant with both the white and African-American plaintiffs. We simply did not see a racial variation in how jurors, overall, responded to the prior conviction evidence or other bad facts.¹³⁴

B. *Salience of Harmful Facts*

Given that plaintiff's prior conviction did not have a definitive effect on either the trial outcome or plaintiff's credibility, we wanted to confirm that the prior conviction, our stimulus variable, actually registered with the jurors in the experimental groups. Thus, we set out to measure the salience of the prior conviction variable. Salience is a social science term that refers to how prominent or noticeable the variable was to study subjects.¹³⁵ In other words, we needed to know whether jurors noticed the prior conviction and registered it as a harmful fact about the plaintiff.

To determine salience, we asked two questions of our jurors. First, our survey contained a yes/no question asking jurors if they noticed

132. Wissler & Saks, *supra* note 36, at 44. Jurors may also have had a reactance or overcorrection response to what they perceived as defense counsel's attempt to manipulate or bias their decision. Reactance is an emotional response people have when they feel that an advocate has corrupted or manipulated their decision-making autonomy. It usually results in people rejecting the position of the advocate who is the perceived source of the manipulation or corruption. See Kathryn Stanchi, *What Cognitive Dissonance Tells Us About Tone in Persuasion*, 22 J.L. & POL'Y 93, 105–06 (2013) (discussing psychology of reactance). Over-correction is another possible response when people feel that an advocate is trying to bias their decision-making. In response, people may "over-correct" for the bias and decide against the perceived source of the bias. *Id.* at 110–11.

133. This hypothesis is somewhat borne out by some of the narrative responses on the survey instruments, which show that the prior conviction might have led jurors to feel empathy with the plaintiff. Several of the jurors commented that the plaintiff's prior conviction for kiting checks had little to do with the case at hand, often pointing out that seven years had passed since that conviction. One respondent showed real empathy with the plaintiff's response to the economic downturn, noting that, "I don't think [the plaintiff's past economic difficulty] matters because most of America has been in that same position. Sometimes you get [sic] and checks bounce." (Survey respondent 185). Another respondent characterized plaintiff's two years of check kiting as a "momentary lapse that anyone might succumb to." (Survey respondent 210).

134. However, when we ran the analysis splitting the jurors into two groups, minorities and non-minorities (whites), we found that regardless of which group the juror was in, or the race of the plaintiff, whites were more inclined to believe the plaintiff than minority jurors were.

135. Salience measures whether particular stimuli stand out relative to others. See SUSAN T. FISKE & SHELLEY TAYLOR, *SOCIAL COGNITION* 60 (2d ed. 2013).

whether either attorney presented any harmful information about the plaintiff during the trial. Second, our survey contained an open-ended question asking jurors to describe the harmful information about plaintiff that they observed. The open-ended question is quite important, as it required jurors to remember and report the harmful information that they recalled. Unlike prior studies, we gave jurors no prompts or hints about the harmful information about which we were seeking information.¹³⁶

1. *Observing a Harmful Fact*

The responses to the first question show intriguing results. Roughly ninety percent of the jurors in the experimental groups (the groups that heard about plaintiff's prior conviction) answered "yes" to the question about whether they noticed a harmful fact about the plaintiff.¹³⁷ Alternatively, only about fifty-one percent of the control group answered "yes" to this question. When we looked for differences in these responses based on the race of the plaintiff, no substantive or statistically significant differences in results emerged.

The difference in the results between the experimental and control groups suggests that prior conviction evidence, as compared to other types of harmful evidence, is more noticeable. Even though our prior conviction evidence was for a moderately serious crime and was embedded within the trial with other positive and negative evidence about the merits of the case, forty percent more jurors who heard the prior conviction evidence reported noticing a bad fact as compared with the jurors who did not hear the prior conviction evidence. Thus, we feel confident in saying that experimental jurors were more likely to notice something negative about the plaintiff.¹³⁸

2. *Articulating the Harmful Fact Observed*

But the crucial result is contained in the response to the open-ended question requiring jurors to report what bad fact they noticed. The juror responses to the open-ended question reveal yet another layer about the salience of the prior conviction evidence. We coded the jurors' answers to the open-ended question into six categories shown in Table 3. As seen

136. See, e.g., Tanford & Cox, *supra* note 36, at 483 (jurors given a list of evidence items and asked to circle which were a part of the trial).

137. Here, there was no significant difference between the two experimental groups. It did not seem to matter here which side raised the prior conviction.

138. A Chi Square and Phi Analysis revealed both a statistically significant result of $p < .001$ and a strong correlation of .455.

in Table 3, for the jurors in both experimental groups, the plaintiff's prior conviction was a key negative fact.

Table 3. Answers Given as the Negative Plaintiff Facts

	Control	π Reveals Conviction	Δ Reveals Conviction
Describe Bad Facts			
Bad Checks	0.0%	65.5	57.8%
π Truthfulness	0.0%	11.9%	8.4%
Bad Checks (+)	0.0%	3.6%	10.8%
Loss of Memory / Failure to Explain	11.3%	0.0%	0.0%
Frustrated / Impatient / Reckless	25.0%	0.0%	0.0%
Other	12.5%	6.0%	9.6%
Blank	51.3%	13.1%	13.3%

In both experimental groups, roughly sixty-nine percent of respondents identified “passing bad checks” or “passing bad checks in addition to other facts” as the negative fact that they observed. The percentage goes up to roughly eighty percent if we include jurors who identified plaintiff's truthfulness (or lack thereof) as the harmful fact. Here again, whether plaintiff or defendant first raised the conviction did not significantly change the result. Finally, this consequence was true across the board for both the white and African-American plaintiffs.

The results were quite different for the control jurors (who did not hear about a prior conviction). As expected, no jurors in the control group identified anything having to do with “bad checks” as a negative fact. And, indeed, no jurors in the control group identified “plaintiff's truthfulness” as a harmful fact. The most common harmful “fact” identified by control jurors was not a specific fact at all. Rather, it was an inference about the plaintiff's impatience or recklessness while driving (twenty-five percent). Control jurors also noted plaintiff's failure to remember or explain things about the accident (eleven percent). Both of these answers go to the merits of this negligence trial, which, as noted above, was about who was at fault in a car accident.

Remarkably, none of the jurors in the experimental groups pointed to plaintiff's driving or failure to remember in their responses. This is remarkable because the experimental jurors heard the same facts about plaintiff's driving and failure of memory in their trials. Again, these

results held regardless of the race of the plaintiff. Thus, an interesting picture emerges in which the control jurors, not distracted by the prior conviction, focused on facts or inferences that went directly to the merits of the case. For the experimental jurors, the prior conviction was a distraction that overshadowed the bad facts about plaintiff's driving and memory.

One other interesting result emerged from our analysis of the answers to these two questions. We also looked at which jurors left the answer to the open-ended question blank and noticed a difference between the experimental and control groups. Specifically, fifty percent of the control respondents left the question blank, as compared with only thirteen percent of the experimental groups. When we ran a Chi Square Analysis to determine whether this difference between the control and experimental groups occurred by chance, we found a statistically significant result.¹³⁹

Viewing these salience results together, we can infer that among all types of bad facts that arise in a trial, prior convictions, even prior convictions for moderately serious crimes not related to the merits of the case, tend to resonate with jurors. First, the experimental groups were more likely to report that they observed a bad fact. Second, they were almost twice as likely to be able to name the specific bad fact that they observed. Third, they zeroed in on the prior criminal conviction (not plaintiff's driving or memory loss) as the bad fact.

C. The Importance of the Bad Facts to Outcome and Credibility

While the results regarding the jurors' memory of the prior conviction give us great insight into the traction that such a conviction has in a juror's mind, the key question is whether the salience of the conviction actually affects how the juror determines the outcome of the case. It is one thing to notice a prior conviction. It is another to use that piece of information as part of the rationale in determining liability. Thus, the next step for us was to examine the questions that asked jurors to rate the importance of the negative information to their decision-making process. We asked two questions about importance. The first focused on outcome: it asked jurors to rate, on a scale of one to ten (ten being extremely important), how important the negative evidence was to them in deciding the outcome of the case, i.e., defendant's liability.

The second question focused on credibility because most lawyers

139. The result was significant at the $p < .001$, which means that a less than one in one thousand chance exists that the results occurred by luck.

believe, and the Rules of Evidence establish, that prior conviction evidence primarily affects a case through the juror's assessment of credibility. This question asked jurors to rate, on a scale of one to ten (ten being extremely damaging), how damaging the negative evidence was to the plaintiff's credibility.

As shown in Table 4, we again saw some statistically significant differences between the control and experimental groups, but perhaps not the ones we expected.¹⁴⁰ Overall, we saw much higher ratings of importance, both in terms of outcome and damage to plaintiff's credibility, in the control group as compared to the experimental groups. Taken as a whole, the results here gave us the first hint that how the prior conviction evidence interacted with credibility in our trial was much more complex and nuanced than we had anticipated.

Interestingly, jurors in the control group were more likely to rate the harmful evidence as important in both categories: outcome and damaging to the plaintiff's credibility, as shown in Table 4.¹⁴¹ Table 4 also demonstrates that the control jurors were least likely to rate the harmful evidence as "most important" and "most damaging to the credibility of the plaintiff."¹⁴² This result is interesting because the control group did not hear about the prior convictions; rather, the control group jurors focused on plaintiff's driving as the key negative fact that they reported.

Conversely, in the two experimental groups, the majority of the jurors rated the negative information as "most important" to outcome and "most damaging to the plaintiff's credibility." And a majority of the jurors in the experimental groups also reported the prior conviction and plaintiff's truthfulness as the harmful facts. Nevertheless, it seems like the experimental jurors did not see the prior conviction as harmful to

140. As noted above, *supra* notes 9–21 and accompanying text, the conventional wisdom in law (as demonstrated by the Rules of Evidence) is that a prior conviction is damaging to credibility. This phenomenon is particularly so for prior convictions involving crimes of dishonesty, which the Rules of Evidence liberally allow in evidence for credibility purposes. It does not matter under the Rules of Evidence if the conviction is for a minor crime. While we may have expected less devastating consequences to credibility here, given that this was a prior conviction for a moderately serious crime introduced as evidence in a civil case, we nevertheless expected that the conviction would undercut the plaintiff's credibility.

141. "Most important" means that the juror rated the evidence eight or higher on the importance scale.

142. "Least important" means that the juror rated the evidence three or lower on the importance scale.

plaintiff's credibility.

Table 4. Percent of Each Group Reporting Damage to Plaintiff Credibility and Importance of Facts

How important was bad fact to case?			
Range	Control	π Reveals Conviction	Δ Reveals Conviction
1-3 Least Important	41%	59%	65%
4-7 Moderate Importance	36%	24%	30%
8-10 Most Important	22%	17%	5%

How damaging was bad fact to the plaintiff's credibility?			
Range	Control	π Reveals Conviction	Δ Reveals Conviction
1-3 Least Important	42%	60%	52%
4-7 Moderate Importance	32%	25%	40%
8-10 Most Important	26%	15%	8%

Because the bad facts identified by the control group were largely about the merits of the case (plaintiff's driving), it is not surprising that the jurors in the control group saw their bad facts as more important to outcome (defendant's liability) than the jurors in the experimental groups (who had mostly identified the prior conviction as the bad fact). On the other hand, it is a bit more puzzling that a larger portion of control jurors over experimental jurors found the harmful facts more damaging to credibility. Recall that none of the control jurors mentioned plaintiff's truthfulness as a bad fact in response to the open-ended question. Rather, the control jurors tended to focus on plaintiff's driving.

Substantive bad facts (such as plaintiff's poor driving here) are, in the conventional wisdom of the law, relevant to the merits, not credibility. Our results suggest that for jurors, the line between merits and credibility might be a bit fuzzier than the line drawn by conventional legal

wisdom.¹⁴³ It may also be that in this kind of “he said/he said” case, the line between merits and credibility is not a bright one, particularly for non-legally trained jurors. After all, in a “he said/he said” case, harmful facts about the merits could be seen as undercutting the plaintiff’s story (and hence, his credibility).¹⁴⁴

These results all remained consistent when we tested for race. In other words, all the results for whether the bad facts were (i) important to outcome and (ii) damaging to plaintiff’s credibility were similar for the white plaintiff and African-American plaintiff.

Overall, the results on “importance” of the bad facts led us to two key findings and spurred us to look more deeply into how the prior conviction affected the decision-making of jurors in our case. First, jurors might have had a “backlash” reaction to the use of the prior conviction to impeach the plaintiff. Second, jurors seemed to be able to notice a particularly negative fact like a prior conviction, but still compartmentalize it when examining the merits of the case. Put together, all these results hinted that the issue of credibility in our trial was much more complex and nuanced than we had anticipated.

Potential Backlash: The result showing that jurors in the experimental groups (who heard about the prior conviction) tended to downgrade the importance of that conviction provides some support for the idea that jurors can have a “backlash” reaction to the use of a prior conviction to impeach a witness. As Table 4 shows, the highest percentages of jurors who rated the bad evidence as less important, both to outcome and credibility, occurred in the groups that heard the prior conviction evidence. Two particularly intriguing outcomes exist here. First, in terms of importance to outcome, the largest percentage of jurors with the lowest ratings of importance to outcome (roughly sixty-five percent of jurors) occurred in the experimental group in which defense counsel first

143. In fact, a review of the bad facts that the control group reported suggests that a blurred line between merits and credibility may exist. For example, a little over eleven percent of the jurors thought it was a bad fact that the plaintiff could not recall or explain certain parts of his story. This lack of memory or explanation could be interpreted as a credibility problem. Similarly, a quarter of the jurors in this group described the plaintiff’s behavior as problematic—he was reckless, impatient, or frustrated. Exhibiting this type of conduct could perhaps also cause a juror to interpret a flaw in the plaintiff’s character, which could lead the juror to conclude that this type of person is not credible—or at least his story is not.

144. Another interesting point here is that the responses about the importance of the bad facts were largely consistent between groups. Across all groups, control and experimental, if jurors thought the bad facts were not important in determining the outcome of the case, they also tended to find them not to be damaging to plaintiff’s credibility.

raises the prior conviction in a “gotcha” moment on cross-examination. Second, and along the same lines, but with respect to damage to credibility, the largest percentage of jurors (about sixty percent) with the lowest ratings for damage to plaintiff’s credibility occurred in the experimental group in which the plaintiff revealed the prior conviction first.

Recall that Wissler and Saks posited that jurors might have had a “backlash” response to the use of a relatively unserious prior crime to impeach a witness.¹⁴⁵ They hypothesized that jurors could have perceived the use of that less serious conviction as an attempt to manipulate or distract them from the real issues in the case.¹⁴⁶ In practical terms, this result suggests that advocates should think twice about raising and arguing a prior conviction against the other side—not just in a criminal case (the subject of the Wissler and Saks study), but also in the civil context. If that prior conviction is of only moderate seriousness and of dubious relevance to the case, jurors may see it as a smokescreen and could have a “backlash” response.¹⁴⁷

Juror Compartmentalization of Bad Facts: When looked at in combination with the results on salience, our results on importance also suggest that jurors can register particularly negative facts, like a criminal conviction, but compartmentalize them when examining the merits of a case. Compare the high levels of salience the criminal conviction had for the jurors in the experimental groups with their low ratings of the importance of that bad fact on outcome and credibility. In other words, contrary to the conventional wisdom, a criminal conviction does not automatically lead jurors to an outcome against the party with the conviction. Moreover, the admission of a criminal conviction, even for a crime involving dishonesty, does not automatically result in jurors determining that the witness with the conviction is less credible. In fact, our results show the opposite could be true.¹⁴⁸

All of these results together led us to conclude that the effect of the

145. Wissler & Saks, *supra* note 36, at 44.

146. *Id.*

147. This hypothesis is further supported by another correlation. Those jurors in the experimental group where the *defense* raises the prior conviction in a “gotcha” moment who also determined that the prior conviction was *not very important* to the outcome were much more likely to find for the plaintiff (sixty-five percent finding for plaintiff) compared to both the other experimental group and the control group (forty-five percent finding for plaintiff).

148. One take-away from this intriguing result may be that the assumption of most lawyers, legal commentators, and judges, as well as the Rules of Evidence, that prior convictions seriously damage the credibility of a witness, is not always correct—at least as it applies to plaintiffs in civil cases. This idea is explored further in the next section.

prior conviction in this case was far more complex than we had imagined. Things become even more complex when we add the results of one final question on outcome to the mix. In addition to asking jurors to rate importance, we also asked the jurors an open-ended question requesting that they report what evidence was most critical to them in reaching their verdicts. All jurors, whether they found for plaintiff or defendant, pointed to the lack of sufficient evidence as the key to their decision. Across all groups, control and experimental, those finding in favor of defendant reported that plaintiff had failed to provide sufficient evidence of defendant's "guilt." Likewise, those jurors who found the defendant "guilty" of negligence pointed to the incompleteness of defendant's case, most particularly to defendant's lack of memory about the accident. Moreover, not one juror in the control or experimental groups focused on credibility as the defining basis for the verdict. Rather, the language of all jurors focused on the merits of the case. These results were true regardless of whether the plaintiff was white or African-American.

These results, combined with what we knew about juror responses to the salience and importance questions, led us to delve into the issue of credibility more deeply. That analysis is explored in the next two sections. We discovered that what the jurors reported about their reliance on the sufficiency of the evidence belies the complexity of how a prior conviction and credibility interact on a subconscious level in juror decision-making.

D. The Interaction Effect of Believing a Witness, Damage to Plaintiff's Credibility, and Case Outcome

In an effort to make sense of the findings on outcome, credibility, and salience, we looked at the correlations of three sets of variables and explored any differences in those correlations between the control and experimental groups. We also checked for differences based on the race of the plaintiff. The three sets of variables are as follows.

First, we looked for correlations between: (i) believing plaintiff's testimony; (ii) damage to plaintiff's credibility; and (iii) case outcome. That is, we wanted to see whether jurors who believed plaintiff were less likely to perceive plaintiff's credibility as damaged and more likely to find for the plaintiff. We anticipated that these variables would be correlated for all groups. After all, it makes sense that if a juror believed plaintiff, she must be unlikely to find plaintiff's credibility damaged, and be more likely to find for plaintiff.

Second, we did the same calculation, but for those jurors who believed defendant's testimony. We looked for correlations between: (i) believing defendant's testimon, (ii) damage to plaintiff's credibility, and (iii) case outcome. Here, we anticipated that if a juror believed the defendant, the juror would be more likely to find damage to plaintiff's credibility, and be more likely to find for defendant.

Third, we looked at correlations between: (i) whether a juror believed plaintiff, (ii) whether a juror believed defendant, and (iii) case outcome. Because this case was a "he said/he said" case, we anticipated that jurors who believed the plaintiff, would disbelieve the defendant, and, therefore, would find for plaintiff (and vice versa).

When we explored this data, we found some intriguing differences between the control group who did not hear the prior conviction evidence and the experimental groups who did. This analysis confirmed that while the prior conviction evidence did not have a direct impact on outcome, it did have a subtle but tangible impact on the trial, and in particular on how credibility worked in the trial.

1. Believe Plaintiff, Damage to Plaintiff's Credibility, and Outcome

The story about how jurors decided the case, in particular the role of credibility in our trial, gets more interesting and complicated when we look at the relationships between the following variables: (i) believe plaintiff's testimony, (ii) damage to plaintiff's credibility, and (iii) outcome. We take the correlations piece by piece.

Believe Plaintiff Testimony/Outcome: First, we examined the relationship between believing plaintiff's testimony and trial outcome. Not surprisingly, we found that for all groups, control and experimental, jurors who believed plaintiff's testimony tended to find the defendant "guilty" of negligence.¹⁴⁹ The correlation was weakest for the control

149. This conclusion is based on correlations. In social science, a correlation measures the degree to which two variables have a linear relationship. A positive correlation means that as one variable goes up in value, the other variable goes up, too. Or as one variable goes down in value, the other variable goes down, too. A positive correlation means the two variables vary in the same direction (either they both go up when one changes, or they both go down when one changes). A negative correlation means that as one variable goes up in value, the other variable goes down. Or as one variable goes down in value, the other variable goes up. A negative correlation means the two variables vary in opposite directions. Correlations range from -1 to +1. A -1 means there is a strong negative linear relationship between the two variables. A +1 means there is a strong positive linear relationship between the two variables. A 0 correlation means that there is no linear relationship between the two variables. Correlations of +1 and -1 are very rare in social science because social behavior is rarely that perfect. For these variables, the correlations were: +.553** (defense raises prior conviction), +.641** (plaintiff raises prior conviction), and +.471** (control).

group, but in essence, a direct link emerged in the jurors' minds between resolving the case and believing the plaintiff. If they believed the plaintiff's testimony, they found in favor of the plaintiff—the defendant was liable and vice versa.

Damage to Plaintiff's Credibility/Outcome: Overall, we found no correlation between the variables "plaintiff's credibility damaged" and "defendant guilty" of negligence in any of the groups.¹⁵⁰ In other words, these two variables were not predictive of each other. This result is a little surprising, as we would expect that if a juror found plaintiff's credibility seriously damaged, that juror would find defendant "not guilty" of negligence. But that was generally not the case.¹⁵¹ The results were consistent regardless of the race of the plaintiff.

Believe Plaintiff/Damage to Plaintiff Credibility: Next, we examined the relationship between the variables "believing the plaintiff" and "damage to plaintiff credibility." We expected that belief and credibility would be intricately intertwined. At this point, though, things got more complicated. Two results emerged. First, these two variables were related to each other only in the experimental groups. Experimental jurors who believed plaintiff's testimony, not surprisingly, tended to be less likely to find the harmful evidence that they identified was damaging to plaintiff's credibility.¹⁵² Recall, these are the very jurors who identified the plaintiff's prior conviction as the bad fact. Put concretely, the jurors who rejected the plaintiff's prior conviction as damaging to plaintiff's credibility were also more likely to believe the plaintiff. The outcome held true for both plaintiffs, white and African-American.

Second, while the correlation of these two variables is not surprising, what is surprising is that the correlation did not hold true for the control

150. We found neither a substantive correlation coefficient nor statistical significance.

151. With one exception: Those jurors in one experimental group (defendant raises prior conviction first) who rated plaintiff's credibility as most seriously damaged by the bad facts were more likely to find defendant "not guilty" of negligence. It is worth noting that another exception to this outcome initially emerged with the group of jurors who heard about the plaintiff's conviction from the plaintiff first. At first, a correlation between "damage to plaintiff's credibility" and "defendant not guilty" appeared here, but it was quite weak, with a Pearson's r of .24*. But most importantly, this weak correlation vanished when we re-ran the analysis to include only those jurors who correctly identified the plaintiff's attorney as the attorney who had first raised the bad checks facts. Thus, in the end, this group of jurors behaved almost identically to the other two groups.

152. The correlations are +.262** (defense raises prior conviction) and +.325** (plaintiff raises prior conviction). These correlations are weak to moderate, but statistically significant. In other words, they are not the result of random chance.

group. Indeed, the opposite outcome revealed itself in the control group: no relationship existed between whether a juror believed plaintiff and whether the juror found the harmful evidence that he or she identified as damaging to plaintiff's credibility. In other words, in the control group, whether jurors believed plaintiff had no bearing on whether they perceived that the bad facts hurt plaintiff's credibility. And whether a juror thought the bad facts hurt plaintiff's credibility had no bearing on whether that juror believed plaintiff. This result means that some of the control jurors thought that the bad facts they identified (recall, those facts largely related to plaintiff's driving) actually did damage the plaintiff's credibility, but still, ultimately, some of these control jurors believed the plaintiff's testimony anyway.¹⁵³

And of course, the inverse was also true for the control jurors. Others in the control group were just as likely to report that they did not think that the bad facts damaged the plaintiff's credibility, but they ultimately did not believe the plaintiff.¹⁵⁴ The control group jurors, remember, did not hear any bad facts about plaintiff's prior conviction, so none articulated hearing any bad facts about plaintiff's truthfulness. None of these results varied significantly with race.

Putting all the results together gives us this, in a nutshell:

- For all groups, if you believed plaintiff, you found defendant "guilty."
- For all groups, no correlation existed between finding plaintiff's credibility damaged and the case outcome.
- But, in the experimental groups, a correlation did exist between whether you found plaintiff's credibility damaged and whether you believed plaintiff. If you found plaintiff's credibility not damaged, you believed plaintiff (and vice versa).
- By contrast, in the control, no correlation was present between whether you found plaintiff's credibility damaged and whether you believed plaintiff. Regardless of whether you found plaintiff's credibility damaged, you might or might not believe plaintiff.

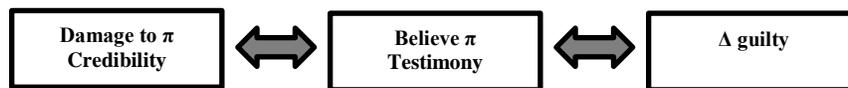
These results lead to a key take-away point. The inclusion of the prior conviction evidence changed the way the experimental jurors analyzed the evidence and decided the case. If the experimental jurors did not find

153. For example, over a third of the jurors in the control group who rated the plaintiff's bad facts as moderately damaging to his credibility still stated that they believed the plaintiff.

154. Similarly, over a third of the jurors in the control group who rated the plaintiff's bad facts as of minor or no damage to his credibility still stated that they did *not* believe the plaintiff.

plaintiff's credibility damaged, they were more likely to believe plaintiff's testimony, and more likely to find defendant liable. Figure 1 illustrates this phenomenon. This process was not so for the control group. For the control group, the outcome of the case was less about damage to credibility and more about the sufficiency of the evidence. The three variables are not related to each other in the control group, the group that heard nothing about a prior conviction. Instead, control group jurors who identified and articulated a bad fact did not connect any damage to plaintiff's credibility with whether they believed what the plaintiff testified. Such a result might appear to make sense because, remember, the control jurors who did identify a bad fact always focused on a fact about the substantiality of the evidence.

Fig. 1. Experimental Groups Only, Three Variables Correlated



Yet, the big picture of these results left us somewhat puzzled: the control group jurors, not the experimental jurors, were more likely to report that the bad facts that they identified were damaging to the plaintiff's credibility.¹⁵⁵ Moreover, these same jurors were more likely to report that the bad facts that they identified were important to them in determining the case's outcome, as compared with the experimental jurors.¹⁵⁶ However, Figure 1 suggests that despite what control jurors reported to us about its importance, damage to the plaintiff's credibility just did not seem to impact their judgment about whether to believe plaintiff.¹⁵⁷

On the other hand, experimental jurors were less likely to report that the bad facts they identified damaged plaintiff's credibility.¹⁵⁸ And these same jurors downplayed the importance of the bad evidence in their

155. *See supra* pp. 937–38. But recall, only fifty percent of this group identified any specific fact as damaging to the plaintiff.

156. *See supra* pp. 938.

157. It may also be that in the minds of lay jurors, "believing" and "credibility" are different concepts, despite the conventional wisdom of law that they are closely linked.

158. *See supra* pp. 937–38.

determination of the outcome of the case.¹⁵⁹ But Figure 1 suggests that damage to plaintiff's credibility (from the bad evidence) played a role for the experimental groups. Why the inconsistency?

In order to better understand this phenomenon, we next explored the relationships between belief in plaintiff's testimony, damage to credibility, and outcome of the case (defendant guilty of negligence) in more depth. We took two approaches. First, we controlled for the variable "damage to plaintiff's credibility" and re-ran the analysis examining the relationship between belief in plaintiff's testimony and case outcome. Second, we controlled for the variable "case outcome" and re-ran the analysis examining the relationship between damage to plaintiff's credibility and belief in plaintiff's testimony. Controlling for a variable means, essentially, that we took that variable out of the mix; we held it constant.¹⁶⁰

159. *See supra* pp. 938.

160. The main purpose in controlling for a variable is to determine whether two variables are directly related or whether a third variable, the controlled variable, is actually affecting that relationship. Consider this example:

Imagine a randomized experiment concerning the effect of noise on concentration. There are 50 subjects in the quiet condition and 50 in the noisy condition. The ideal version of this experiment is represented by the table below. The independent variable is labeled 'IV' and extraneous variables are labeled 'EV.' Note that the only variable that differs systematically across the two conditions is the independent variable itself [noise level]. There is little noise in the quiet condition and lots of noise in the noisy condition. The rest of the variables—IQ, room temperature, etc.—are the same across the two conditions. They have been **controlled**. *So if there is a difference in the concentration levels of subjects in the quiet and noisy conditions, it must be caused by the independent variable.*

Variables	Quiet Condition	Noisy Condition
Noise Level (IV)	Low	High
IQ (EV)	Average	Average
Room Temperature (EV)	68 Degrees	68 Degrees
Sex of Subjects (EV)	60% F	60% F
Task Difficulty (EV)	Moderate	Moderate
Time of Day (EV)	All Different Times bet. 9 – 5	All Different Times bet. 9 – 5
Etc. (EV)	Same as Noisy Cond.	Same as Quiet Cond.
Etc. (EV)	Same as Noisy Cond.	Same as Quiet Cond.

Now imagine a less than ideal version of this experiment, with some other variables that differ systematically across conditions. These are confounding variables, [temperature and time of day]. Now if there is a difference in the concentration levels of subjects in the quiet and noisy conditions, it could be caused by the independent variable . . . *but it could also be caused by any of the confounding variables*. If subjects in the quiet condition have greater concentration levels, is it because it was quiet, because the temperature was not too hot, or because they were tested in the morning? There is no way to tell. Obviously, this is less than ideal.

Control for Damage to Plaintiff Credibility: When we controlled for damage to plaintiff’s credibility, the relationship between the variables “belief in plaintiff’s testimony” and “case outcome” remained virtually unchanged in the experimental groups.¹⁶¹ On the other hand, controlling this variable changed the results for the control group. The correlation between “belief in plaintiff’s testimony” and “case outcome” shot up in the control group, reaching a level equivalent to the correlation in the experimental groups.¹⁶² This result means that in the control group, the variable “damage to plaintiff’s credibility” acted as a confounding variable. Specifically, the confounding variable acted as a suppressor variable, weakening what would ordinarily be a strong linear relationship between the other two variables.¹⁶³ In our case the effect was that the variable “damage to plaintiff’s credibility” was probably suppressing the relationship between “believing plaintiff’s testimony” and “case outcome” in the control group.

The key takeaway here is that while fewer of the experimental group jurors may have reported to us that the bad facts that they identified were

Variables	Quiet Condition	Noisy Condition
Noise Level (IV)	Low	High
IQ (EV)	Average	Average
Room Temperature (EV)	68 Degrees	82 Degrees
Sex of Subjects (EV)	60% F	60% F
Task Difficulty (EV)	Moderate	Moderate
Time of Day (EV)	Morning	Afternoon
Etc. (EV)	Same as Noisy Cond.	Same as Quiet Cond.
Etc. (EV)	Same as Noisy Cond.	Same as Quiet Cond.

Paul Price & Karl Oswald, *Confounding Variables*, CALIFORNIA ST. U., FRESNO (Aug. 12, 2006), <http://psych.csufresno.edu/price/psych144/confounding.html>.

161. The correlations were remarkably similar: +.552** (defense raises prior conviction) as compared with +.553** when we did not control for damage to credibility and +.627** (plaintiff raises prior conviction) as compared with +.641** when we did not control for the variable.

162. For the control, the correlation with the variable controlled was +.612** as compared with +.471** when the variable was not controlled.

163. A great illustration of a suppressor variable is *Mediating Variables and Partial Correlation*, UNIV. N.C., <http://www.unc.edu/courses/2007spring/psyc/530/001/partials.html> (last visited Aug. 12, 2014). The illustration involves a test to see whether women find men who are physically larger more attractive. Imagine that researchers, perhaps thinking of male body builders or athletes, hypothesize that women will find physically larger men more attractive. But this is not what the data shows. The data shows no correlation between ratings of male attractiveness and physical size. Then the researchers control for body fat index—they take out of the correlation men who are obese. Once they control for that variable, the correlation between ratings of attractiveness and physical size shoots up to expected levels. In this example, body fat index acts as a suppressor variable on the correlation between physical size and male attractiveness. Damage to plaintiff’s credibility works similarly here, suppressing the correlation we would expect between whether a juror believes the plaintiff and whether the juror finds the defendant liable.

less likely to damage plaintiff's credibility, in reality, damage to credibility actually played the same role in determining outcome for control jurors that it did for the experimental jurors. In other words, once we took "damage to credibility" out of the mix, the "belief in plaintiff" variable became just as strong a predictor of outcome for the control group as it was for the experimental groups. Indeed, it became a stronger predictor of outcome in the control as compared to the experimental group where the defense first raised the past conviction.¹⁶⁴ But remember, it was only the experimental jurors, who downplayed the importance of the bad evidence, who were more likely to connect "damage to credibility" to "belief in plaintiff." Put another way, while our earlier results on "importance" seemed to suggest that control jurors found the bad facts they identified (plaintiff's poor driving) more damaging to credibility and important to outcome than the experimental groups (who focused on the conviction), the distinction between the control and experimental groups on credibility was, in reality, less stark.¹⁶⁵

Control for Case Outcome: Equally important, we found that the moderate correlations that we reported above in the experimental groups between "damage to credibility" and "belief in plaintiff" slipped just outside of the statistically significant range when we controlled for case outcome.¹⁶⁶ However, our analysis of the distributions for these two variables reveals a more complex story across the control and experimental groups.¹⁶⁷ Regardless of the group, the higher the ranking of damage to the credibility and outcome the juror gave, the larger the number of jurors in that category who found for the defendant. In other

164. Recall that the correlation between these variables was $+0.552^{**}$ (defense raises prior conviction). For the control group, the correlation was $+0.612^{**}$ when we controlled for damage to plaintiff's credibility. This is yet further evidence that a backlash effect may have taken hold in our study as hypothesized by Wissler and Saks, *supra* note 36, at 44.

165. One of the key functions of statistical analysis is to uncover inconsistencies in how respondents report things versus their actual behavior. This inconsistency is one such example. The experimental group reported that the bad facts were less damaging and were less important to the case outcome, but with more in depth analysis, we found that when it came time to decide the case, the bad facts' importance, for the experimental groups, held about the same weight as for the control group. At the end of the day, for all groups, belief in the plaintiff's testimony seemed to really matter.

166. In essence, case outcome was a confounding variable in the relationship between damage to plaintiff's credibility and belief in plaintiff.

167. The belief variable was so pronounced in determining the "guilt" of the defendant that an exceptionally high percentage of jurors who believed the plaintiff also found the defendant liable (93.8% of the control group, 93.1% of the experimental group where plaintiff revealed the conviction, and 88% of the experimental group where defendant revealed the conviction).

words, jurors who ranked the damage as more severe to the plaintiff were more likely to find for the defendant. At the end of the day, while damage to plaintiff's credibility may not have a direct effect on case outcome, it does indirectly affect the case outcome.

So, what do these results mean? Ultimately, for the control jurors and experimental jurors alike, the damage to plaintiff's credibility (regardless of the type of fact that the juror articulated as damaging) played some role in deciding whether to believe plaintiff. Across the board those that ranked the damage to credibility as high were substantially more likely to disregard the plaintiff's testimony. However, the differences become less pronounced as the jurors find the bad facts less damaging. But, the decision about whether to believe the plaintiff is an incredibly strong predictor of which party a juror finds for.¹⁶⁸ The upshot is that jurors do not appear to compartmentalize evidence in the same way that lawyers do. The jurors in this study saw merits and credibility as intertwined. In some ways, credibility seems to be not just about a particular witness, but about the party's entire case.

2. *Believe Defendant, Damage to Plaintiff Credibility, and Outcome*

We next explored how the variable "believe defendant's testimony" worked with the variables "damage to plaintiff credibility" and "defendant guilty."

Believe Defendant/Case Outcome: First, the correlation between "believes defendant testimony" and "defendant (not) guilty" was strong for all groups.¹⁶⁹ This outcome is not a surprise; it makes sense that jurors who believed defendant would find him "not guilty" of negligence.¹⁷⁰

Believe Defendant/Damage to Plaintiff's Credibility: Second, we found no correlation in any of the groups between the variables "believe

168. Quite remarkably, the distribution across juror ranking of the importance of the bad facts on deciding the case bears no discernible influence on whether a juror chose to believe the plaintiff. This phenomenon held true across the experimental and control groups. It suggests an interesting disconnect between how jurors framed the case. The bad facts may or may not have held importance in deciding the case, and may or may not have influenced whether the juror believed the plaintiff, yet believing the plaintiff (or defendant) was key to the outcome determination in the case.

169. -.54 in the experimental and -.45 for the control.

170. Specifically, 88.9% of the control group, 94.5% of the plaintiff reveals first experimental group, and 86.2% of the defense reveals first experimental group who believed the defendant, found for the defendant.

defendant's testimony" and "damage to plaintiff's credibility." It is interesting that in a case involving only two witnesses, no relationship presents itself between whether a juror believed the plaintiff to be damaged by the bad facts and whether the juror believed defendant. Perhaps such a result is not surprising given that numerous factors other than plaintiff's damaged credibility could have led jurors to believe or not believe the defendant.¹⁷¹

But, again, when we began to dig more deeply into the relationships, the waters muddied. Specifically, the correlation between "believe defendant" and "outcome" has a small wrinkle. In the control group, only fifty-three percent of the jurors who did not believe defendant found him "guilty" of negligence. This number is surprisingly low, especially in a case like this one that turned on the testimony of only two key witnesses. It means that forty-seven percent of jurors in the control group who believed defendant's testimony, nevertheless still found him "guilty" of negligence. In other words, about half of the jurors in the control group could find for the defendant even though they did not believe his testimony. This outcome was true regardless of the race of the plaintiff, so that factor was not significant in this result.

By contrast, a much higher percentage of experimental jurors who did not believe defendant, seventy-five percent, found him "guilty." This difference from the control group is statistically significant. For experimental jurors, disbelieving defendant was more likely to lead to a guilty verdict as compared to the control group jurors. And, for experimental jurors, believing defendant was more likely to lead to a finding for defendant as compared to the control group. This result was yet another indication that even though fewer experimental jurors reported that the bad facts were important to their decision on outcome (as compared with the control group), in reality, the decision-making approach of these experimental jurors was more nuanced. Specifically, for the experimental jurors, disbelieving defendant was more likely to lead to a particular verdict (against defendant) than it was for the control jurors.

This result suggests that "belief in defendant's testimony" was a more important factor in the decision-making process of the experimental groups than in the control group. In other words, we can infer from the data that a credibility question—here, belief in defendant's testimony—was more important to case outcome for the experimental jurors, but not

171. Such factors could include the likeability of the witnesses and the likeability and believability of the attorneys.

clearly so for the control group. We see a fuller picture of where this result leads us in the final part of the analysis, discussed next.

3. *The Relationships Between Believe Plaintiff, Believe Defendant, and Case Outcome*

Finally, we looked at whether the variable “believe plaintiff” was correlated with “believe defendant.” We expected a correlation between these two variables because the case was a “he said/he said” case that seemed to depend largely on which story jurors believed.

But, when we looked at whether “believe plaintiff’s testimony” correlated with “believe defendant’s testimony” a division emerged between the control and experimental jurors. For control jurors, these variables are not correlated. Control jurors could believe plaintiff, or defendant, or both. If control jurors believed plaintiff, that did not necessarily mean they had to disbelieve defendant, and vice versa.

For the experimental groups, however, these two variables are negatively correlated.¹⁷² So, for experimental jurors who heard about the prior conviction, believing plaintiff meant that they were much more likely to disbelieve defendant, and vice versa. In essence, we theorize that something about the presence of the prior conviction led jurors to think that believing one party meant they had to disbelieve the other.

Overall, this outcome suggests something compelling about the presence of the prior conviction evidence in these trials and the workings of the subconscious mind. Remember that the experimental jurors disclaimed the importance of the prior conviction evidence to their determinations of outcome and plaintiff’s credibility.¹⁷³ Our results show that the reality is a little different from what the experimental jurors reported. Although the experimental jurors did not consciously perceive the prior conviction evidence as affecting their verdicts to the same extent that the control group perceived their bad facts affecting their verdicts, our analysis shows that the prior conviction evidence might

172. The correlation for both experimental groups is moderately strong: -.44* for the defense reveals first group and -.41* for the plaintiff reveals first group. Indeed, these correlations remained or increased in statistical significance even when controlling for damage to plaintiff, how important bad facts were to the case, and how confident the juror was in his or her verdict. Interestingly, a weak-to-moderate, statistically significant relationship showed up for the control group between these two variables when we controlled for how important the bad facts were to determining the case.

173. *See supra* p. 937–38.

have subconsciously affected the experimental jurors.¹⁷⁴ For example, all groups experienced some influence on their belief in the plaintiff's testimony depending on how damaging they perceived the bad facts to be to plaintiff's credibility. And, furthermore, all groups were likely to determine the outcome of the case based on whether they believed the plaintiff or the defendant.

Here is where the subconscious component arises for the experimental groups: only the experimental groups had this connection—and tension—between whether to believe plaintiff or whether to believe defendant. The prior conviction evidence seemed to create a subconscious paradigm shift in how the experimental groups analyzed the case compared to the control group. This shift seems to have generated a subliminal credibility “zero-sum game” for the experimental groups in which some felt compelled to make a choice to believe one party, in turn forcing them to disbelieve the other.

Recall, though, that overall, the experimental groups were slightly less likely to find for the defendant compared with the control group. Our results hint at a one-two-punch scenario. Prior conviction evidence can act as a “prime” for some jurors.¹⁷⁵ Specifically, the introduction of prior conviction evidence, relevant or not, might have made jurors think of the case in terms of truthfulness.¹⁷⁶ In other words, the prior conviction led jurors to frame the case as one requiring a contest between the believability of one witness versus the believability of the other. The jurors in the control group did not frame the case this way, perhaps because they were not primed by the prior conviction. It could be that the control jurors framed the case as one that could be resolved largely by reference to the merits—a case about which party provided enough compelling evidence.¹⁷⁷ In other words, the jurors in our study

174. This might have been subconscious, or it might have been that experimental jurors did not want to seem biased by the prior conviction. In other words, jurors might have believed or thought that they *should not* take the prior conviction into account because it was irrelevant and/or that would make them biased. See, e.g., Randall A. Gordon, *Social Desirability Bias: A Demonstration and Technique for Its Reduction*, in 3 HANDBOOK FOR DEMONSTRATIONS AND ACTIVITIES IN THE TEACHING OF PSYCHOLOGY 215 (Mark E. Ware & David E. Johnson eds., 2d ed. 2000).

175. Priming is a psychological term that means to subconsciously activate certain associations in a person's memory prior to that person carrying out a particular task. See generally Kathryn Stanchi, *The Persuasive Power of Priming in Legal Advocacy*, 89 OR. L. REV. 305 (2010) and sources cited therein.

176. This certainly calls to mind the fear of one lawyer that prior convictions can make jurors frame the case in terms of the “moral attributes” of the parties, rather than the merits. See Foster, *supra* note 9, at 21 (arguing that evidence diverts jurors from the merits and their “obligation of neutrality”).

177. Keep in mind though, the control group determined that the bad facts were more likely to

took a more expansive view of credibility. For the experimental jurors, credibility worked hand in hand with the believability of one witness over the other, but for the control group, credibility was more about the case as a whole, rather than one particular witness.

Yet, the priming may have also backfired for a subset of the experimental jurors. Recall that fifteen to twenty percent more of the experimental jurors found defendant “guilty” of negligence compared with the control jurors.¹⁷⁸ While the experimental jurors may have resolved the case as requiring belief in one party over the other, they also tended to downplay the significance of the prior conviction to such a degree that they believed the plaintiff’s story, rejected the defendant’s story, and, as a result, they found in favor of the plaintiff.

IV. DISCUSSION

Given the conventional wisdom of most lawyers, we had certain expectations regarding our experiment. Most lawyers believe that prior convictions are particularly damaging pieces of evidence, both because of the harm they can cause to credibility and outcome, and also because jurors may overblow the importance of the evidence. Conventional wisdom of lawyers, buoyed by the Rules of Evidence, holds that prior crimes, particularly those involving dishonesty, are very damaging to credibility. The prior studies of criminal conviction evidence had, to some extent, borne out the belief of lawyers in showing that jurors focus unduly on prior conviction evidence and misuse it to assume a witness’s general bad character or propensity to commit crimes. So, we expected that the admission of our civil plaintiff’s prior conviction would damage the plaintiff and hurt his case. That direct outcome effect did not happen in our trial, but we did discover some information about how prior conviction evidence can impact a civil trial in terms of both outcome and credibility versus believability.

A. *Case Outcome*

As an initial matter, our results showed that the admission of a prior conviction for a moderately serious felony crime for dishonesty does not

have harmed the plaintiff’s credibility and were more important to the case. But credibility seemed to be directly connected to the stories told rather than the characteristics or prior acts of the parties.

178. *See supra* pp. 927–29.

always substantially affect the outcome of a civil trial.¹⁷⁹ Our study's outcome is consistent with the results of one previous study testing the impact of a perjury conviction in a civil trial where the conviction did not greatly impact the case outcome.¹⁸⁰

More important, our study directly contradicts the concern of one legal scholar that a prior conviction is likely to be particularly harmful in a civil case where the story of one party is pitted against the other.¹⁸¹ Not only did our results show that prior conviction evidence does not play a substantial role in how jurors decide the case, i.e. the case outcome, but prior conviction evidence also appears to be of low importance to jurors when considering the verdict and in assessing the plaintiff's credibility. Moreover, these assessments did not vary between the white and African-American plaintiffs.

Even more surprising, our results, echoing the results of two prior studies,¹⁸² suggest that the prior conviction evidence against plaintiff might have resulted in *fewer* verdicts for the defendant. The experimental jurors, who heard about plaintiff's prior record, exhibited more ambivalence about whether defendant was negligent as compared to control jurors who did not hear the evidence.

B. Credibility and Believability

The jurors in the experimental groups who heard the prior conviction evidence initially appeared less likely to find that the bad facts damaged plaintiff's credibility as compared with those in the control group (who heard nothing about a prior conviction). However, after controlling for the plaintiff's damaged credibility variable, we found that the experimental groups were not any less likely than the control group to believe plaintiff's testimony, even though they heard the extra evidence about plaintiff's criminal record. Again, no statistically significant difference existed among these results for the white plaintiff as compared to the African-American plaintiff. However, what we did find is that prior conviction evidence can act as a "prime" in terms of how jurors tackle the case. Jurors who did not hear about the prior conviction tended to view the case in terms of the credibility of case theory or narrative as told through the evidence. On the other hand, jurors who did

179. This outcome was true, in our case, for both a white plaintiff and an African-American plaintiff.

180. Tanford & Cox, *supra* note 36, at 484–85.

181. Foster, *supra* note 9, at 20.

182. Cornish & Sealy, *supra* note 42, at 218; Wissler & Saks, *supra* note 36, at 44.

hear the prior conviction evidence tended to view the case in terms of credibility of the witness—i.e., in order to determine which side won, these jurors believed one witness and rejected the testimony of the other witness.

These results give some added perspective to the general alarm over admission of prior convictions, as well as the conventional wisdom that prior convictions, especially those for crimes involving dishonesty, harm credibility. Specifically, in a realistically simulated, but simple, civil trial involving conflicting stories of two parties, a prior conviction admitted against one party may not be as harmful either to outcome or to credibility as lawyers might believe. In other words, what lawyers would almost universally presume is “bad” evidence—a prior conviction for a crime involving a two-year fraud scheme—may simply not make that much difference, even in a simple civil trial that pits the credibility of the two parties against each other. In our experiment, the prior conviction did not make a significant difference in the outcome or in plaintiff’s credibility in the direct, simple way that we, and most other lawyers, might have expected (prior conviction for plaintiff = credibility damage to plaintiff = bad outcome for plaintiff).

Our results also challenge the conventional thinking on prior convictions in another way. The flip side of the lawyer who believes that prior convictions are devastating to his own client is the lawyer who rejoices when he finds that a party or main witness for the other side has a prior conviction. Most lawyers would not hesitate to use the “sword” that a prior conviction for theft by deception provides to try to undercut the other side’s case. Most lawyers believe, and the Rules of Evidence confirm, that a conviction for a crime involving dishonesty will surely lead the jury to conclude that the witness is a liar. Our results show that not only do jurors not seem to believe the “ancient assumption”¹⁸³ that “once a liar, always a liar,” but the results also suggest that lawyers should approach the use of prior conviction evidence with caution because the “sword” may become opposing counsel’s “shield.” Introducing seemingly unrelated prior convictions might run the risk of a backlash response.

In other words, our results show some support for the notion that litigants who uses prior conviction evidence against the other side might risk hurting their own case. This result echoes the findings of the Wissler

183. See Uviller, *supra* note 4, at 803–04.

and Saks study, which noted that the prosecution's use of a prior conviction for theft in a murder case resulted in fewer guilty verdicts against defendant.¹⁸⁴ Wissler and Saks hypothesized that the prosecution's use of a lesser crime that seemed to be unrelated to the current charge might have led jurors to believe that the prosecution was trying to bias or manipulate them with irrelevant evidence.¹⁸⁵ Our study was similar in that the prior conviction was for a less serious crime that was also seemingly irrelevant to the dispute at issue—the evidence was a conviction for theft by deception (passing bad checks) admitted in a car accident case.

Perhaps more interesting, the backlash result was most pronounced in the trial in which the defendant raised the prior conviction in a “gotcha” moment on cross-examination of the plaintiff. The possible take-away here is that if the conviction is irrelevant to the merits and for a less serious crime, the strategy of raising the conviction in a “gotcha” moment, and arguing it aggressively in closing, might do the case more harm than good. This is so even if the crime involves dishonesty, which the Rules of Evidence and the conventional wisdom tell us is always damaging to credibility. Our study suggests that non-lawyer jurors may not agree with this conventional wisdom. Again, this proved true with both plaintiffs, whether white or African-American; jurors did not judge the African-American plaintiff more harshly than the white plaintiff.

Keep in mind that our results may be the by-product of a number of factors. First of all, this study is one of a very few on prior convictions in civil cases, and the only one that attached the prior conviction to the plaintiff. Moreover, we deliberately tried to construct as realistic a mock civil trial as possible. We started with a real trial transcript that we modified and then had vetted by experienced trial lawyers. Our trial was a simple car accident case, but the lawyers treated the prior conviction evidence, and indeed all the evidence in the trial, as real lawyers would. They framed, they insinuated, and they argued in closing as they would in a real trial. Our mock jurors were chosen from actual jury pools in two different geographic locations and they watched a video simulation of the trial. Finally, our study did not specifically and directly ask about the prior conviction evidence in that way that the prior studies did.

Our results could be the product of any one, or a number, or all of these variables (or some other variable we have not thought of). For

184. Wissler & Saks, *supra* note 36, at 44; *see also* Cornish & Sealy, *supra* note 42, at 218 (finding that prior conviction for crime involving dishonesty lowered conviction rate in rape case).

185. Wissler & Saks, *supra* note 36, at 44.

example, the muted effect of the prior conviction evidence on the trial could be the result of low level of seriousness of the crime or a particularly convincing frame or a particularly likeable or credible attorney. Or, it could be that jurors use prior convictions differently in civil cases, where they are not tempted by the “career criminal” conclusion, as they are in criminal cases. But the upshot is that in our more realistic version of a mock civil trial, jurors seemed to be able, to some degree, to look past the conviction and weigh the merits of the case in a reasoned way.

Certainly one possibility here is that our prior conviction for theft by deception was simply not “bad” enough to affect the trial. Although theft by deception is a felony, it is not a particularly serious one, and passing bad checks is not a crime that is likely to inspire a great deal of outrage or disgust. This fact could account for our results, and in itself could be an interesting outcome. Keep in mind that as a felony and a crime involving dishonesty, this prior conviction for theft would almost surely be admitted in most civil trials.¹⁸⁶ Rule 609, and most state rules of evidence, states that a prior conviction for a crime involving dishonesty is probative of credibility regardless of the seriousness of the offense—even misdemeanors are admissible.

These results raise doubts about Rule 609’s underlying premise that crimes involving dishonesty are per se “proof” that a witness is lying. Especially given Rule 609, while most lawyers might not presume that a conviction for theft is devastating, they would likely see the conviction as a very serious piece of harmful evidence that would have to be mitigated in some way. Recall that one commentator thought that prior conviction evidence would be particularly harmful in a civil case.¹⁸⁷ Our results suggest that this may not be so; in a civil case, at least some prior convictions might not be as harmful or worrisome as lawyers presume. Perhaps surprisingly, this was true regardless of the race of the plaintiff. In our case, the African-American plaintiff did not suffer more damage than the white plaintiff from the prior conviction.

Another, perhaps more likely, possibility is that our framing of the prior conviction muted its harmful effect on the case. The likelihood is that a prior conviction, even for a less serious crime, is a bad fact. It is hard to imagine that a conviction based on a two-year fraud scheme

186. FED. R. EVID. 609.

187. Foster, *supra* note 9, at 20–23.

would be a neutral fact in the case. Remember that, overwhelmingly, experimental jurors recognized the prior conviction as a bad fact. It may not be a devastating fact, but it is not a good or neutral fact. What might account for the lack of impact of the prior conviction evidence is the framing of the evidence. We had the plaintiff's lawyer strategically frame the prior conviction as an aberration in plaintiff's otherwise law-abiding life and argue to the jury that the conviction was wholly irrelevant to the case at hand. Our results might suggest that framing a prior conviction in this way can be effective in mitigating the damage of the evidence, which again contradicts the conventional wisdom that the damage of prior conviction evidence is irreparable.¹⁸⁸

Finally, none of our results showed that the race of the plaintiff made a difference in the assessment of the prior conviction. But we want to be cautious about our results regarding race. It is particularly important to note that we do not argue here, nor do we believe that our results support, that race bias does not exist in our justice system or that our trial system is truly "colorblind." Moreover, we do not argue here that jurors in all circumstances will treat an African-American witness with a prior conviction the same as a white witness.¹⁸⁹ Again, here, many factors might be at play in these results. The nature of the prior conviction—more of a "white collar" crime not stereotypically associated with African-Americans—could have made a difference.¹⁹⁰ Or, the individual appearance or demeanor of the witnesses might have influenced the results. We might also be seeing the results of social desirability bias or a "watch dog" effect, as in prior studies.¹⁹¹ What our results show is that in one civil car accident trial, a prior conviction for theft by deception seemed to have the same impact on a white plaintiff

188. See ROBERT KLONOFF & PAUL COLBY, WINNING JURY TRIALS: TRIAL TACTICS AND SPONSORSHIP STRATEGIES 21–23, 66–67 (3d ed. 2007) (arguing that framing bad evidence as irrelevant is the best way to counteract it).

189. Our data does not contradict the primary race-based critique of Rule 609, eloquently articulated by Professor Montré Carodine, that use of prior convictions has a disparate impact on African-American defendants because of the disproportionate numbers of African-American men with criminal records. See generally Carodine, *supra* note 14.

190. See *id.*, at 569 (pointing out that Black males are stereotypically associated with violent crimes, drug crimes, and gang-related crimes); Mazzella & Feingold, *supra* note 55, at 1325.

191. See Petty et al., *supra* note 53 (watchdog effect); Maeder & Hunt, *supra* note 56, at 618 (social desirability/guilt); Sargent & Bradfield, *supra* note 56, at 1003 (watchdog). Indeed, another result we noticed regarding race, which is outside the scope of this article because it is not really about the prior conviction, might suggest that one or some of these phenomena were at work in our trial. For example, in the trial with a white plaintiff, 63% of minority jurors found for the plaintiff compared with 36.7% of white jurors. Moreover, white jurors were slightly more likely to find in favor of the Black plaintiff (52.6%) compared with minority jurors (47.4%).

and an African-American plaintiff even when we controlled for the race of the juror.

Perhaps the most fascinating part of our results, however, is that the damaging nature of a prior conviction is a more complex and subtle question than lawyers may realize. First of all, our results could suggest that prior conviction evidence “pops out” for jurors in a way that other bad evidence, even evidence directly related to the ultimate question in the case, does not. To some degree, this confirms the fears of lawyers about prior conviction evidence—it is very noticeable and could possibly distract jurors from noticing other evidence.

These results were our first clue that the prior conviction evidence, the bad facts about the plaintiff, was a more prominent part of the trial for the experimental jurors. Even more tellingly, though, for the experimental jurors, it was not negative evidence about plaintiff’s driving, but plaintiff’s prior conviction that they noticed.

Despite these results, when asked about the importance of the evidence, experimental jurors disclaimed that the “bad facts” they noticed were important to outcome or damaging to plaintiff’s credibility. More jurors in the control group rated the “bad facts” they noticed (about plaintiff’s driving or memory) as important to outcome and damaging to plaintiff’s credibility as compared with how jurors in the experimental groups rated their “bad facts” (about the prior conviction).¹⁹² Indeed, when asked what the key factor in deciding the case was, all groups of jurors focused on the sufficiency of the evidence and not anything about credibility.

When we focused more deeply on the relationships among the variables associated with credibility, a more complex picture developed. We noted three intriguing results. First, a relationship between believing plaintiff’s testimony, damage to plaintiff’s credibility and finding for plaintiff existed only for the experimental jurors, not for the control. Indeed, for the control, the relationship between believing plaintiff and an outcome in favor of plaintiff is suppressed by the variable “damage to plaintiff’s credibility.” This was our next inkling that questions surrounding plaintiff’s credibility and whether it had been damaged by

192. A possible hypothesis for future studies is that this difference between the control and experimental groups is the result of social desirability bias—the tendency of people to answer questions in a way that will be viewed favorably by others. *See, e.g.*, Gordon, *supra* note 174. It may be that our jurors knew, on some level, that in a civil case a prior conviction is not supposed to be used to influence outcome and gave us the answer that they thought we “wanted.”

bad facts were not as central to control jurors as they were to the experimental jurors.

Second, a similar result can be seen with the variable “believe defendant’s testimony.” For the control jurors, liability did not seem to depend heavily on whether they believed defendant. For control jurors, fifty percent who did not believe defendant found him negligent, but fifty percent who did not believe defendant *did not* find him negligent. By contrast, seventy-five percent of experimental jurors who did not believe defendant found him negligent. Again, this suggests that credibility, or belief in a party’s testimony, was more central to the decision-making of experimental jurors than control.

Third, only experimental jurors seemed to conclude that if they believed plaintiff, they had to disbelieve defendant, and vice versa. The experimental groups had a negative correlation between “believing defendant’s testimony” and “believing plaintiff’s testimony.” For the control, these two variables were unrelated. The control jurors could believe plaintiff and believe defendant, or believe neither. The belief in one party was simply unrelated to belief in the other. Not so for the experimental groups.

Overall, these results suggest that instead of a direct effect on outcome, what the prior conviction evidence did to the trial was elusive. It turned this simple civil car accident case into a case where credibility and outcome were connected. This harkens back to the criticism one lawyer made about prior conviction evidence, that it can distract jurors from the merits of the case and make the trial about the “moral attributes” of the parties.¹⁹³ That is not what happened here, because the prior conviction evidence never became *the* predictive factor in outcome as compared with the merits. But we can hear a faint echo of that criticism in these results. The prior conviction evidence turned this case into a zero-sum credibility game, where belief in one party’s story meant necessarily disbelieving the story of the other party.

CONCLUSION

Our study offers some potential insight for litigators in civil trials contemplating the use of prior conviction evidence in a credibility case. This type of evidence can be both a sword and a shield. Even if it is a conviction for only a moderately serious crime of dubious relevance to the merits of the case, it will most certainly resonate with the jurors.

193. Foster, *supra* note 9, at 5.

They will notice it and remember it. However, effective framing can mitigate any potential harmful effect on the witness against whom it is used. More importantly, an attorney using the evidence against a witness may run the risk of a backlash effect if the prior conviction is not relevant and not particularly serious. Finally, the introduction of prior conviction evidence could have a priming effect. It can lead jurors to feel that in order to resolve the case one witness has to be believed and the other disbelieved even when the jurors asserted that the key to the case's resolution was the sufficiency of the evidence, not the credibility of the parties.