Evidence Law's Blind Spots

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ABSTRACT: Evidence law is about information disclosure: what should we tell the jury, and what should we hide from it? Under the narrow, traditional vision of evidence law, judges consider whether providing the jury a given piece of information would "unfairly prejudice" a party, preventing a "just determination" of the case at hand. But this narrow vision of evidence law overlooks two important things: first, the effects of failing to provide the jury information, including the possibility that jurors' biases will fill in the gaps; and second, it overlooks injustices that extend beyond the parties in the case at hand. These are evidence law's blind spots: biased gap-filling and systemic injustice. This Article's first contribution is to identify them.

The Article's second contribution is to demonstrate them empirically. To do so, the Article reports the first empirical study of the relationship between defendant race and prior conviction evidence. In a set of preregistered experimental survey studies (n = 1131), mock jurors read about the trial of either a Black defendant or a white defendant. The trial, based on the Supreme Court's iconic decision in Old Chief v. United States, *featured a dispute over the information jurors would receive about the defendant's prior conviction. The results reveal a troubling racial disparity: when mock jurors lacked information about the nature of the defendant's prior conviction, they rated the Black defendant more likely to be guilty than the white defendant. Interestingly, though, when the prosecutor introduced more information about the prior offense, the racial disparity disappeared. In other words, when mock jurors lacked the information that the* Old Chief *Court famously required be withheld from them, they engaged in the sort of biased gap-filling that compounds systemic*

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injustice, all outside traditional evidence law's narrow sightlines.

Finally, the Article discusses two normative implications that flow from these findings. First, the results supply a new impetus for reforming the rules governing prior conviction evidence, and they imply that these reforms should take a somewhat different form than some scholars, courts, and legislators suggest. Second, and more fundamentally, the results may help illustrate the need for a new, broader vision of evidence law. This Article begins to sketch out that broader vision and argues that it finds support in the text, history, and purpose of the Federal Rules of Evidence, as well as an emerging body of case law.

INTRODUCTION

Evidence law is about information disclosure. For any given piece of evidence, it asks: should jurors see this, or should it be hidden from them?[1] The answer turns on what we think the jury would do with the information at issue and what effects that would have in the case at hand. As the Federal Rules of Evidence ("the Rules") put the question, would disclosing this information to the jury "unfair[ly] prejudice" a party,[2] undermining the goal of securing a "just determination" of the case?[3]

Consider a famous example. In *Old Chief v. United States*, the defendant faced charges of assault with a dangerous weapon, using a firearm in relation to a crime of violence, and felon in possession of a firearm.[4] To prove the "felon" element in the felon-in-possession charge, the prosecutor sought to introduce evidence that the defendant had previously been convicted of a violent assault.[5] The Supreme Court held that the jury should learn only the existence of the defendant's prior conviction, not the violent nature of his prior offense.[6]

The case may seem easy if we focus, as the *Old Chief* Court did, only on what the jury would do with the information at issue, and the effect that would have in the case at hand. After all, if jurors learn the violent nature of his prior offense, they might infer that Old Chief has a propensity for violence and is therefore more likely to be guilty of the offense with which he's now charged—a form of "propensity-based" reasoning that the Rules forbid as unfairly prejudicial.[7]

But that focus ignores two important questions. First, what would jurors do *without* this evidence—e.g., would they fill the informational gap in a biased way, assuming, for example, that an indigent Black defendant's prior offense was probably violent, or that a wealthy white defendant's was probably not? This is an example of evidence law's first blind spot: biased gap-filling.[8]

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1. *See* GEORGE FISHER, EVIDENCE 1 (3d ed. 2013).

2. *See* FED. R. EVID. 403.

3. FED. R. EVID. 102.

4. Old Chief v. United States, 519 U.S. 172, 174–76 (1997).

5. *Id.* at 177.

6. *Id.* at 174.

7. *Id.* at 182. Or, worse yet, that even if he is not guilty of the charged offense, he ought nonetheless to be punished or incapacitated. *Id.*

8. The relevant juror bias may be "explicit," "implicit," or some combination. *See* Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1132–33 (2012) (distinguishing explicit

And second, what effects would the rule have in the aggregate, *beyond the case at hand*—e.g., might this seemingly well-intentioned rule have the effect of deepening racial and economic inequities that plague society generally and the criminal legal system in particular? This is an example of evidence law's second blind spot: "systemic" injustice.[9]

This Article provides original empirical evidence that jurors engage in biased gap-filling, thereby compounding systemic injustice, all outside the sightlines of traditional evidence law. The evidence comes from the first empirical study of the relation between defendant race and juror reactions to prior conviction evidence.[10] In a set of preregistered experimental survey studies (n = 1131),[11] mock jurors read about a criminal trial, based on *Old*

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and implicit biases). Nothing in this Article turns on this distinction, or on the validity or implications of implicit association tests. *See id.*; Bertram Gawronski, *Six Lessons for a Cogent Science of Implicit Bias and Its Criticism*, 14 PERSPS. ON PSYCH. SCI. 574, 575 (2019) (assessing criticisms of implicit-bias research). For further discussion of racial bias in juror decision-making, see generally Hillel J. Bavli, *Character Evidence as a Conduit for Implicit Bias*, 56 U.C. DAVIS L. REV. 1019 (2023); Teneille R. Brown, *The Content of Our Character*, 126 PENN ST. L. REV. 1 (2021); Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867 (2018) [hereinafter Capers, *Evidence Without Rules*]; Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243 (2017); Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835 (2016); Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 830, 868 (2013) [hereinafter Capers, *Real Women, Real Rape*]; Montré D. Carodine, *"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521 (2009); Daniel C. Richman, Old Chief v. United States*: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939 (1997). For discussion of prior empirical studies, see *infra* Part II.

9. Throughout this Article, I use the term "systemic," as in "systemic injustice," in a capacious sense not limited to unintended injustice. In most places the terms "system-wide" or "system-level" would be acceptable substitutes. *See* Brandon Vaidyanathan, *Systemic Racial Bias in the Criminal Justice System is Not a Myth*, PUB. DISCOURSE (June 29, 2020), https://www.thepublicdiscourse.com/2020/06/65585 [https://perma.cc/93YF-7TXF] (pointing out "at least three distinct types of mechanisms" that produce "racial disparities as a system-level output," each of which appropriately falls under the umbrella term "systemic racism").

10. The absence of any prior empirical studies on this topic is surprising. Just as surprising, there appears to be only one prior study of the relation between defendant race and juror reactions to character evidence of any kind. *See* 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. SCIS. & L. 608, 613–14 (2011); Bavli, *supra* note 8, at 1082 (noting this "marked gap in the literature regarding how character evidence interacts with variables such as race . . . in influencing a verdict"); *infra* Section IV.A. More generally, empirical studies of the relationship between race and the laws of evidence are surprisingly rare. To be sure, some empirical work studies the *reliability* of certain *types* of evidence, such as eyewitness identification evidence, where reliability depends in part on the defendant's race. But those studies don't concern the effect of admitting or excluding such evidence, only its reliability. *See also infra* Section III.A.2 (discussing empirical work, outside the evidence law context, studying the effect of defendant race on verdicts generally).

11. All preregistration information, data, coding, and statistical analyses can be found here: James A. Macleod, *ResearchBox # 1176 - 'Evidence Law's Blind Spots'*, RESEARCHBOX, https://researchbox.org/1176 [https://perma.cc/2XCR-UHLS] [hereinafter *Evidence Law's Blind Spots* Dataset].

Chief v. United States, with either a Black defendant or a white defendant.[12] When mock jurors heard no mention of a prior conviction, they rated the Black and white defendants equally likely to be guilty. But when they learned of the existence of the defendant's prior conviction—and, crucially, lacked information about the nature of the prior offense—they rated the Black defendant significantly more likely to be guilty than the white defendant. This racial disparity disappeared when the mock jurors then learned that the prior offense was serious and violent: upon learning the violent nature of the prior offense, mock jurors' likelihood-of-guilt estimates rose significantly *more* for the white defendant than for the Black defendant, thereby bringing the white and Black defendants' likelihood of guilt back to the same level.[13]

These results are deeply troubling. A rule designed to limit unfair prejudice may actually disadvantage minority defendants vis-à-vis white defendants. By making it easier to convict Black defendants with prior convictions than white defendants with prior convictions, the rule provides an incentive for prosecutors to overcharge Blacks vis-à-vis whites.[14] Compounding the problem, the defendant's apparent race is one of the few data points available to both parties during plea bargaining,[15] where most criminal cases are resolved.[16] The criminal legal system's resulting racial disparities may further perpetuate stereotypes of Black criminality, which then feed back into more biased gap-filling in future trials, creating a vicious circle.

What's more, both of evidence law's blind spots—biased gap-filling and systemic injustice—arise throughout evidence law in contexts beyond prior conviction evidence and *Old Chief*. Any rule that excludes relevant evidence—in other words, most rules of evidence—creates a potential for jurors to fill the information gap with biased assumptions.[17] And, regardless of whether

12. *See infra* Section III.B.

13. When, on the other hand, the defendant introduced a form of "positive" character evidence—namely, evidence that the prior conviction concerned a minor, nonviolent, white-collar offense—Black and white defendants' guilt ratings dropped by roughly equivalent amounts, leaving the racial disparity intact. *See infra* Section III.A. In other words, the only evidence concerning the nature of the prior offense that would actually be admissible under current law did nothing to change the racial disparity. *See infra* Section III.A.

14. *See* Richman, *supra* note 8, at 980–82.

15. Insofar as the parties anticipate the likely influence of the defendant's race in the event of trial, the defendant's race may therefore play an outsize role in driving plea negotiations, compared to the many unknowns at that stage (e.g., whether other witnesses will be available and testify compellingly, etc.).

16. *See 2023 Plea Bargain Task Force Report Urges Fairer, More Transparent Justice System*, AM. BAR ASS'N (Feb. 22, 2023), https://www.americanbar.org/news/abanews/aba-news-archives/2023/02/plea-bargain-task-force [https://perma.cc/5KW3-CYW9] ("Plea bargaining has become the primary way to resolve criminal cases in the United States, with nearly [ninety-eight percent] of convictions nationwide currently coming from guilty pleas.").

17. *See, e.g.*, Capers, *Real Women, Real Rape*, *supra* note 8, at 829–30 (critiquing rape shield laws on similar grounds); *see also* Heidi H. Liu, *Provisional Assumptions*, 95 S. CAL. L. REV. 543,

evidentiary decision-makers take note, these evidentiary rules may contribute to systemic injustice, whatever their more immediate effects in the case at hand.[18] Nor is there reason to suspect that the phenomena revealed by the experimental results are limited to anti-Black or prowhite biases.[19] In short, this Article's results may show merely the tip of the iceberg.[20]

After exposing evidence law's blind spots, this Article discusses two normative implications. First, the rules governing prior conviction evidence should be reformed—albeit in a manner subtly different from the way the conventional wisdom would have it. Scholars have long criticized rules that admit prior conviction evidence, including on the ground that such rules have a disparate racial impact.[21] After all, Black individuals are disproportionately likely to have prior criminal convictions, so as a class Black individuals stand to lose more from any rule that compounds the negative impacts of those prior convictions. The implication of this standard critique is that the less the prosecution is permitted to reveal to the jury about the defendant's prior conviction, the better. Where the prosecution is permitted to reveal the *existence* of the defendant's prior conviction, for example, the prosecution should not be permitted additionally to reveal the *nature* of the prior offense. In state and federal courts, trial judges often embrace this approach in contexts where they could, but choose not to, prevent the jury from learning of the prior conviction altogether. When faced with the decision of whether

554–57, 570–79 (2022) (reviewing prior studies and providing original experimental evidence finding that in the absence of information about the defendant's possession of liability insurance—evidence which is excluded under Rule 411—jurors often assume that the defendant has liability insurance); Shari Seidman Diamond, Beth Murphy & Mary R. Rose, *The 'Kettleful of Law' in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. L. REV. 1537, 1575–86, 1599–1601 (2012) (arguing, based on direct observation of civil jury deliberations in fifty cases, that jury instructions too often fail to instruct jurors not to consider factors such as litigation expenses and insurance, which jurors are prone to treat as legally relevant).

18. *See, e.g.*, Gonzales Rose, *supra* note 8, at 2253–54 (criticizing the evidentiary rules concerning adoptive admissions).

19. *See, e.g.*, Avani Mehta Sood, *Attempted Justice: Misunderstanding and Bias in Psychological Constructions of Criminal Attempt*, 71 STAN. L. REV. 593, 630–33 (2019) (finding evidence of anti-Muslim bias in mock jurors' application of standards for criminal attempt).

20. While this Article focuses on and empirically tests lay decision-makers, a similar biased gap-filling phenomenon may affect police investigators, prosecutors, defense attorneys, and judges, all of whom are at times required to make decisions based on minimal information about the nature of a defendant's prior convictions. *See* Eric S. Fish, *The Paradox of Criminal History*, 42 CARDOZO L. REV. 1373, 1373–78 (2021) (discussing legal actors' reliance on records of criminal convictions that contain very little information about the prior offenses); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 797–98 (2012); L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2634–35 (2013); Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1539–42 (2004); Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1196–97 (2009).

21. *See, e.g.*, Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 398–99 (2018); Carodine, *supra* note 8, at 550–53; Roberts, *supra* note 8, at 878.

to allow prior conviction-based impeachment, for example, judges sometimes choose the compromise, "sanitizing," approach, permitting the jury to learn that the defendant has a prior conviction but strictly prohibiting the prosecution from revealing what the defendant was convicted of.[22] And in some states, judges are *required* to "sanitize" prior conviction evidence in this manner.[23]

This Article's study results suggest that such half-measures may be worse than none at all. At least for purposes of minimizing race-based bias in juror decision-making, both the no-prior-conviction-information and high-prior-conviction-information regimes may be preferable to the medium-information one in which jurors learn that the defendant has a prior conviction but are barred from learning anything more about it.[24] The unacceptability of the medium-information regime as a compromise position may render many evidence scholars' longstanding aim of reducing prior conviction-based impeachment more pressing and stark in its demands. Rather than "the less prior conviction information the better," the maxim should be "no prior conviction information or bust."

But this, in turn, highlights the importance of moving beyond the scholarly focus on prior conviction-based *impeachment*[25] and confronting the problems posed by crimes whose substantive elements include prior convictions (e.g., felon in possession of a firearm), or whose punishment severity turns on the

22. *See* Ric Simmons, *An Empirical Study of Rule 609 and Suggestions for Practical Reform*, 59 B.C. L. REV. 993, 1031–33 (2018).

23. *E.g.*, VA. SUP. CT. R. 2:609(a)(iii) ("[T]he name or nature of any crime of which the . . . accused was convicted, except for perjury, may not be shown, nor may the details of prior convictions be elicited, unless offered to rebut other evidence concerning prior convictions."); KY. R. EVID. 609(a) ("The identity of the crime upon which conviction was based may not be disclosed upon cross-examination unless the witness has denied the existence of the conviction."); N.J. R. EVID. 609(a)(2) ("[T]he prosecution may only introduce evidence of the defendant's prior convictions limited to the degree of the crimes, the dates of the convictions, and the sentences imposed, excluding any evidence of the specific crimes of which defendant was convicted, unless the defendant waives any objection to the non-sanitized form of the evidence."); *see also* CONN. CODE EVID. § 6-7(c) ("[T]he court shall limit the evidence to the name of the crime and when and where the conviction was rendered, except that (1) the court may exclude evidence of the name of the crime and (2) if the witness denies the conviction, the court may permit evidence of the punishment imposed.").

24. This Article doesn't attempt to answer the more difficult question of whether and when, if ever, the high-information regime would be preferable to the medium-information regime *all-things-considered* (as opposed to merely with respect to the goal of minimizing race-based bias in the juror decision-making in a given case). That far more complex question implicates a host of value judgments and tradeoffs, as well as a host of unknown empirical facts (e.g., the true effect size of defendant race in medium-information regime cases; reliability of the null effect in the low-info regime; and even more empirically intractable questions concerning the distal effects of minority convictions on maintenance of race-based stereotypes).

25. *See, e.g.*, Simmons, *supra* note 22, at 994 ("Rule 609 of the Federal Rules of Evidence[, which] allows a party to impeach a witness with his or her prior criminal convictions . . . . is the most criticized of all the Rules of Evidence; scholars have been calling for its reform or outright abolition for decades.").

defendant's prior convictions (e.g., various "aggravated" offenses).[26] In the many cases in which prosecutors choose to add such charges, case law seemingly friendly to defendants can make it difficult or impossible to shield the jury from exposure to the fact of the defendant's prior conviction.[27] Thankfully, solutions developed primarily at the state level suggest potential widescale reforms here, too.[28]

This Article's second proposal is more fundamental and wide-reaching:[29] the traditional, narrow vision of evidence law's aims should give way to a new, broader vision.[30] Whereas the former emphasizes fact-finding accuracy inside the courtroom, to the near exclusion of other considerations, the latter is more cognizant of evidence law's influence on injustice outside of the courtroom. To begin to see the difference between the two views of evidence law, let's compare how they interpret perhaps the two most fundamental phrases in the text of the Federal Rules of Evidence: the Rules' stated purpose of "securing a *just determination*,"[31] and their method of doing so by policing evidence that risks "*unfair prejudice*."[32]

On the narrow view, the rules aim to secure a "just determination," in the rare cases that go to trial, for the parties to the trial. The rules have no regard for broader systemic racial or economic inequalities that may render unjust, in the aggregate, the distribution of cases that go to trial in the first place, or the distributional consequences those cases' outcomes have on marginalized groups. But on the *broad* view, securing a "just determination" means taking into account causes and effects outside of the courtroom. A "just determination" is one that bears the right relation to the broader society and legal system of which it is a part—a relation in which it aims for a positive contribution to systemic justice, including *but not limited to* justice in the case at hand.

Now consider the Rules' frequent references to "unfair prejudice."[33] Under the narrow view, after determining that a given type of prejudice is

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26. *See* Nancy J. King, *Juries and Prior Convictions: Managing the Demise of the Prior Conviction Exception to* Apprendi, 67 SMU L. REV. 577, 578–80 (2014).

27. *See id.* at 587.

28. *See infra* Section IV.A.3.

29. As I explain at the outset of Section IV.B, the Article's second proposal, while potentially more radical in its implications, is proposed more tentatively and defended only in a limited way. *See infra* Section IV.B. The Article sketches out the proposed broad view and argues that it has a surprisingly firm foundation in evidence law's traditional sources. But one's ultimate preferences for the broad view or the narrow view (and, for those who favor the broad view, one's beliefs about how far it should be taken) likely depend on a host of empirical predictions, beliefs about institutional design, and moral judgments that are ultimately beyond this Article's scope.

30. The Article's two proposals are logically independent; one could favor one proposal while disfavoring the other.

31. FED. R. EVID. 102 (emphasis added).

32. FED. R. EVID. 403, 412 (emphasis added).

33. FED. R. EVID. 403, 412(b)(2); *see also, e.g.*, FED. R. EVID. 606, 609 (addressing prejudicial information and effects); FED. R. EVID. 105 advisory committee's notes (noting the "close

unfair, the *reasons* for it being unfair are set aside. In the Rules' many balancing tests, the weight accorded to any given type of unfair prejudice is determined using a single metric: degree of influence on the verdict in the case at hand. In contrast, the broad view allows for certain *types* of unfair prejudice to be accorded greater weight than other types in light of the reasons we find them unfair, including their relation to broader, systemic injustices.

The new, broader view of evidence law finds support not only in the text of the Rules, as argued above, but also in recent case law. The Court's 2017 decision in *Peña-Rodriguez v. Colorado* illustrates the trend, as well as the potential consequences of adopting one view or the other.[34] The *Peña-Rodriguez* majority, in allowing inquiry into jurors' mid-deliberation statements of overt racial prejudice, effectively adopted the new, broader vision.[35] The Court emphasized that the particular *type* of prejudice at issue—"racial prejudice in the jury system," especially in the realm of criminal law—"implicates unique historical, constitutional, and institutional concerns."[36] Given these broader implications, the law should take special care to guard against it.[37] In contrast, Justice Alito's dissenting opinion adopted the traditional, narrow view of evidence law. On that view, the broader implications of racial bias have nothing "to do with the scope of an *individual criminal defendant's* . . . right to be judged impartially" in the case at hand.[38] "[D]ifferent *types* of juror bias . . . should be treated the same way"—i.e., they should be weighed and guarded against exclusively according to the degree to which they pose a risk of an inaccurate verdict.[39] Evidence law, on this view, has no need to consider upstream causes or downstream consequences; its exclusive focus is accurate fact-finding inside the courtroom.

This basic breakdown between the narrow and broad views of evidence law plays out in a variety of contexts beyond the racial bias at issue in cases like *Peña-Rodriguez*.[40] And the broad view of evidence law, while newly ascendant, turns out to have surprisingly firm roots in the history and purpose of the Rules and their text.[41] Evidence law, in short, has the resources to become more attentive to its traditional blind spots.

The Article proceeds as follows. Part I summarizes the ways that defendants' prior convictions get admitted into evidence, despite blackletter law's general

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relationship between Rules 403 and 105, insofar as each is concerned with "the danger of unfair prejudice"); FED. R. EVID. 404 advisory committee's notes (noting concerns over admission of "prejudicial" information).

34. *See generally* Peña-Rodriguez v. Colorado, 580 U.S. 206 (2017) (holding that in certain cases jurors may testify about other jurors' mid-deliberation comments demonstrating racial bias).

35. *See id.* at 224–26, 229.

36. *Id.* at 223–24.

37. *Id.*

38. *Id.* at 251 (Alito, J., dissenting).

39. *Id.* at 250–52.

40. *See infra* Part IV.

41. *See infra* Section IV.B.

ban on propensity evidence. Part II surveys prior empirical work concerning juror reactions to propensity evidence generally and prior conviction evidence specifically. Part III foregrounds race. After noting the paucity of empirical evidence scholarship on race and propensity evidence, Section III.A summarizes prior empirical work in related areas. Then Section III.B describes this Article's original empirical studies and reports their results. Part IV considers those results' normative implications. Specifically, Section IV.A argues for reforms of the rules governing prior conviction evidence, and Section IV.B considers a more fundamental shift in how we think about evidence law—away from the field's traditional, near-exclusive focus on verdict accuracy in individual cases, and toward a greater recognition of the systemic injustices within which evidentiary rulings are embedded.

I. ADMITTING PRIOR CONVICTIONS

As a matter of blackletter law, the Federal Rules of Evidence ban "propensity evidence."[42] Propensity evidence is evidence of the defendant's prior "crime, wrong, or act," introduced "to prove [the defendant's] character in order to show that on a particular occasion [he] acted in accordance with the character."[43] In other words, evidence of the defendant's prior bad acts cannot be introduced to prove that the defendant has a propensity to commit the sort of offense with which he is now charged.[44] Two rationales are commonly cited in support of the ban on propensity evidence. First, jurors may overestimate the probative value of the defendant's prior bad acts.[45] And second, the ban prevents jurors from convicting the defendant for the wrong reasons—namely, to punish or incapacitate him for his prior bad acts, rather than the crime with which he is now charged.[46]

Whatever its rationale, the ban on propensity evidence would appear to prohibit evidence of the defendant's prior convictions. But there are three recognized exceptions to the ban, each of which permits introduction of the defendant's prior bad acts, including prior convictions, as propensity evidence. The first and most straightforward applies only in sexual assault and child molestation cases.[47] In those cases, the Rules permit evidence of the

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

43. *Id.* "Propensity evidence" is sometimes called "character evidence" or "character-propensity evidence." *See* Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 GA. L. REV. 775, 778 (2013). I'll use the terms interchangeably.

44. *See* 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 4:22 (4th ed. 2022).

45. *Id.*; *see, e.g.*, Michelson v. United States, 335 U.S. 469, 475–76 (1948).

46. MUELLER & KIRKPATRICK, *supra* note 44, § 4:22.

47. FED. R. EVID. 413–15. Some states extend these rules to allegations of domestic violence. *See, e.g.*, CAL. R. EVID. 1109(a); Erin R. Collins, *The Evidentiary Rules of Engagement in the War Against Domestic Violence*, 90 N.Y.U. L. REV. 397, 417–19, 422–24 (2015). One rationale for Rules 413–415, and for similar rules concerning domestic violence, is that unless the propensity ban is

defendant's prior sex offenses, including prior convictions for such offenses, explicitly for the purposes of arguing that the defendant has a propensity to commit such offenses and is therefore more likely to have committed the sex offense with which he is now charged.[48] In other words, in sexual assault and child molestation cases, the propensity ban simply doesn't apply to evidence of the defendant's prior sex offenses.

Second, and more generally applicable, in any case in which the defendant testifies, the prosecution may impeach him (i.e., cast doubt on his trustworthiness) by offering evidence of his "character for untruthfulness"—that is, his propensity to lie on the witness stand.[49] Importantly, the Rules treat nearly all prior convictions, including those that involved no dishonesty, as proof of such a propensity.[50] So, whatever the subject of the defendant's direct testimony, during cross-examination the prosecution may inquire into the defendant's prior convictions.[51] Jurors are permitted to consider these prior convictions only as proof that the defendant has a propensity to lie on the witness stand in the case at hand—not as proof of a propensity to commit the offense with which he is now charged.[52] If the judge is concerned that the jury will consider the prior convictions to be proof of the latter (a form of "unfair prejudice," according to the Rules), the judge has options: she may exclude the prior convictions evidence entirely[53]; limit the information about them that the jury receives[54]; and/or instruct jurors to consider the prior convictions only for the narrow, permitted purpose of assessing the defendant's credibility as a witness.[55]

Third, regardless of whether the defendant chooses to testify, defendants may choose to introduce evidence of their own character trait or propensity, which then opens the door to cross-examination regarding the defendant's prior bad acts, potentially including prior convictions.[56] So, for example, the defendant in an assault trial may introduce evidence of his propensity for nonviolence.[57] He can only do so via a "character witness" who testifies that

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lifted in these cases, the offenses at issue would be unduly difficult to prosecute. *See id.* at 411, 417–28, 449–50.

48. *See* FED. R. EVID. 413–15.

49. FED. R. EVID. 404(a)(3), 607–09.

50. *See* FED. R. EVID. 609(a)(1). "*Nearly*" all because misdemeanors that are not crimes of falsity are automatically precluded. *See* FED. R. EVID. 608(b), 609(a).

51. FED. R. EVID. 608(b), 609(a). Granted, nearly all such inquiries must pass whichever balancing test the Rules specify. *See* FED. R. EVID. 609(a)–(b).

52. *See* H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 872 (1982).

53. FED. R. EVID. 609, 403.

54. *See* Simmons, *supra* note 22, at 1015–16.

55. FED. R. EVID. 105 (requiring such a limiting instruction upon party request).

56. FED. R. EVID. 404(a)(2)(A), 405(a), 608.

57. *E.g.*, People v. Waldron, No. F068691, 2017 WL 4054392, at *51 (Cal. Ct. App. Sept. 14, 2017); State v. Martinez, 679 N.W.2d 620, 624–25 (Iowa 2004).

she, or that the community more generally, believes that the defendant possesses the propensity[58] (e.g., "I've known the defendant for ten years and I believe he is a nonviolent man"). The witness is not permitted to reference any specific events or acts of the defendant to explain *why* she or the community has this positive opinion of him.[59] But during cross-examination the prosecution may ask the witness whether she is aware of specific bad acts of the defendant—including prior convictions—that cut against her more positive generalities about him (e.g., "You claim the defendant is nonviolent, but are you aware of his prior assault conviction?").[60] These questions are supposed to help the jury evaluate the character witness's knowledge of the defendant or his reputation; they are not supposed to provide independent evidence of the defendant's propensities.[61] Again, if the judge is concerned about the risk of unfair prejudice, she may bar the questions, limit the information they convey about the prior convictions, and/or instruct the jurors to consider the prior convictions only for the narrow, proper purpose of assessing the character witness's credibility.[62]

In addition to the three ways, discussed above, that prior convictions may enter evidence to prove propensity, there are various ways for prior convictions to be admitted for purposes *other* than proving propensity. For example, a defendant's prior conviction may be admissible to prove his relevant knowledge (e.g., where the defendant is accused of importing drugs and has a prior conviction for importing drugs, the prior conviction may prove that the defendant possessed the requisite knowledge to commit the charged offense).[63] Or, a prior conviction might help establish the defendant's motive (e.g., the defendant's bank robbery, for which he was already convicted, establishes a motive for his shooting a police officer who was following him later on the day of the robbery).[64] Again, if the judge is concerned that evidence of these prior bad acts will lead the jury to draw the forbidden propensity inference, the judge may exclude the evidence of prior convictions, limit the information that the jury receives about them, and/or issue a limiting instruction.[65]

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58. FED. R. EVID. 405. The former is called "opinion" testimony, the latter "reputation" testimony. The parenthetical that follows in the text is an example of "opinion" testimony.

59. FED. R. EVID. 405.

60. FED. R. EVID. 404(a)(2)(A)–(B). Still, neither party may offer proof that such specific acts actually occurred. FED. R. EVID. 405. The only "evidence" of the specific act is the cross-examining lawyer's question and the character witness's yes-or-no response.

61. *See* MICHAEL H. GRAHAM, 3 HANDBOOK OF FEDERAL EVIDENCE § 404:5 (9th ed. 2022).

62. *See* FED. R. EVID. 105, 403, 609; Simmons, *supra* note 22, at 1032–33.

63. *E.g.*, United States v. Martinez, 182 F.3d 1107, 1110–12 (9th Cir. 1999).

64. *E.g.*, United States v. Brown, 880 F.2d 1012, 1014–15 (9th Cir. 1989). Other common examples include *modus operandi*, narrative integrity, and absence of accident. *See* Michael D. Cicchini & Lawrence T. White, *Convictions Based on Character: An Empirical Test of Other-Acts Evidence*, 70 FLA. L. REV. 347, 353–54 (2018).

65. *See supra* notes 53–55 and accompanying text.

A final, formally non-propensity-based, route for admission of prior convictions deserves special emphasis. We've already seen it in the case of *Old Chief*.[66] In cases where the defendant is charged with a crime for which a prior conviction is an element, or a crime for which a prior conviction would result in a sentencing enhancement, the defendant's prior conviction is admissible as proof that the substantive element is satisfied or the sentencing factor is present.[67] There are many such crimes under federal and state law.[68] In them, judges often permit the jury to learn of the defendant's prior convictions but limit the information the jury receives about them.[69] By charging the defendant with these types of crimes, prosecutors can ensure that the jury will learn of the defendant's prior conviction if the case goes to trial.[70]

To summarize, we've seen several ways for jurors to learn of the defendant's prior conviction(s). For some of these ways, blackletter law permits jurors to draw from the fact of a prior conviction some sort of inference about the defendant's propensities (e.g., for prior-conviction-based impeachment of a testifying defendant, jurors are permitted to infer that the defendant has a propensity to lie on the witness stand, but not that he has a propensity to commit the type of crime with which he now stands charged). For others (e.g., prior conviction as proof of a substantive element or sentencing enhancement), blackletter law does not permit jurors to draw from the fact of prior conviction any inference whatsoever about the defendant's propensities.

II. REACTING TO PRIOR CONVICTIONS

How do jurors actually react to evidence bearing on the defendant's propensities? The empirical evidence, while admittedly thin, points to two basic findings. First, jury instructions attempting to prohibit jurors from drawing propensity inferences are largely futile.[71] This may be especially true

66. *See supra* note 13 and accompanying text.

67. *See* Old Chief v. United States, 519 U.S. 172, 191 (1997). At present, where a prior conviction would increase the maximum potential sentence, it need not be submitted to the jury, despite *Apprendi*'s requirement that other maximum-sentence-enhancing factors be submitted to the jury. *See* King, *supra* note 26, at 578. Still, it appears very likely that the Court will soon overturn the precedent that exempts prior convictions from *Apprendi*'s requirement. *See id.* at 583; Daniel Epps & William Ortman, *The Informed Jury*, 75 VAND. L. REV. 823, 885–86 (2022).

68. *See infra* note 71 and accompanying text; King, *supra* note 26, at 578.

69. *See supra* notes 53–55 and accompanying text.

70. *See supra* notes 53–55 and accompanying text.

71. *See* Cicchini & White, *supra* note 64, at 361–63; Maeder & Hunt, *supra* note 10, at 613–14; Sally Lloyd-Bostock, *The Effects on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study*, 2000 CRIM. L. REV. 734, 754; Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 LAW & HUM. BEHAV. 67, 76 (1995); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37, 38–39 (1985); E. Gil Clary & David R. Shaffer, *Effects of Evidence Withholding and a Defendant's Prior Record on Juridic Decisions*, 112 J. SOC. PSYCH. 237, 239 (1980); Valerie P. Hans & Anthony N. Doob, *Section 12 of the Canada Evidence Act and*

with respect to prior conviction evidence.[72] Judges can try to instruct jurors, for example, that they may not infer from the defendant's prior assault conviction that the defendant has a propensity to act violently, but jurors will draw the inference anyway.[73] And this appears to be true regardless of whether, as a formal matter, the jury is permitted to treat the prior conviction as proof of some *other* propensity (e.g., the defendant's propensity to lie on the witness stand), or is instead only permitted to consider it for nonpropensity purposes (e.g., as proof of the "felon" element in a felon-in-possession charge). Blackletter law's formal distinction between propensity and nonpropensity evidence doesn't track juror behavior, even when jurors are instructed on which inferences are permissible and which are impermissible. Jurors are unable or unwilling to abide by evidence law's attempts to prevent them from drawing forbidden propensity inferences.[74]

The second basic finding is that evidence of the defendant's prior bad acts does indeed significantly influence jurors' verdicts.[75] This appears to be

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the Deliberations of Simulated Juries, 18 CRIM L.Q. 235, 243 (1976); *see also* Justin Sevier, *Evidence Law and Empirical Psychology*, *in* PHILOSOPHICAL FOUNDATIONS OF EVIDENCE LAW 349, 357–58 (Christian Dahlman, Alex Stein & Giovanni Tuzet eds., 2021) (discussing "fifty published reports and a meta-analysis" concerning the limited effect of limiting instructions generally); Larry Laudan & Ronald J. Allen, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. CRIM. L. & CRIMINOLOGY 493, 523 (2011) ("It is already widely agreed that limiting instructions to juries not to draw propensity inferences from information given them by the prosecutor about prior crimes are failures.") (citing VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 124–27 (1986)).

72. *See supra* note 67 and accompanying text. While no studies appear to directly compare the effect of a prior conviction for *X*'ing to an accusation of *X*'ing absent a prior conviction for it, the effects in studies testing prior convictions tends to be larger. This stands to reason, given that a conviction involves proof beyond a reasonable doubt (and even apart from that, lay jurors may be aware that convictions have a criminogenic tendency in light of the effect of imprisonment, job loss, etc.).

73. Defendants with criminal records, therefore, often choose not to testify in cases where the jury would not otherwise learn of their prior offenses. *See* John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL L. STUD. 477, 489–91 (2008). Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand*, 94 CORNELL L. REV. 1353, 1354–55 (2009). *But see* Bellin, *supra* note 21, at 414–15 (finding that the "silence penalty" defendants face in failing to testify may result in roughly the same degree of detriment to defendants as the "prior offender penalty" defendants face when they testify and face prior-conviction-based impeachment).

74. *See* Sevier, *supra* note 71, at 357–58; MICHAEL J. SAKS & BARBARA A. SPELLMAN, THE PSYCHOLOGICAL FOUNDATIONS OF EVIDENCE LAW 87–88 (2016).

75. *See, e.g.*, Jennifer S. Hunt & Thomas Lee Budesheim, *How Jurors Use and Misuse Character Evidence*, 89 J. APPLIED PSYCH. 347, 358 (2004). Jurors appear to be far less influenced by *positive* propensity evidence. *See, e.g.*, *id.* at 353 ("When [character evidence] contains examples of specific positive acts, jurors' . . . guilt and conviction judgments do not change."); Maeder & Hunt, *supra* note 10, at 616; Brown, *supra* note 8, at 47–49 (discussing studies demonstrating that "[b]ehaviors that are perceived to be immoral are 'more heavily weighted than their positive counterparts'" in people's assessments of others' character (quoting Peter Mende-Siedlecki, *Changing Our Minds: The Neural Bases of Dynamic Impression Updating*, 24 CURRENT OP. PSYCH. 72,

true even of prior bad acts that were not the subject of prior criminal convictions.[76] In one pair of studies, for example, the defendant's prior bad acts were lying to his employer and being "accused of" animal cruelty.[77] When mock jurors learned of these prior bad acts, their guilty verdicts increased.[78] But once again, prior convictions evidence is if anything even more influential than other prior bad acts evidence.[79] In any event, numerous studies demonstrate the uncontroversial truth that evidence of prior convictions—like other specific bad acts evidence—increases mock jurors' assessments of the defendant's guilt.[80]

III. RACE AND THE RULES OF EVIDENCE

This Part adds race to the mix. Section III.A surveys the limited prior empirical literature concerning the relationship between defendant race and evidence law. Section III.B describes a set of original experimental studies which tested the relation between defendant race and prior conviction evidence. These new studies reveal a disconcerting pattern of racial disparities in mock jurors' judgments, prompting the normative proposals set forth in Part IV.

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73 (2018)). This is especially true as to the kind of positive opinion or reputation testimony, unsupported by evidence of any specific prior acts, that the Rules actually permit the defendant to introduce. *See supra* note 58 (discussing Rule 405). It appears hardly to alter jurors' impression of the defendant generally, let alone their assessment of his guilt or innocence. *See* Hunt & Budesheim, *supra*, at 351–52; *see also* Eugene Borgida, *Character Proof and the Fireside Induction*, 3 LAW & HUM. BEHAV. 189, 197 (1979) (finding that positive character testimony regarding specific acts had a greater effect than similarly positive character testimony regarding reputation). Indeed, in the leading study, when positive character evidence went further than the Rules even allow, by mentioning the defendant's specific prior good acts, it still had no significant effect on mock jurors' likelihood-of-guilt estimates or verdicts. *See* Hunt & Budesheim, *supra*, at 350–52; *see also* Michael Lupfer, Robert Cohen, J.L. Bernard & Dale Smalley, *Presenting Favorable and Unfavorable Character Evidence to Juries*, 110 LAW PSYCH. REV. 59, 66–68 (1986).

76. *See* Maeder & Hunt, *supra* note 10, at 612; Hunt & Budesheim, *supra* note 75, at 361.

77. *See* Maeder & Hunt, *supra* note 10, at 612; Hunt & Budesheim, *supra* note 75, at 361.

78. Maeder & Hunt, *supra* note 10, at 614; Hunt & Budesheim, *supra* note 75, at 352.

79. *See* King, *supra* note 26; *see, e.g.*, Cicchini & White, *supra* note 64, at 361–63; Wissler & Saks, *supra* note 71, at 41–43. Larry Laudan and Ronald Allen have argued that jurors are "generally able to infer who has priors" regardless of whether those prior crimes are ever mentioned at trial, and that therefore admission of prior crimes evidence has little to no impact on verdicts. *See* Laudan & Allen, *supra* note 71, at 498–99, 508–09, 515, 519. For a thorough explanation of the ways Laudan and Allen's "ground shaking juror-sophistication hypothesis" is based on a mischaracterization of the overwhelming empirical evidence on-point, see Bellin, *supra* note 21, at 418–25.

80. *See* Bellin, *supra* note 21, at 406 ("The empirical evidence from mock juror experiments is one-sided and clear. The studies suggest that the introduction of prior conviction evidence substantially damages defendants' chances for acquittal, primarily through a legally prohibited 'criminal propensity' inference."); SAKS & SPELLMAN, *supra* note 74, at 168 ("The available empirical research is unanimous in finding that, notwithstanding judicial instructions to the contrary, most people travel the forbidden path of using prior crimes evidence to make substantive inferences about the likelihood that the testifying defendant committed the current crime charged."); Cicchini & White, *supra* note 64, at 362–63; Wissler & Saks, *supra* note 71, at 362–63; Eisenberg & Hans, *supra* note 73, at 1358–59; Hans & Doob, *supra* note 71, at 242–43.

A. RELATED EMPIRICAL WORK

1. Race and Character Evidence Generally

This Article is apparently the first to test whether and how reactions to prior conviction evidence interact with defendant race. Nearly as surprising, there appears to be only one prior empirical study of the relationship between defendant race and non-prior-conviction-based propensity evidence.[81] In it, participants read about a criminal assault and robbery trial with either a Black or a white defendant, then indicated the likelihood that the defendant was guilty.[82] Participants were randomly assigned to one of three conditions: (1) no character evidence; (2) positive character evidence[83]; and (3) negative character evidence.[84] With respect to the first two conditions, the defendant's race had no significant effect on participants' likelihood-of-guilt estimates.[85] In the third condition, however, while the negative character evidence had virtually no effect on estimates of *Black* defendant guilt,[86] it significantly increased estimates of *white* defendant guilt,[87] leaving the white defendant significantly more likely to be deemed guilty than the Black defendant.[88] The authors of the study interpret this result in terms of the "diagnosticity" of a given piece of information: whereas the Black defendant was presumed to have a bad character even without any bad character evidence being introduced, the same bad character evidence was more "diagnostic" with respect to the white defendant, since it provided information cutting against presumptions of the white defendant's good character.[89] As we'll see, this "diagnosticity" explanation accords with this Article's study results.[90]

While the study's findings are suggestive, one must be careful not to overinterpret them. The study was well designed, but there were only an average of twenty-one participants in each study condition, all of them

81. *See* Maeder & Hunt, *supra* note 10, at 608; *see also* Bavli, *supra* note 8, at 1082 (noting the "marked gap in the literature" and citing Maeder & Hunt's study as the sole exception).

82. *See* Maeder & Hunt, *supra* note 10, at 612. The defendant's race was manipulated via photos that accompanied the materials. *Id.*

83. *See supra* note 75 and accompanying text (describing the nature of the positive character testimony, which was introduced via character witness testimony).

84. *See* Maeder & Hunt, *supra* note 10, at 612–13 (describing the nature of the negative character testimony, which was introduced via cross-examination of the defendant's character witness).

85. *Id.* at 613–14.

86. *Id.* at 614. Indeed, negative character evidence slightly *reduced* guilty verdicts for the Black defendant relative to the first, no-character-evidence, condition. *Id.* at 614, 615 fig.1.

87. *Id.* at 615.

88. *Id.*

89. *Id.* at 617.

90. *See infra* notes 142–48 and accompanying text. *But see* Bavli, *supra* note 8, at 1025–28 (hypothesizing, based on principles of Bayesian inference, that information cutting against jurors' presumptions will be *less* influential, not more).

undergraduate students.[91] Additionally, it's worth recalling that the negative character evidence in the study's materials consisted of relatively idiosyncratic prior bad acts, not the introduction of a prior conviction.[92] As Hillel Bavli recently noted, citing the above study as the sole exception, there remains "a marked gap in the literature regarding how character evidence interacts with variables such as race . . . in influencing a verdict."[93] Indeed, one might expand the point: there is a marked gap in the empirical literature regarding how *rules of evidentiary exclusion*—i.e., most rules of evidence—interact with defendant race.[94]

2. Race and Verdicts Generally

Despite the surprising lack of prior empirical work in the context of evidence law,[95] numerous studies outside of that context have investigated the effect of defendant race on verdicts more generally.[96] While this research

91. *See* Maeder & Hunt, *supra* note 10, at 611, 618.

92. Specifically, the prosecutor asked the witness "if he was aware that the defendant had lied to his employer about the reason for his lack of car insurance, had been fired from his last job, and had been accused of cruelty towards animals. Each time, the character witness replied that he had not previously been aware of these facts." *Id.* at 612.

93. Bavli, *supra* note 8, at 1082 & n.204; *see also* Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1005 (2003) ("[T]he lack of social science research on race and jury decision making is surprising.").

94. Outside the empirical literature, evidence scholars have recently addressed the interaction between race and questions of evidentiary admission and exclusion, at times categorizing the defendant's race as itself "evidence." *See, e.g.*, Capers, *Evidence Without Rules*, *supra* note 8, at 869; Gonzales Rose, *supra* note 8, at 2262 ("Racial character evidence is evidence in the sense that juries often rely upon it in reaching a verdict. However, it is not technically evidence because it is usually not formally introduced or subjected to evidentiary scrutiny."); Montré D. Carodine, *Race Is Evidence: (Mis)Characterizing Blackness in the American Civil Rights Story*, *in* CIVIL RIGHTS IN AMERICAN LAW, HISTORY, AND POLITICS 64, 66 (Austin Sarat ed., 2014) ("[R]ace is one form of character evidence."); Montré D. Carodine, *Contemporary Issues in Critical Race Theory: The Implications of Race as Character Evidence in Recent High-Profile Cases*, 75 U. PITT. L. REV. 679, 681 (2014) ("[I]n traditional evidence law and criminal law scholarship as well as in critical race theory scholarship, race as an evidentiary concept is largely overlooked.").

95. For reviews, see generally Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 ANN. REV. L. & SOC. SCI. 269 (2015); Samuel R. Sommers, *Race and the Decision Making of Juries*, 12 LEGAL & CRIMINOLOGICAL PSYCH. 171 (2007); Sommers & Ellsworth, *supra* note 93, at 1004 ("Many of the experiments commonly cited with regard to the first issue, the prevalence of bias, are flawed. On the question of the circumstances under which bias is most likely, there are hardly any studies that directly address the matter."). For meta-analyses, see generally Dennis J. Devine & David E. Caughlin, *Do They Matter? A Meta-Analytic Investigation of Individual Characteristics and Guilt Judgments*, 20 PSYCH. PUB. POL'Y & L. 109 (2014); Tara L. Mitchell, Ryann M. Haw, Jeffrey E. Pfeifer & Christian A. Meissner, *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621 (2005).

96. That said, numerous studies have examined the effect of defendant race on mock juror *sentencing* recommendations, particularly in the context of capital sentencing. There, the evidence more clearly demonstrates an anti-Black, or prowhite, bias. *See* Hunt, *supra* note 95, at 272–73;

tends to support the view that there exists an anti-Black, or prowhite, bias in jurors' verdicts generally, it has produced somewhat mixed results. On the one hand, many studies have found evidence that jurors' verdicts tend to be more favorable toward same-race defendants than defendants from different racial groups.[97] On the other hand, various studies have found no significant effect of defendant race on verdicts.[98] And a few studies have even concluded that white jurors are biased against white defendants, not nonwhite defendants.[99]

More to the point, prior research provides surprisingly few clear answers when it comes to identifying the conditions under which verdicts are most likely to be tainted by racial bias. As one might expect, the makeup of the jury matters: racially biased verdicts appear to be more likely when the individual

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Mitchell et al., *supra* note 95, at 628–29; Laura T. Sweeney & Craig Haney, *The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies*, 10 BEHAV. SCI. & L. 179, 181–83 (1992).

97. *See* Mitchell et al., *supra* note 95 (meta-analysis finding a small but significant overall similarity-leniency effect, with the effect stronger for Black mock jurors than for white mock jurors). *But see* Devine & Caughlin, *supra* note 95, at 110–11 (meta-analysis finding small but significant similarity-leniency effect in white mock jurors' verdicts in cases with white defendants versus cases with Latino defendants, and in Black mock jurors' verdicts in cases with Black defendants versus cases with white defendants, but finding *no* significant effect for white mock jurors' verdicts in cases with white defendants versus cases with Black defendants).

98. *See, e.g.*, Ronald Mazzella & Alan Feingold, *The Effects of Physical Attractiveness, Race, Socioeconomic Status, and Gender of Defendants and Victims on Judgments of Mock Jurors: A Meta-Analysis*, 24 J. APPLIED SOC. PSYCH. 1315, 1333 (1994) (meta-analysis including data from participants of all races concluding, based on data from over 6,700 participants, no significant evidence of racial bias in mock juror verdicts, but cautioning that this conclusion might be "misleading because race apparently interacted complexly with other factors influencing jurors' judgments of guilt"); Maeder & Hunt, *supra* note 10, at 614 (finding no "significant main effect for defendant race . . . indicating that participants' verdicts were not biased against Black defendants"); Francis X. Shen, *Minority* Mens Rea*: Racial Bias and Criminal Mental States*, 68 HASTINGS L.J. 1007, 1011–13 (2017) (noting that some studies in the area have found null results, and reporting new null results in study of racial bias in mens rea ascription); Jennifer Elek & Paula Hannaford Agor, *Can Explicit Instructions Reduce Expressions of Implicit Bias? New Questions Following a Test of a Specialized Jury Instruction*, NAT'L CTR. ST. CTS., Apr. 28, 2014, at 12, 12.

99. *See, e.g.*, Christine Ruva et al., *Battling Bias: Can Two Implicit Bias Remedies Reduce Juror Racial Bias?*, PSYCH., CRIME & L., May–Aug. 2022, at 16, 21; Sommers & Ellsworth, *supra* note 93, at 1008–1010 (summarizing studies). Such results are at times characterized as both surprising and consistent with "previous research on modern racism." Eisenberg & Johnson, *supra* note 20, at 1540–42 (finding that compared to the Black defendant, the white defendant received a harsher sentence on average in the control condition, but explaining that "[t]his finding is consistent with previous research on modern racism, which indicates that when racist behavior cannot be justified on nonracial grounds, subjects will often be more favorable toward a Black person than a white person. This finding could be due to whites' 'bending over backwards' to show that they are not racist"); *see also* Maeder & Hunt, *supra* note 10, at 617 (finding that "unexpectedly, impressions of the defendant were slightly more positive when he was Black," and explaining that some "research shows jurors often scrutinize evidence more closely in cases involving Black rather than white defendants. Because jurors do not wish to be biased, they act as 'watchdogs' by thoroughly examining the evidence in order to treat Black defendants fairly"); Elizabeth Ingriselli, *Mitigating Jurors' Racial Biases: The Effects of Content and Timing of Jury Instructions*, 124 YALE L.J. 1690, 1736 (2015) (finding "an unusual reverse bias against the white defendant" in one study but not others).

jurors deciding the verdict score higher on tests of racial bias,[100] and when the jury is racially homogeneous.[101] The nature of the case also matters: racially biased verdicts appear to be more likely in close cases[102]; in cases concerning crimes stereotypically associated with one or another race[103]; and in cases where racism is *not* a central issue explicitly discussed at trial (e.g., when the crime charged did not involve use of racially charged language repeated at trial).[104] But beyond those few findings, we know surprisingly little about which trial conditions increase or decrease jurors' reliance on explicit or implicit racial biases.[105]

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100. *See, e.g.*, Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 338–39 (2010); Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty By Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 190 (2010).

101. Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1019 (2011) (concluding, based on jury outcomes in ten years' worth of felony trials in Florida, "the presence of even one or two blacks in the jury pool results in significantly higher conviction rates for white defendants and lower conviction rates for black defendants"); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 81, 84 (1993) (citing studies); Ellen S. Cohn, Donald Bucolo, Misha Pride & Samuel R. Sommers, *Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes*, 39 J. APPLIED SOC. PSYCH. 1953, 1954–55 (2009) ("[I]n the studies in which jury deliberation did reduce White juror bias, jury deliberation only reduced White juror racial bias when the deliberating juries were comprised of both White and Black jurors."); *see also* Mitchell et al., *supra* note 95, at 627 (finding that "participants were more likely to render guilt judgments for other-race defendants than for defendants of their own race").

102. That is, where the evidence does not overwhelmingly favor one side or the other. *See* Ingriselli, *supra* note 99, at 1707–08 (discussing studies).

103. *See* Jeanine L. Skorinko & Barbara A. Spellman, *Stereotypic Crimes: How Group-Crime Associations Affect Memory and (Sometimes) Verdicts and Sentencing*, 8 VICTIMS & OFFENDERS 278, 288, 298–99 (2013) (testing stereotype-based judgments concerning fifty-five crimes and finding, for example, that many crimes of violence are stereotypically associated with Black offenders, while many fraud crimes are stereotypically associated with white offenders, and that for violent crimes, white defendants were more likely to be found guilty of hate crimes and Black defendants more likely to be found guilty for gang activity, while verdicts did not differ between Black and white defendants with respect to nonviolent crimes of embezzlement and burglary, despite the stereotypical association of these nonviolent crimes with white individuals and Black individuals respectively).

104. *See* Cohn et al., *supra* note 101, at 1955, 1961 (explaining that the predominant theory used "to account for the race-salience effect is aversive racism . . . . [Aversive racists] respond to information in the environment indicating that their actions could appear racist . . . by acting in ways that do not appear prejudiced"); Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCH. BULL. 1367, 1369, 1373–74 (2000); Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCH. PUB. POL'Y & L. 201, 217 (2001). *But see* Ingraselli, *supra* note 99, at 1698 (suggesting that, for race to be sufficiently "salient" for the effect to be found, it need not be a "central" issue at trial and could instead be primed more subtly).

105. *See* Shen, *supra* note 98, at 1011 (emphasizing, after reviewing the literature, that "we are still limited in our understanding of how, precisely, race intersects with juror decisionmaking"). For discussion of the possibility of jury instructions as a debiasing mechanism, see *infra* notes 161–65 and accompanying text.

3. Employment Discrimination and "Ban-the-Box" Laws

Given the dearth of empirical research concerning race and the rules of evidence—and the complete lack of any studies concerning the interaction of race and prior convictions evidence—this Article's study hypotheses sprang from a different context altogether: employment discrimination. In a series of recent studies, researchers have examined the effects of so-called "Ban-the-Box" laws on hiring outcomes.[106] These laws prohibit employers from asking whether job applicants have any prior criminal convictions (traditionally done via a checkbox on the initial job application).[107] Ban-the-Box laws thus lead to increased employment rates for people with prior convictions.[108] And since certain demographic groups (e.g., young Black men) are disproportionately likely to have prior convictions, these laws might likewise help increase employment rates for members of those groups—or so the thought went.[109]

Unfortunately, the empirical studies to-date have found the opposite: "Ban-the-Box" laws tend to *increase* statistical discrimination against Black applicants, especially young Black male applicants, relative to white applicants.[110] Employers, unable to obtain the prior-conviction information they consider relevant, fall back on applicant race as a proxy.[111] Thus, employers fill the informational gap with their own race-based presumptions.

The same perverse effect arises with respect to other laws that attempt to decrease racial discrimination by withholding from employers information thought to be on average less favorable toward Black applicants. For example, one study found that a law banning employers from obtaining applicants' credit scores (which were on average lower for Black applicants than for white applicants) led employers to hire *fewer* Black applicants, not more.[112] Another study found that when employers obtained drug test results as a prerequisite to employment, Black applicants' employment rates increased substantially compared to when no such information was available.[113] As Jennifer Doleac and Benjamin Hansen recently summarized, "[t]here is plenty of evidence

106. Jennifer L. Doleac & Benjamin Hansen, *The Unintended Consequences of "Ban the Box": Statistical Discrimination and Employment Outcomes When Criminal Histories Are Hidden*, 38 J. LAB. ECON. 321, 324–29 (2020).

107. *See id.* at 323.

108. *Id.*

109. *Id.* at 323–24.

110. *See id.*; Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment*, 133 Q.J. ECON. 191, 195 (2018). *But see* Doleac & Hansen, *supra* note 106, at 327 (discussing a study by Daniel Shoag & Stan Veuger, *No Woman No Crime: Ban the Box, Employment, and Upskilling* 22–23 (Harv. Kennedy Sch., Working Paper No. RWP16-015, 2016), which found evidence of increased employment for Black males in "high-crime neighborhoods" when Ban-the-Box laws were adopted).

111. Agan & Starr, *supra* note 110, at 193.

112. Doleac & Hansen, *supra* note 106, at 328–29.

113. *Id.* at 360–61.

that statistical discrimination increases when information about employees is less precise."[114]

* * *

Might something similar happen when information about the defendant's prior conviction is withheld from jurors? The rules of evidence, like the employment discrimination measures examined above, are rules of information exclusion. And jurors, like the employers in the Ban-the-Box studies above, appear to consider prior conviction information to be relevant to their decisions.[115] Does withholding that information from jurors lead them to fill the informational gap in a racially biased way, resulting in outcomes that—as in the employment context—are more racially disparate than they would otherwise be? The following studies sought to answer those questions.

B. NEW EMPIRICAL EVIDENCE

1. Main Study: DeShawn, Dylan, and *Old Chief*

i. Design, Materials, and Participants

The study was preregistered.[116] 575 participants were recruited from Amazon Turk ("MTurk"), an online subject pool.[117] After exclusions, 559 remained.[118] Each participant was randomly assigned to read either the Black-

114. *Id.* at 328; *cf.* Lior Jacob Strahilevitz, *Privacy Versus Antidiscrimination*, 75 U. CHI. L. REV. 363, 364 (2008) ("[B]y increasing the availability of information about individuals, we can reduce decisionmakers' reliance on information about groups.").

115. *See supra* notes 106–13 and accompanying text; *infra* notes 128–130 and accompanying text; Doleac & Hanson, *supra* note 106, at 322–24.

116. *See* James Macleod, *Evidentiary Exclusion - Old Chief-Style Priors (#78160)*, ASPREDICTED (Oct. 27, 2021, 7:20 AM), https://aspredicted.org/a9gv2.pdf [https://perma.cc/4V86-UY2Q] [hereinafter Macleod, *Old Chief-Style Priors*].

117. As Tess Wilkinson-Ryan recently explained,

> [MTurk] has been studied extensively at this point. Its advantages are that populations recruited via Turk are more representative of the national population than convenience samples (e.g., undergraduates) and that a variety of experimental findings have been replicated using [MTurk]. . . . There is also evidence, both systematic and anecdotal, that Turk subjects are particularly attentive, perhaps due to the formal mechanisms available for receiving feedback that affects reputation ratings. The disadvantage of [MTurk] as compared to the sample procured by a commercial survey firm is the young and leftward skew of the population. Turk respondents are 'wealthier, younger, more educated, less racially diverse, and more Democratic' than national samples.

Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117, 150 n.162 (2017).

118. As preregistered, participants who completed the survey were excluded from the analysis if their completion time was less than or equal to one-fourth of the median completion time, or if they failed a simple attention check. As an added precaution, to ensure all international respondents were barred from completing the survey, I implemented the protocol described in Nicholas J. G. Winter, Tyler Burleigh, Ryan Kennedy & Scott Clifford, *A Simplified Protocol to Screen*

defendant or the white-defendant version of a short vignette. The only difference between the two versions was the name of the defendant: DeShawn Washington (stereotypically Black) or Dylan Anderson (stereotypically white).[119] The vignette was based loosely on the facts of *Old Chief v. United States*.[120]

I'll call the following "Part 1" of the vignette:

> [*DeShawn Washington / Dylan Anderson*] is on trial. You are one of the jurors in his case.
>
> Prosecutors allege that [*DeShawn / Dylan*] was involved in a street fight a few months ago, and that he fired a gun at someone during the fight. [*DeShawn / Dylan*] now faces two charges: (1) "assault with a dangerous weapon," and (2) "felon in possession of a firearm."
>
> [*DeShawn / Dylan*] denies both charges. He claims he was not involved in the street fight and did not fire a gun at anyone during it. He concedes, though, that in 2015 he was convicted of a felony.
>
> At one point during the trial, an attorney says, "Here is an official record of [*DeShawn's / Dylan's*] felony conviction. As it shows, [*DeShawn / Dylan*] was previously convicted of the crime of…."
>
> But before he can say what [*DeShawn / Dylan*] was previously convicted of, an attorney on the other side interrupts: "Objection, Your Honor. The other side should not be allowed to tell the jury what [*DeShawn's / Dylan's*] prior conviction was for. Both sides agree that in 2015 [*DeShawn / Dylan*] was

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Out VPS and International Respondents Using Qualtrics (Sept. 28, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3327274 [https://perma.cc/2JFQ-MLNK]. Since overseas respondents were unable to complete the survey, they are not included in the number of "exclusions" reported above. Macleod, *Old Chief-Style Priors*, *supra* note 116.

The 559 participants' race: eighty two percent white (including Hispanic); ten percent Black, or African American; one percent American Indian or Alaskan Native; four percent Asian; two percent Native Hawaiian or Other Pacific Islander; one percent Multiple Races. The 559 participants' age: thirty-two percent 21–29; forty-six percent 30–39; fourteen percent 40–49; six percent 50–59; two percent 60–69. *See Evidence Law's Blind Spots* Dataset, *supra* note 11. The data were collected on October 28, 2021.

119. A pretest of seventy-five MTurk respondents affirmed that, consistent with prior research, these names were understood to refer to a Black and white defendant, respectively. *See, e.g.*, Sood, *supra* note 19, at 628–29. Participants in the pretest were screened from the studies.

120. Old Chief v. United States, 519 U.S. 172, 174 (1997); *see supra* note 67 and accompanying text. In *Old Chief*, the defendant faced one charge for "assault with a dangerous weapon" and another for "felon in possession of a firearm." Over the defense's objection, the prosecutor sought to present to the jury an official record of the defendant's prior conviction, which stated that the prior conviction was for assault causing serious bodily injury, that the assault had taken place approximately six years ago, and that it had resulted in a sentence of five years' imprisonment. *Old Chief*, 519 U.S. at 177.

> convicted of a felony. And that's all that matters—not whether it was a violent or non-violent offense, not whether it led to imprisonment, etc. The other side should not be allowed to tell the jury such irrelevant information."

After reading Part 1, participants were asked,

> How likely do you think it is that [*DeShawn / Dylan*] was involved in the street fight a few months ago and fired a gun at someone during it? Please answer on a scale from 0 (certainly innocent) to 10 (certainly guilty).

After answering this question, participants remained in either the Black-defendant or white-defendant version but were further randomly assigned to read one of two continuations of the story. I'll call them "Part 2." Their only difference was the nature of the defendant's prior conviction.

> The judge decides to allow the attorney to tell the jury what crime [*DeShawn / Dylan*] was previously convicted of.
>
> It turns out that [*DeShawn's / Dylan's*] 2015 felony conviction was for [*"assault causing serious bodily injury," a violent offense for which he was sentenced to several years in prison*] [*"falsifying corporate business records," a non-violent offense for which he was sentenced to several months of community service*].

After reading Part 2, participants answered the same question they answered after Part 1. Participants then indicated their own race, age, and gender.

To summarize, then, each participant was exposed to one of four possible conditions, in a 2 (race) x 2 (nature of prior conviction) design, and each participant answered the same likelihood-of-guilt question once prior to, and once after, learning the nature of the defendant's prior conviction.

ii. Results

There were three main findings. First, when participants learned of the existence of the defendant's prior offense but not the nature of the offense, their likelihood-of-guilt estimates were significantly higher in the Black-defendant condition than in the white-defendant condition.[121] In other words, after reading Part 1 of the vignette and before reading Part 2,

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121. $t(557) = 2.72$, $p = .007$. Black-defendant mean = 7.096; white-defendant mean = 6.640. *Evidence Law's Blind Spots* Dataset, *supra* note 11. Throughout this Article, the statistical significance of the mean differences was analyzed with two-tailed t-tests. While the preregistration materials specified that certain of these analyses would be one-tailed, Macleod, *Old Chief-Style Priors*, *supra* note 116, I report the two-tailed results for consistency and because they are more conservative. Using a one-tailed t-test for those hypotheses that were preregistered as one-tailed t-tests would not change any of the reported results from statistically significant to insignificant or vice versa. Paired t-tests were used only when comparing the likelihood-of-guilt ratings taken from the very same mock jurors in a given study, first after reading Part 1 of the vignette and then again after reading Part 2. Footnote 136, *infra*, contains the only examples. All other t-tests were unpaired.

participants who had read about a white defendant rated the defendant less likely to be guilty than did participants who had read about a Black defendant.

Second, after reading Part 2 and learning the violent nature of the defendant's prior conviction, participants' likelihood-of-guilt estimates increased by a significantly greater amount in the white-defendant condition than in the Black-defendant condition.[122] Indeed, there was almost no difference between the Black defendant's guilt likelihood after Part 1, on the one hand, and the white defendant's after Part 2, on the other.[123] In other words, learning of the white defendant's prior violence brought the white defendant into line with the violent history already presumed with respect to the Black defendant.

Third, and closely related, after participants learned of the serious, violent nature of the defendant's prior conviction, their likelihood-of-guilt estimates were no longer significantly higher in the Black-defendant condition than in the white-defendant condition.[124] As we'll see below, the reliability of this null finding is bolstered by the results of the follow-up study.[125] Similarly, when participants learned of the relatively minor, nonviolent nature of the defendant's prior offense, the racial disparity diminished and became statistically nonsignificant.[126] However, as we'll see below, once this study's nonviolent-prior results are combined with those of the follow-up study, the difference does reach statistical significance, albeit only barely.[127] In other words, once all the results are in, the racial disparity remains statistically significant in the non-violent-prior condition.

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122. $t(278) = -2.06$, $p = .040$. Black-defendant mean difference = .113; white-defendant mean difference = .540. *Evidence Law's Blind Spots* Dataset, *supra* note 11. *Cf. supra* note 99 and accompanying text (describing Maeder and Hunt's similar finding). In contrast, in the *non*violent prior offense condition there was no significant difference in the amount by which likelihood-of-guilt estimates decreased in the Black defendant condition and the white defendant condition. $t(277) = .525$, $p = .600$. Black-defendant mean difference = -1.029; white-defendant mean difference = -1.137. *Evidence Law's Blind Spots* Dataset, *supra* note 11.

123. $t(278) = .209$, $p = .835$. Black-defendant mean = 7.206; white-defendant mean = 7.158. *Evidence Law's Blind Spots* Dataset, *supra* note 11. On the other hand, where the prior offense was *non*violent, there was a significant difference in likelihood-of-guilt estimates between the white defendant after Story 1, on the one hand, and the Black defendant after Story 2, on the other. *Id.* $t(277) = -2.677$, $p = .008$. Black-defendant mean = 5.957; white-defendant mean = 6.669. *Id.* This is attributable to the far greater downward shift in likelihood-of-guilt estimates in the non-violent-prior condition for both Black and white defendants, compared to the relatively small upward shift in the violent-prior condition for both Black and white defendants (indeed, in the violent-prior condition, a nearly nonexistent shift for Black defendants). *See infra* Figure 1.

124. $t(278) = .700$, $p = .485$. Black-defendant mean = 7.319; white-defendant mean = 7.159. *Evidence Law's Blind Spots* Dataset, *supra* note 11.

125. *See infra* Figure 1; *infra* note 129 and accompanying text.

126. $t(277) = 1.457$, $p = .146$. Black-defendant mean = 5.957; white-defendant mean = 5.525. *Evidence Law's Blind Spots* Dataset, *supra* note 11.

127. *See infra* Figure 1, *infra* note 129 (noting p value of .033 for combined results).

2. Follow-Up Study: Banning the Box?

The main study's likelihood-of-guilt estimates were obtained only after participants learned that the defendant had a prior felony conviction. This left open the question whether, absent any indication of a prior conviction, the same racial disparity would emerge. In other words, when mock jurors were put in a position more directly analogous to the employers in the Ban-the-Box studies (who lacked any information whatsoever about prior convictions), would they exhibit the same race-based biases? The follow-up study aimed to test that.

i. Design, Materials, and Participants

The follow-up study was also preregistered.[128] Six hundred participants were recruited from Amazon's Mechanical Turk (567 after exclusions).[129] The vignette was nearly identical to the main study's vignette. In this study, however, participants provided their first likelihood-of-guilt estimate before learning that the defendant had a prior conviction. To keep the materials as close as possible to the main study vignette, this required omission of the felon-in-possession charge. Here, then, is Part 1:

> [*DeShawn Washington / Dylan Anderson*] is on trial. You are one of the jurors in his case.
>
> Prosecutors allege that [*DeShawn / Dylan*] was involved in a street fight a few months ago, and that he fired a gun at

128. *See* James Macleod, *Evidentiary Exclusion and Inclusion - Old Chief-Style Priors Intro'd in S2 (#83074)*, AsPredicted (Dec. 14, 2021, 8:20 AM), https://aspredicted.org/ve5hg.pdf [https://perma.cc/83Y6-2QYC] [hereinafter Macleod, *Old Chief-Style Priors Intro'd in S2*]; James Macleod, *Evidentiary Exclusion and Inclusion - Non-Violent Prior Intro'd in S2 (#96037)*, AsPredicted (May 4, 2022, 7:33 AM), https://aspredicted.org/7kv6v.pdf [https://perma.cc/8PUV-659L] [hereinafter Macleod, *Non-Violent Prior Intro'd in S2*]. While I combine them for ease of reporting, the violent-prior condition (with defendant race randomized) was preregistered and tested separately from the non-violent-prior condition (with defendant race randomized). Given my greater interest in the violent-prior condition, I preregistered and ran it first, at a time when I was unsure whether I would also run a follow-up study concerning the non-violent-prior condition.

129. Three hundred recruited for the violent-prior condition (287 after exclusions), and Three hundred recruited for the non-violent-prior condition (280 after exclusions). *See* sources cited *supra* note 128. Exclusion criteria were the same as in the main study. *See supra* note 118. No participants in the main study were permitted to participate in either condition of the follow-up study. In the violent-prior condition, participants' race was: eighty-two percent white/Caucasian, nine percent Black or African American, five percent Asian, three percent Multiple Races, one percent Other; age was one percent 18–20, twenty-five percent 21–29, thirty-one percent 30–39, twenty-four percent 40–49, ten percent 50–59, six percent 60–69, one percent 70 or older. *Evidence Law's Blind Spots* Dataset, *supra* note 11. The data were collected on December 15, 2021. In the non-violent-prior condition, participants' race was: seventy-nine percent white/Caucasian, ten percent Black or African American, one percent American Indian or Alaskan Native, seven percent Asian, two percent Multiple Races, one percent Other; age was two percent 18–20, twenty-four percent 21–29, forty-one percent 30–39, eighteen percent 40–49, ten percent 50 –59, four percent 60–69, one percent 70 or older. *Id.* The data were collected on May 4, 2022.

> someone during the fight. [*DeShawn / Dylan*] now faces one charge: "assault with a dangerous weapon."
>
> [*DeShawn / Dylan*] denies the charge. He claims he was not involved in the street fight and did not fire a gun at anyone during it.

After reading Part 1, participants were asked the same likelihood-of-guilt question that the participants in the main study were asked. Then participants read Part 2, in which they learn that the defendant has a prior conviction for either a violent or a nonviolent offense:

> At one point during the trial, [*DeShawn / Dylan*] concedes that in 2015 he was convicted of a felony. Then an attorney says, "Here is an official record of [*DeShawn's / Dylan's*] felony conviction. As it shows, [*DeShawn / Dylan*] was previously convicted of the crime of…."
>
> But before he can say what [*DeShawn / Dylan*] was previously convicted of, an attorney on the other side interrupts: "Objection, Your Honor. The other side should not be allowed to tell the jury what [*DeShawn's / Dylan's*] prior conviction was for. Both sides agree that in 2015 [*DeShawn / Dylan*] was convicted of a felony. And that's all that matters—not whether it was a violent or non-violent offense, not whether it led to imprisonment, etc. The other side should not be allowed to tell the jury such irrelevant information."
>
> The judge decides to allow the attorney to tell the jury what crime [*DeShawn / Dylan*] was previously convicted of.
>
> It turns out that [*DeShawn's / Dylan's*] 2015 felony conviction was for [*"assault causing serious bodily injury," a violent offense for which he was sentenced to several years in prison*] [*"falsifying corporate business records," a non-violent offense for which he was sentenced to several months of community service*].

After reading Part 2, participants once again answered the same likelihood-of-guilt question. Finally, participants indicated their own race, age, and gender.

ii. Results

There was a small, nonsignificant racial disparity in participants' initial likelihood-of-guilt estimates.[130] In other words, where mock jurors had no indication that the defendant had any prior convictions, they rated the Black

130. $t(565) = 1.077$, $p = .282$. Black-defendant mean = 6.063; white-defendant mean = 5.873. *Evidence Law's Blind Spots* Dataset, *supra* note 11.

defendant and white defendant roughly equally likely to be guilty.[131] This result contrasts with the somewhat analogous Ban-the-Box studies described above.[132] But more importantly for present purposes, it contrasts with the main study reported above, in which participants were aware of the existence of the defendant's prior conviction, but not its nature, and provided racially disparate likelihood-of-guilt estimates.[133]

Once the follow-up study's participants read Part 2 of the vignette, thereby learning both the existence of the defendant's prior conviction *and* its nature (minor and nonviolent or major and violent), their likelihood-of-guilt estimates were similar to those of the main study's participants after reading Part 2; no significant racial disparity was observed in either the violent, major prior offense condition or the minor, nonviolent offense condition.[134]

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131. This set-up mirrored the Ban-the-Box setting, in that it did not affirmatively tell participants that the defendant *lacked* any prior convictions. It is possible that the (nonsignificant) disparity would have been even smaller had the study's participants been affirmatively told that the defendant *lacked* a prior conviction—something the defendant is free to point out to the jury at trial. *See* Laudan & Allen, *supra* note 71, at 508 ("Consider the typical behavior of a defendant with a clean record. He is free to announce that he has no prior convictions." (citing Daniel Givelber & Amy Farrell, *Judges and Juries: The Defense Case and Differences in Acquittal Rates*, 33 LAW & SOC. INQUIRY 31, 47 n.10 (2008) ("[W]hen the defendant has no [criminal] record, the jury is likely to hear this fact."))).

132. That's not to say that the results here contradict or conflict with the Ban-the-Box studies' results. The employers in those studies are in an analogous informational position, but they face a very different type of decision: deciding which person among various competitors will receive a scarce resource (a job). *See supra* notes 106–11 and accompanying text. For this and other reasons, one might anticipate some differences in the degree to which relatively weak biases affect decision outcomes.

133. *See supra* notes 117–26 and accompanying text. Although not part of the preregistered analysis, three separate two-way unbalanced ANOVAs were run, primarily for the purpose of testing whether there was any interaction between revelation of prior conviction information and defendant race. The first of these ANOVAs compared guilt scores in the "existence of prior undisclosed" condition versus the "existence of prior disclosed, nature undisclosed" condition. It showed statistically significant main effects of disclosing the existence of the prior conviction (but not its name or nature) on guilt scores ($F(1, 1122) = 54.65$, $p < .001$), and of defendant race on guilt scores ($F(1, 1122) = 6.99$, $p = 0.008$), but no statistically significant interaction between the effect of disclosing the existence (but not name or nature) of the prior conviction and the effect of defendant race ($F(1, 1122) = 1.18$, $p = 0.277$). *See Evidence Law's Blind Spots* Dataset, *supra* note 11. In other words, there is no statistically significant difference between the amount of race-based disparity in guilt scores when the existence of the defendant's prior conviction was undisclosed, on the one hand, versus when its existence, but not its name or nature, was disclosed. Likewise, in a comparison of the "existence of prior undisclosed" condition versus the "existence of prior disclosed: major, violent" condition, a two-way unbalanced ANOVA showed no statistically significant interaction between the effect of disclosing the existence and nature of the prior conviction and the effect of defendant race ($F(1, 1130) = 1.05$, $p = 0.307$). *See id.* The same was also true with respect to a comparison of the "existence of prior undisclosed" condition versus the "existence of prior disclosed: minor, non-violent" condition ($F(1, 1114) = 0.14$, $p = 0.711$). *See id.*

134. *See infra* Appendix Figures 2–3. For the follow-up study's violent-prior condition, there was no significant difference between the Black-defendant condition and white-defendant

Before moving on, it may be worth pausing to note one result which, though not the subject of a preregistered analysis, may catch readers by surprise. In the follow-up study's nonviolent, minor prior offense condition, participants rated both the Black and white defendants significantly *less* likely to be guilty after Part 2 of the vignette, compared to after only reading Part 1.[135] But Part 1 didn't even reveal the *existence* of a prior offense. Why would mock jurors consider the defendant less likely to be guilty after learning that he has a prior conviction, even if it is for a relatively minor offense? The answer may have to do with gap-filling. Without any mention of prior convictions, mock jurors effectively presume, as part of their intuitive risk assessment, that the defendant—who prosecutors are saying fired a gun at someone during a street fight—may well have one or more prior convictions, perhaps for violent offenses.[136] But after learning that the defendant has only one prior conviction, and that it is for a relatively minor, nonviolent offense that's highly dissimilar to the alleged street violence,[137] mock jurors adjust their guilt assessments downward.[138] In short, absent evidence regarding the defendant's prior convictions, mock jurors intuitively fill in the gap and presume that there's at least some nonzero chance he has been convicted of similar violence in the past. Once they effectively learn that he hasn't, they adjust accordingly.[139]

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condition: $t(285) = -.971$, $p = .332$; Black-defendant mean = 6.923; white-defendant mean = -7.146. *See Evidence Law's Blind Spots* Dataset, *supra* note 11; *cf. supra* note 121 (reporting analogous finding from the primary study). For the follow-up study's non-violent-prior condition, there was no significant difference between the Black-defendant condition and the white-defendant condition, although, much like in the main study's results, it came closer to reaching significance: $t(278) = 1.581$, $p = .115$; Black-defendant mean = 5.702; white-defendant mean = 5.288. *See Evidence Law's Blind Spots* Dataset, *supra* note 11; *cf. supra* note 126 (reporting analogous finding from the primary study). As noted below, once the main study and follow-up study results are combined, there is a statistically significant difference between the Black and white defendants' post-Part-2 guilt ratings in the nonviolent prior condition. *See infra* note 145 and accompanying text.

135. In the Black-defendant condition (paired): $t(140) = 2.806$, $p = .006$; Post-Part-1 mean = 6.092; Post-Part-2 mean = 5.702. *Evidence Law's Blind Spots* Dataset, *supra* note 11. In the white-defendant condition (paired): $t(138) = 2.411$, $p = .017$; Post-Part-1 mean = 5.590; Post-Part-2 mean = 5.288. *Id.* There was no significant racial disparity in the amount of reduction from Part 1 to Part 2 (unpaired): $t(278) = -.496$, $p = .620$; Black-defendant mean = -.393; white-defendant mean = -.300. *Id.*

136. I would guess this is not a conscious consideration, but simply something "priced into" mock jurors' intuitive assessment of how likely this defendant is to be guilty, all things considered.

137. The prior offense is dissimilar not only in the conduct that it involved (falsifying records versus physical violence), but also in what it might imply to jurors regarding the socioeconomic status of the defendant (high-status and wealthy versus low-status and poor).

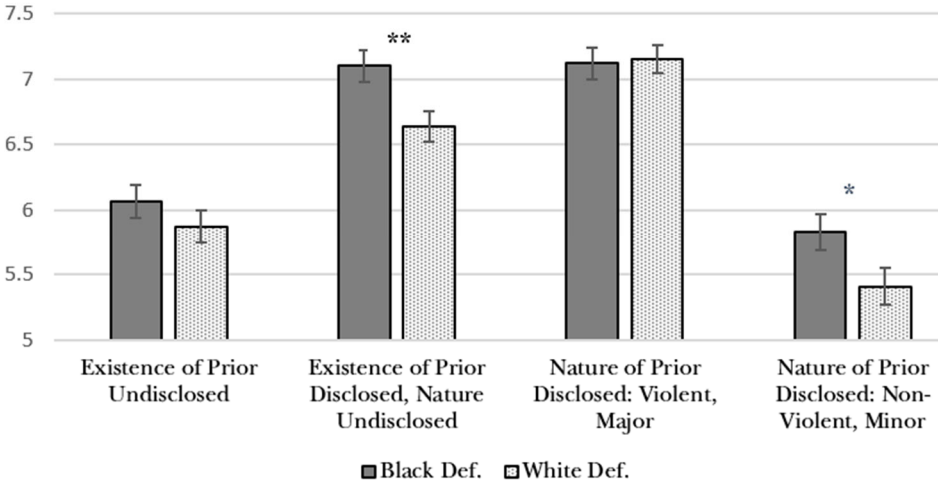
138. Granted, mock jurors weren't explicitly told that this was the defendant's *only* prior offense, but that's the strong implication of the vignette.

139. If that's the right explanation, then one might worry about any information-disclosure regime that would require jurors to be left in the dark about the defendant's criminal record in cases where such evidence may actually help the defendant. But that's not the regime we currently have. In real trials, defendants are typically permitted to inform the jury that they have only one

3. Summary

The picture that emerges from these studies is disconcerting. Figure 1 will be useful for combining and summarizing the findings.

Figure 1: Likelihood of Guilt Estimates (0–10 scale).[140]



Begin with the leftmost pair of bars in Figure 1.[141] When the *existence* of a prior conviction was not disclosed, participants' likelihood-of-guilt ratings,

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criminal conviction, that it was for such-and-such nonviolent offense, and so on—or, for that matter, those without prior convictions can and often do inform the jury that they have no prior convictions. *See supra* note 131. In Part IV.A.3, this Article proposes only to prohibit the prosecution from introducing evidence of the defendant's prior convictions, not to prohibit the defendant from doing so whenever he believes doing so might be to his advantage in light of the jury's likely presumptions about his record absent any evidence on the matter. *See infra* notes 179–80 and accompanying text.

140. Error bars indicate standard errors. * indicates $p \leq .05$; ** indicates $p \leq .01$; *** indicates $p \leq .001$.

141. The left half of Figure 1 shows participants' likelihood-of-guilt estimates after reading Part 1. For the first, leftmost pair of bars, labeled "Existence of Prior Undisclosed," $n = 567$ (i.e., the total n from the follow-up study—the only study to test this). For the second pair of bars, labeled "Existence of Prior Disclosed, Nature Undisclosed," $n = 559$ (i.e., the total n from the main study—the only study to test this). The right half of Figure 1 shows participants' likelihood-of-guilt estimates after reading Part 2. It combines the results of the main and follow-up studies, since the content of both studies' vignettes was nearly identical. The main difference between the main and follow-up studies was simply the timing of participants' first likelihood-of-guilt estimate, which in the main study was after learning of the existence of the defendant's prior conviction, but in the follow-up study was before learning of its existence. But in both the main and follow-up studies, participants providing their likelihood-of-guilt estimates after Part 2 had been exposed

while slightly higher for the Black defendant than for the white defendant, showed no significant difference based on defendant race.[142]

On the other hand, when mock jurors learned that the defendant had a prior felony conviction, but did not learn its nature, a significant race-based disparity emerged: mock jurors rated the Black defendant significantly more likely to be guilty than the white defendant (see the second pair of bars in Figure 1).[143] In other words, when mock jurors were placed in precisely the situation required by the Court in *Old Chief*, by judges applying *Old Chief*'s basic reasoning in other contexts, and by legislation in some states, mock jurors engaged in racially biased gap-filling.

But when mock jurors then learned that the prior offense was relatively serious and violent—i.e., when they learned the information that judges often shield from them—the racial disparity vanished (see the third pair of bars in Figure 1).[144] In other words, once the informational gap was filled with actual evidence, rather than biased presuppositions, the Black and white defendants returned to equal footing. On the other hand, when mock jurors learned that the prior offense was relatively minor and nonviolent, the racial disparity remained intact (see the fourth pair of bars in Figure 1).[145] Note that under current law in most jurisdictions, the minor, nonviolent nature of the prior offense would often be admissible, whereas the major, violent nature of the

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to nearly identical content. For the third pair of bars, labeled "Nature of Prior Disclosed: Violent, Major," $n = 567$ (i.e., the total n from the main and follow-up study's violent-prior conditions combined, which only coincidentally happens to be the same number as the n from the first, leftmost pair of bars). For the fourth pair of bars, labeled "Nature of Prior Disclosed: Non-Violent, Minor," $n = 559$ (i.e., the total n from the main and follow-up study's non-violent-prior conditions combined, which only coincidentally happens to be the same as the n from the second pair of bars). For additional Figures that disaggregate the results of the main and follow-up studies with respect to their respective post-Part-2 likelihood-of-guilt estimates, see *infra* Appendix.

142. *See supra* note 130.

143. *See supra* note 121. *But see supra* note 133 (noting that an ANOVA comparing the "existence of prior undisclosed" condition versus the "existence of prior disclosed, nature undisclosed" condition revealed no significant interaction between defendant race and disclosure of the existence, but not name or nature, of the defendant's prior conviction).

144. Combining the main and follow-up study results, there was no significant difference between the Black and white defendant post-Part-2 likelihood-of-guilt estimates in the violent-prior condition: $t(565) = -.198$, $p = .843$; Black-defendant mean = 7.12; white-defendant mean = 7.15. *Evidence Law's Blind Spots* Dataset, *supra* note 11. Nor was there a significant difference in the main or follow-up study considered in isolation. *See infra* Appendix Figures 2–3. For statistics on the difference between how much likelihood-of-guilt estimates changed between Part 1 and Part 2 in the Black defendant condition, compared to how much it changed in the white defendant condition, see *supra* notes 121–27. For analysis of the (nonsignificant) interaction between race and prior conviction disclosure regime, see *supra* note 133.

145. Combining the main and follow-up study results, there was a significant difference between the Black and white defendant post-Part-2 likelihood-of-guilt estimates in the non-violent-prior condition: $t(557) = 2.138$, $p = .033$; Black-defendant mean = 5.829; white-defendant mean = 5.406. *Evidence Law's Blind Spots* Dataset, *supra* note 11. However, there was neither a significant difference in the main study considered in isolation, see *supra* note 122, nor in the follow-up study considered in isolation. *See supra* note 134; *infra* Appendix Figures 2–3.

prior offense—i.e., the only information that eliminated the racial disparity—would not.[146]

Because this Article's studies are the first to test the relation between defendant race and prior convictions evidence,[147] it's especially important to pause and note a few limitations. First, the studies used short vignettes, not real-life courtroom proceedings followed by jury deliberation. It's always possible that effects observed in the former setting wouldn't appear in the latter.[148] Also, the studies tested only one type of charged crime (violent assault), and two types of prior conviction (violent assault and business fraud).[149] Other types and combinations of charged and prior crimes might not produce the same effects. Finally, the defendant's race was manipulated using names (DeShawn / Dylan) that may have connoted not only different races but also different economic status (poor / wealthy), different location (urban

146. *See* FED. R. EVID. 609. After the jury learns that a defendant has a prior conviction, the defendant may, perfectly consistent with the Rules, inform the jury of its nature in order to counter the jury's otherwise more negative assumptions. *See id.*; Laudan & Allen, *supra* note 71, at 508. Moreover, since in this case the minor, nonviolent conviction was one involving dishonesty, the prosecution would be permitted to introduce it as a matter of course in the event the defendant testified. FED. R. EVID. 609. *But see supra* note 23 (listing state jurisdictions that prohibit introduction of the name or nature of the defendant's prior convictions, including where the defendant does not object to their introduction). On the inadmissibility of the major, violent nature of the offense over a defendant's objection, see *supra* note 120 and accompanying text.

147. And, it is only the second to test the relation between defendant race and prior convictions evidence more generally. The results are consistent with the results of that one prior study. *See generally* Maeder & Hunt, *supra* note 10 (finding that an initial racial disparity was eliminated when bad character evidence was introduced, due to a large increase in white-defendant guilt ratings and nearly no increase in Black defendant guilt ratings).

148. Furthermore, the vignettes involved a party raising an in-court objection. That's what happened in the *Old Chief* case on which the vignettes were based, but in other cases the issue might be resolved prior to trial, with no in-court objection raised. On the effects of objections and instructions to disregard, see generally Molly J. Walker Wilson, Barbara A. Spellman & Rachel York, *Beyond Instructions to Disregard: When Objections Backfire and Interruptions Distract* (Saint Louis Univ. Legal Stud., Rsch. Paper No. 2014-11, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2432527 [https://perma.cc/5UHM-VABN].

149. More specifically, the prior convictions tested here differed along several different dimensions. The violent assault was relatively (a) major, (b) similar to the charged crime, and (c) probably stereotypically associated with Black perpetrators, while the business records falsification was relatively (a) minor, (b) dissimilar to the charged crime, and (c) probably stereotypically associated with white perpetrators. On the effect of similarity to the crime charged, see Sevier, *supra* note 71, at 351. On the influence of race-related stereotypicality of crime, see Skorinko & Spellman, *supra* note 103; Randall A. Gordon, *The Effect of Strong Versus Weak Evidence on the Assessment of Race Stereotypic and Race Nonstereotypic Crimes*, 23 J. APPLIED SOC. PSYCH. 734, 747 (1993); Galen V. Bodenhausen, *Stereotypic Biases in Social Decision Making and Memory: Testing Process Models of Stereotype Use*, 55 J. PERSONALITY & SOC. PSYCH. 726, 732 (1988); Galen V. Bodenhausen & Meryl Lichtenstein, *Social Stereotypes and Information-Processing Strategies: The Impact of Task Complexity*, 52 J. PERSONALITY & SOC. PSYCH. 871, 877 (1987); Michael Sunnafrank & Norman E. Fontes, *General and Crime Related Racial Stereotypes and Influence on Juridic Decisions*, 17 CORNELL J. SOC. RELS. 1, 1–4 (1983).

/ suburban), and so on. Multiple biases may well have affected participants' gap-filling.

IV. ADDRESSING EVIDENCE LAW'S BLIND SPOTS

This Part makes two normative proposals, each corresponding to one of evidence law's blind spots. First, in light of the biased gap-filling observed in this Article's studies, Section IV.A urges reform of the rules governing prior convictions evidence. It considers and rejects two potential reform options: juror exposure to debiasing instructions and juror exposure to increased prior-convictions information. Then it argues for a third option—juror exposure to *no* information about prior convictions. Next, given evidence law's traditional inattention to systemic injustice, Section IV.B recommends that evidentiary decision makers consider adopting a new, broader vision of evidence law's aims. It uses recent cases to illustrate how this new vision diverges from the traditional, narrow view of evidence law, and it argues that the new view is compatible with evidence law's formal sources and animating values.

A. BIASED GAP-FILLING AND PRIOR CONVICTION EVIDENCE REFORM

Recall that in this Article's study results, a racial disparity emerged in what one might call the "medium-information" regime, in which jurors learn the existence, but not the nature, of the defendant's prior conviction. The racial disparity was absent in the "high-info regime" in which the prosecutor informs jurors of the existence *and nature* of the defendant's prior conviction,[150] and in the "low-info regime," in which jurors learn neither the existence nor the nature of the defendant's prior conviction.

This Section examines three potential reforms aimed at eliminating the racial disparity: (1) avoid the problem by debiasing jurors; (2) adopt the high-info regime; or (3) adopt the low-info regime.[151] I reject the first option primarily on the ground that it appears to not work well. I reject the second on the ground that it directly and unnecessarily contradicts the Rules'

150. In what follows, discussion of the "high-info" regime is limited to the regime in which the *prosecutor* informs jurors of the serious, violent nature of the crime. That is the "high-info" regime which eliminated the racial disparity but which is often prohibited under current law. *See supra* note 67 and accompanying text (discussing cases like *Old Chief*, in which felony status is an element of the crime); *supra* note 22 and accompanying text (discussing judges' discretionary decisions to allow prosecutors to inform jurors of the existence, but not the name or nature, of the defendant's prior convictions); *supra* note 23 and accompanying text (discussing some states' prohibition on introduction of evidence concerning the name and nature of prior convictions). Recall that in another high-info regime, the *defendant* introduced evidence of the minor, nonviolent nature of his prior offense. *See supra* note 24. That is the high-info regime which did not eliminate the racial disparity, and which current law does not prohibit. *See supra* note 24.

151. This is of course only a partial list of potential reforms, focusing on tools readily available to evidentiary decision-makers. One could imagine many broader means of addressing the biased gap-filling problem—from ensuring diversity in jury selection to reducing the number of criminal cases brought in the first place.

concern with unfair prejudice generally and propensity evidence specifically. I embrace the third, low-info regime option, then explain how it could be realized as a matter of doctrine and procedure.

1. Debiasing Jury Instructions?

In Part II, we saw that jury instructions don't appear to prevent jurors from drawing forbidden propensity inferences. Assuming jurors comprehend them, jurors remain either unable or unwilling to follow them.[152] The problem isn't limited to the propensity context. For example, instructions to entirely disregard statements or evidence are notoriously ineffective.[153] Of course, that doesn't prevent courts from adopting a "presumption that jurors follow these instructions."[154] Nor do problems with jury instruction effectiveness prevent evidence scholars from routinely advocating them as a means of reform.[155] And this is certainly understandable: jury instructions do appear to work in some contexts, they're a low-cost reform, and they're one of the only tools in the evidence law toolbox.[156]

Numerous scholars have proposed using jury instructions to reduce the influence of juror bias on verdicts.[157] Some judges give one or another form of debiasing instruction at trial, whether in response to a party's request or *sua sponte*.[158] Some states' model jury instructions contain optional debiasing instructions.[159] And a recent American Bar Association Resolution recommends

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152. *See supra* notes 71–74 and accompanying text.

153. *See* SAKS & SPELLMAN, *supra* note 74, at 85–93.

154. *E.g.*, Kansas v. Carr, 577 U.S. 108, 124 (2016).

155. *E.g.*, Capers, *Evidence Without Rules*, *supra* note 8, at 898–900 (proposing jury instructions as a "modest" reform); Capers, *Real Women, Real Rape*, *supra* note 8, at 471–73 (same); Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 858–60 (2012); Kang et al., *supra* note 8, at 1183; Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 478–95 (1996).

156. *See, e.g.*, Capers, *Real Women, Real Rape*, *supra* note 8, at 898–900.

157. *See, e.g.*, *id.*; Roberts, *supra* note 155, at 858–60; Kang et al., *supra* note 8, at 1183; Yung Lee, *supra* note 155, at 406, 478–95 (advocating debiasing instructions in some cases concerning self-defense).

158. *See* Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 MICH. ST. L. REV. 1243, 1285–93 (citing examples of debiasing instructions); Jacqueline M. Kirshenbaum & Monica K. Miller, *Judges' Experiences with Mitigating Jurors' Implicit Biases*, 28 PSYCHIATRY, PSYCH. & L. 683, 686–87 (2021) (reporting results of a survey of 357 judges, in which approximately twenty-eight percent indicated that they alert jurors to potential biases); Kang et al., *supra* note 8, at 1181–83 (describing one judge's extensive efforts to address jurors' implicit biases, and noting that "[t]o date, no empirical investigation has tested a system like Judge Bennett's—although we believe there are good reasons to hypothesize about its benefits"); Roberts, *supra* note 155, at 859 (quoting Judge Bennett's instructions); United States v. Young, 6 F.4th 804, 809 (8th Cir. 2021) (addressing the issue in the context of voir dire).

159. *See, e.g.*, NINTH CIR. JURY INSTRUCTIONS COMM., MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS § 1.1 (2022); JUD. COUNCIL OF CAL., CRIMINAL JURY INSTRUCTIONS § 101 (2021).

issuing such instructions.[160] The various proposed and adopted instructions all differ somewhat in length and substance, but each takes the same basic approach of alerting jurors to the widespread existence of biases (often described as "subconscious" or "implicit"), then urging jurors to evaluate the case without being influenced by such biases.[161]

These instructions may turn out to be salutary, but at this point there's little evidence that they work. There appear to be three sets of studies on point.[162] Each one of them tested a different set of debiasing instructions resembling those advocated by scholars and at times adopted by judges and by drafters of pattern jury instructions.[163] None of the studies found that the debiasing instructions reduced racial bias in mock jurors' verdicts.[164] Again, one cannot confidently proclaim that the instructions can't work based on these three sets of studies alone. But until contrary evidence surfaces, one should approach them with some skepticism.[165]

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160. *See* ABA RES. 116, HOUSE OF DELEGATES RESOLUTION TO AMEND THE *ABA PRINCIPLES FOR JURIES AND JURY TRIALS* (2016).

161. *See, e.g.*, sources cited *supra* note 155.

162. *See* Ruva et al., *supra* note 99, at 12–34; Ingriselli, *supra* note 99, at 1717–29; Elek & Agor, *supra* note 98, at 7–17.

163. *See* Ruva et al., *supra* note 99, at 16–17 (separately testing a pattern instruction and an eleven-minute video, each prepared by the U.S. District Court, Western District of Washington); Ingriselli, *supra* note 99, at 1718 (testing an instruction created by the author); Elek & Agor, *supra* note 98, at 8 (testing an instruction "[b]ased loosely on a jury instruction developed and used by Judge Mark Bennett of the U.S. District Court, Northern District of Iowa"); *cf.* Roberts, *supra* note 155, at 859 (quoting Judge Bennett's instructions).

164. *See* Ruva et al., *supra* note 99, at 14, 20–21, 25–26 (finding no significant effect of instructions or video on verdicts or on judgments of defendant culpability); Ingriselli, *supra* note 99, at 1736 n.193 (finding no significant reduction in racial disparity of verdicts); Elek & Agor, *supra* note 98, at 13 (same).

165. Interestingly, all three studies shared a somewhat strange feature: to each author's professed surprise, in the control condition (i.e., without debiasing instructions), white defendants were either equally or more likely to be found guilty than Black defendants. *See* Ruva et al., *supra* note 99, at 20–21, 25 (noting that, in the murder scenario, the white defendant was significantly more guilty with respect to the charge of evidence tampering, but there was no significant difference with respect to the homicide charge; in battery scenario, there was no significant difference); Ingriselli, *supra* note 99, at 1736 (noting that jurors found the white defendant significantly more guilty); Elek & Agor, *supra* note 98, at 12–13 (noting no significant difference except where the victim was Black, in which case the white defendant was significantly more guilty than Black defendant). In effect, then, each paper tested whether the debiasing instruction would—through some combination of reducing white guilt judgments, increasing Black guilt judgments, or both—reduce the racial disparity otherwise favoring the white defendant. To reiterate, though, none found a significant effect of debiasing instructions reducing bias relative to the control condition. As for nonsignificant effects, Elek & Agor's study found a nonsignificant reduction in racial disparity in the instructions condition, due in part to increased Black-defendant guilt and in part to reduction in white-defendant guilt. Elek & Agor, *supra* note 98, at 12–13. Ingriselli's study found a nonsignificant reduction in racial disparity in the instructions condition, but it's unclear whether it resulted from increased Black-defendant guilt, reduced white-defendant guilt, or both. Ingriselli, *supra* note 99, at 1736. In Ingriselli's

One might nonetheless reason that, at the very least, debiasing jury instructions do no harm to defendants. But while that may turn out to be true, it's not self-evident. To see why, imagine that debiasing instructions *do* work to reduce or eliminate the racial disparity in juror verdicts. Now ask: would they do so by lowering conviction rates for Black defendants or by raising them for white defendants?[166] To illustrate, consider a "race-switching" form of debiasing instruction, favored by a number of scholars and used in at least one reported case.[167] This instruction asks jurors to imagine what their verdict would be if the defendant's race were different than it in fact is.[168] The instruction concludes, "[i]f your evaluation of the case is different after engaging in race-switching, this suggests a subconscious reliance on stereotypes. You must then reevaluate the case from a neutral, unbiased perspective."[169] But which is the neutral, unbiased, "race-free" evaluation across cases—the more conviction-prone one that, absent any debiasing instruction, applies only to Black defendants, or the more acquittal-prone one that, absent any debiasing instruction, applies only to white defendants?[170] Put another way,

other studies, instructions reduced Black-defendant guilt, but those studies contained no white-defendant condition, leaving open the question whether they would have reduced whatever racial disparity there may or may not have been in a comparison with a white-defendant condition. *See id.* at 1735–36. Ruva et al.'s study does not report whether the instructions or video had any (nonsignificant) effect on juror bias, only that there was no significant effect. Ruva et al., *supra* note 99, at 16.

166. This is oversimplified, for two reasons. First, they could do both in combination. Second, and more importantly, in contexts like the three studies described above, the racial disparity in the control condition owes to greater white-defendant guilt, not less. *See supra* note 165. This might be especially common in white-collar criminal cases, for example. *See* Skorinko & Spellman, *supra* note 103, at 300; *see also* Cynthia Lee, *"But I Thought He Had a Gun": Race and Police Use of Deadly Force*, 2 HASTINGS RACE & POVERTY L.J. 1, 46–47 (2004) (noting the possibility that prosecutors might strategically request a race-switching instruction in certain cases).

167. *See* CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 256 (2003); Yung Lee, *supra* note 155, at 406, 565; Roberts, *supra* note 155, at 869; *see also* James H. McComas & Cynthia L. Strout, *Feature: Combating the Effects of Racial Stereotyping in Criminal Cases*, 23 CHAMPION 22, 24 (1999) (describing a case in which such an instruction was provided); Walter I. Gonçalves, Jr., *Banished and Overcriminalized: Critical Race Perspectives of Illegal Entry and Drug Courier Prosecutions*, 10 COLUM. J. RACE & L. 1, 77 (2020) (advising lawyers in certain cases to request a race-switching instruction); Caroline Forell, *Homicide and the Unreasonable Man*, 72 GEO. WASH. L. REV. 597, 620 (2004) (reviewing CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM (2003)) (advocating for a modified version of a race-switching instruction in certain self-defense cases, but not in provocation cases); L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 326 (2012) (advocating for use of race-switching instruction); Tania Tetlow, *Why* Batson *Misses the Point*, 97 IOWA L. REV. 1713, 1742 (2012) (same); *cf.* Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 MICH. ST. L. REV. 1243, 1285–93 (discussing cases in which trial courts refused to provide an instruction addressing potential racial bias and were upheld on appeal, including one in which the defendant proposed a race-switching instruction).

168. *See* sources cited *supra* note 167.

169. Yung Lee, *supra* note 155, at 482.

170. Again, this is an oversimplification. *See supra* note 166.

do jurors exhibit anti-Black bias, prowhite bias, or both?[171] Nobody knows.[172] The worry, then, is that if such instructions were given in a wide swath of trials, and if jurors "level up" their guilt judgments in cases involving white defendants, rather than "level down" in cases involving Black defendants, the debiasing instructions might raise conviction rates in the aggregate.[173]

2. Admit More Prior-Conviction Information?

Of course, there's another potential solution to the racial-disparity problem—one for which this Article's data provides considerable support—which is more certain to increase aggregate conviction rates. Namely, we could give prosecutors free reign to inform jurors about the existence and nature of the defendant's prior convictions as a matter of course. After all, where the jury learns that the defendant possesses a prior conviction, this Article's data shows that the resulting racial disparity may be reduced or eliminated by the prosecutor's introduction of information about the nature of the offense.[174]

But one need not be a staunch advocate of defendants' rights to oppose this proposal: one only need believe that the propensity ban is justified.[175] After all, the detriment to individual defendants would result from precisely the sort of propensity-based reasoning that the Rules seek to ban as unfairly

171. *See, e.g.*, Robert J. Smith, Justin D. Levinson & Zoë Robinson, *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 891–98 (2015); Carodine, *supra* note 8, at 530–36 (discussing the existence of a "Black tax" and a "white credit" in assessment of people's character). *But see* United States v. Robinson, 872 F.3d 760, 784 (6th Cir. 2017) (Donald, J., concurring) ("Implicit biases can be positive or negative; it is the negative biases, however, that give rise to problems that we struggle to combat in the law and, more broadly, in our society.").

172. One might try to answer by reference to the actual, accurate rate of crime commission—i.e., one might deem nonbiased whichever combination of "leveling up" and "leveling down" would promote more aggregate accuracy (perhaps weighted by the Blackstone ratio or some similar ratio). But we don't know the rate at which defendants actually are guilty of the crimes with which they are charged. So, assuming equal rates of offending among Black people and white people, we don't know whether the more conviction-prone (typically anti-Black) sentiment gets closer to the true rate, or instead the more acquittal-prone (typically prowhite) sentiment. *Cf.* Carodine, *supra* note 8, at 555–79 (arguing that the average prior conviction of a Black defendant may be a less reliable signal, compared to the average prior conviction of a white defendant, that the defendant did in fact commit the prior offense).

173. One might propose that such instructions should be given only where they are expected to help defendants, regardless of whether those cases in fact reflect the greater "bias" relative to true guilt rates. This may be a sensible proposal, so long as one is mindful that the direction of racial biases can apparently be tough to predict. *See supra* note 165 (noting studies in which authors expressed surprise at finding antiwhite or pro-Black bias in the control condition).

174. *See supra* note 150 and accompanying text.

175. *See supra* notes 45–46 and accompanying text (articulating the justifications for the ban on propensity evidence).

prejudicial.[176] While most scholars appear to support keeping the ban on propensity evidence—indeed, appear to support it most staunchly in the context of prior convictions evidence[177]—it is true that a few scholars have advocated dispensing with the propensity ban altogether.[178] And, if eliminating the propensity ban would prevent some of the biased gap-filling highlighted in this Article, then so much the better for these scholars' position. Thankfully, though, there's another way to address the problem of biased gap-filling in this context without throwing out the entire propensity ban.

3. Admit Less Prior-Conviction Information

The better solution is to prevent prosecutors (but not defendants, if they so choose)[179] from informing jurors of the existence of the defendant's prior convictions.[180] After all, recall that the racial disparity in this Article's study results emerged where mock jurors learned that the defendant had a prior

176. *See supra* Sections III.B.2ii, III.B.3. Here it is worth noting that guilt likelihood estimates *decreased* upon learning that the defendant's conviction was for minor fraud, compared to every other condition. *See supra* Sections III.B.2ii, III.B.3. While this Article's vignettes didn't involve defendant-witness impeachment, it's still remarkable that a prior conviction for fraud reduced guilt estimates even relative to the condition where the existence of a prior conviction was not revealed.

177. *See supra* note 71 and accompanying text. With the exception of a lone article by Laudan & Allen, *supra* note 71, I've been unable to find commentators who favor exempting prior convictions evidence from the propensity ban altogether, i.e., creating a special carveout for them. *See* Bellin, *supra* note 21, at 406 (thoroughly debunking the empirical grounds for Laudan and Allen's argument). If anything, prior convictions evidence seems to be singled out by scholars as a type of evidence for which the propensity ban is especially crucial. Rule 609 is not "the most criticized of all the Rules of Evidence" because it admits too *few* prior convictions for too *limited* a purpose! Simmons, *supra* note 22, at 994. *But see* Justin Sevier, *Legitimizing Character Evidence*, 68 EMORY L.J. 441, 503–07 (2019) (arguing that if prior convictions evidence were admissible as a matter of course, it would not have a distorting effect on defendants' decision to testify).

178. *See* Sevier, *supra* note 177, at 503–07 (arguing that the propensity ban is unduly complicated, distorting of defendants' decisions whether to testify, and undermining of public perceptions of the legitimacy of legal proceedings); Thomas J. Leach, *"Propensity" Evidence and FRE 404: A Proposed Amended Rule with an Accompanying "Plain English" Jury Instruction*, 68 TENN. L. REV. 825, 827 (2001) (favoring abolishment of Rule 404 "because the Rule is hopelessly opaque," and because "the Rule causes all involved in the trial process—parties, judges, attorneys, court staff, witnesses, victims, and jurors—to leave the trial with the queasy feeling that justice has been slighted or short-changed"); Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547, 1624; Uviller, *supra* note 52, at 890 ("It is foolish to exclude helpful evidence simply because it tends to prove the fact by proving predisposition to perform it. Relevant is relevant.").

179. *See supra* note 139 (explaining that at trial, defendants are routinely permitted to inform the jury of their own prior convictions, or their lack thereof); *supra* note 141 (considering whether, based on the follow-up experiment's results, there may be cases in which, compared to saying nothing about the existence or nature of prior convictions, it would be to the defendant's advantage to proactively inform the jury that the defendant has only one prior conviction and it concerns a minor, unrelated offense).

180. By "in the first instance," I mean they could still do so in response to the defendant's having brought them up. Note, also, that Congress's express adoption of Rules 412–15, concerning prior crimes in sex crime cases, stand as a much more formidable barrier to reform in that context than exists in all other contexts.

conviction.[181] Without that information, this Article's studies, like a number of others, found no significant racial disparity.[182]

If this solution allows one to keep the propensity ban and to reduce or eliminate the racial disparity that would otherwise exist, what does it sacrifice? Not much. As discussed in Part I, there are two primary reasons that prosecutors are permitted to inform jurors of a defendant's prior conviction: (a) impeachment of a testifying defendant; and (b) proof of a substantive element of a crime with which the defendant is charged.[183] Neither is worth the cost.[184]

The Rule that permits prior-conviction-based impeachment of criminal defendants is "the most criticized of all the Rules of Evidence; scholars have been calling for its reform or outright abolition for decades."[185] And for good

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181. *See supra* notes 142–44 and accompanying text.

182. *See supra* notes 97–99 and 142–44 and accompanying text. This isn't to say that finding is rock-solid. *See, e.g.*, *supra* note 97 and accompanying text (noting studies finding racially biased verdicts); *supra* notes 106–114 and accompanying text (discussing Ban-the-Box studies); *supra* note 134 (explaining that a two-way unbalanced ANOVA revealed no statistically significant interaction between the independent variables of disclosure of a prior conviction's existence and defendant race, on the dependent variable of likelihood-of-guilt score); *see also* Bavli, *supra* note 8, at 1082 (considering possible triggers of juror bias). To the extent one is concerned with biased gap-filling in a low-information regime, see generally Liu, *supra* note 17, for one possible solution. Liu's studies provide evidence that in civil contexts (where, absent any information about the defendant's liability insurance, jurors often presume that the defendant possesses liability insurance), a "provisional assumption"—an instruction to jurors to "assume that the defendant *does not* have [liability insurance]"—helps prevent jurors from filling the informational gap in a way that would otherwise work to defendants' systematic disadvantage. *Id.* at 570–79. Here, in the "low-information" regime, the analogous instruction would be: "Assume that the defendant has no prior convictions." And in the medium-information regime, in which jurors learn the existence, but not name or nature, of the defendant's prior convictions, the provisional assumption could be something like: "Assume that the defendant's prior conviction was for a minor, unrelated offense." *Cf. id.* at 584 (discussing the use of provisional assumptions in cases where testimony touching on the issue of insurance is admitted for some limited purpose). Granted, the civil insurance and criminal convictions settings are disanalogous in potentially important respects. For example, criminal defendants without prior convictions may inform the jury of their lack of prior convictions, whereas civil defendants without liability insurance may not. And whereas white criminal defendants may already be getting the benefit of a sort of unspoken "no-prior-conviction" provisional assumption, there might not be any particular subset of civil defendants that jurors already assume possess no liability insurance.

183. Or a sentencing enhancement, if and when the Court overrules its *Almendarez-Torres* rule excepting prior convictions from the otherwise-applicable *Apprendi* rule requiring that every fact capable of increasing the maximum sentence be found by a jury. *See* Epps & Ortman, *supra* note 67, at 885–86.

184. As discussed in Part I, the other two ways for prosecutors to get prior convictions into evidence, without the defendant first "opening the door" by introducing his own character evidence, are (a) nonpropensity uses (e.g., motive, *modus operandi*); and (b) proof of propensity in sex offense cases. *See supra* Part I.

185. Simmons, *supra* note 22, at 994 (discussing Rule 609). Granted, calling Rule 609 "the" Rule that permits prior-conviction-based impeachment is a bit too simple. Rule 608, which permits character-based impeachment, might also permit prior-conviction-based impeachment if Rule 609 were gone. *See* FED. R. EVID. 608.

reason.[186] Recall the rationale underlying it: a witness's prior convictions, regardless of whether they involved acts of dishonesty, are probative of the witness's propensity to be dishonest on the witness stand; when a defendant testifies in his own defense, the jury's awareness of his prior convictions helps them decide whether he is likely to tell the truth. The problems with this rationale are legion. To name three: (1) prior convictions likely aren't very probative of the likelihood that the defendant will be dishonest while testifying in his own defense (among other things, if he's guilty he has enough motive to lie already, even if he has no "character for untruthfulness" supposedly ascertainable via evidence of unrelated prior convictions)[187]; (2) jurors treat prior convictions as evidence that the defendant has a propensity to commit a crime, even when jurors are instructed not to[188]; and (3) consequently, the threat of admitting prior convictions deters defendants from testifying.[189] Not much would be lost from abolishing Rule 609, as some states have already done.[190]

Of course, even if the prior conviction impeachment rules were thoroughly reformed, a large problem would remain. The fact of a defendant's prior conviction is often introduced to prove a substantive element, as is the case not just for felon-in-possession charges, but also a wide array of "aggravated" offenses for which a prior conviction for a similar offense is an element.[191] This ensures that the jury finds every fact necessary to establish criminal

186. *See* Simmons, *supra* note 22, at 995–96 (citing and summarizing various scholarly critiques of the Rule).

187. *See* Richard Friedman, *Character Impeachment Evidence: A Psycho-Bayesian (!?) Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 637 (1991).

188. *See supra* Part II.

189. *See* Roberts, *supra* note 8, at 835; Eisenberg & Hans, *supra* note 73, at 1377–79; Bellin, *supra* note 21, at 410 (providing evidence that defendants' failure to testify leads jurors to infer guilt).

190. *See* Roberts, *supra* note 8, at 840. More precisely, one could abolish 609, or one could eliminate 609 only as it would apply to criminal defendant-witnesses, or one could eliminate 609(a)(1) but maintain 609(a)(2) (regarding prior crimes involving dishonest acts or false statements). Jeffrey Bellin has made a compelling argument that, if judges were to correctly apply Rule 609 as written, prior conviction evidence would almost never be admitted. *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, 338 (2008) ("A straight comparison of: (i) the prejudicial effect of the jury's learning of a defendant's criminal past; against (ii) the probative value of informing the jury that the defendant has *slightly less* credibility than his status as an interested party already suggests, strongly favors exclusion.").

191. *See, e.g.*, State v. Allen, 506 N.E.2d 199, 200–01 (Ohio 1987) (holding that where a prior conviction increases the degree of the offense, it is an element of the aggravated offense); State v. Newnom, 95 P.3d 950, 950–51 (Ariz. Ct. App. 2004) (determining that a prior domestic violence conviction is an element of aggravated domestic violence); State *ex rel.* Romley v. Galati *ex rel.* County of Maricopa, 985 P.2d 494, 496–97 (Ariz. 1999) (determining that a prior DUI conviction is an element of aggravated DUI).

liability or heightened punishment,[192] but it also risks unfair prejudice.[193] To limit that prejudice, judges often limit the information the jury receives about the prior conviction,[194] placing jurors in the medium-information zone that, in this Article's studies, gave rise to the largest racial disparity.[195]

Thankfully, many courts and state legislatures have permitted or required measures that avoid introducing to the jury the fact of the defendant's prior conviction—measures that can and should be adopted more broadly. Some courts, for example, permit the defendant to enter a guilty plea only as to the prior conviction, then go to trial on the remaining elements without the jury learning of the prior conviction.[196] Other courts permit defendants to selectively waive their jury right, leaving the judge as the factfinder with respect to the prior conviction and the jury for everything else.[197] And some states "authorize or mandate a bifurcated or two-phase jury trial when the state must prove to the jury a prior conviction, a fact related to a prior conviction, or an additional charge that includes a prior conviction as an element."[198] In other words, the jury remains the sole factfinder, but jurors learn of the defendant's prior convictions only if and when they have returned a guilty verdict with respect to the other elements of the offense.[199]

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192. *But see* King, *supra* note 26, at 578–80 (explaining that, where a prior conviction is not a substantive element but is instead the basis for a "sentencing enhancement," there is no constitutional requirement that the jury find the sentence-enhancing prior conviction under current jurisprudence); Epps & Ortman, *supra* note 67, at 886 (explaining why the Supreme Court is likely to get rid of the prior conviction exception to *Apprendi*, thereby recognizing a constitutional requirement that all prior convictions that serve as a basis for a sentencing enhancement must be found by a jury).

193. *See, e.g.*, United States v. Daniels, 770 F.2d 1111, 1118 (D.C. Cir. 1985); United States v. Dockery, 955 F.2d 50, 56 (D.C. Cir. 1992).

194. *See* King, *supra* note 26, at 587–89.

195. *See supra* notes 144–49 and accompanying text.

196. King, *supra* note 26, at 581–82 (citing Oregon, New York and North Carolina as examples, but noting that "[t]his alternative is not followed when the charge involves conduct that would be innocent but for the defendant's criminal history status, such as being a convicted felon in [otherwise-lawful] possession of a firearm").

197. *Id.* at 583–84; *see also* Shepard v. United States, 544 U.S. 13, 26 n.5 (2005) (explaining that, in the event the prior-conviction exception to *Apprendi* is overruled, "any defendant who feels that the risk of prejudice is too high can waive the right to have a jury decide questions about his prior convictions"); Ostlund v. State, 51 P.3d 938, 941–42 (Alaska Ct. App. 2002) (joining the "majority of jurisdictions considering this issue[, which] have created procedures for the trial court to try the felony DWI without the jury being informed of the prior convictions during its consideration of the current DWI offense," and holding that it was an abuse of discretion for the trial judge to refuse the defendant's selective waiver of his right to a jury determination of the fact of prior conviction).

198. King, *supra* note 26, at 585–86 (footnotes omitted).

199. *Id.*; *see also* Epps & Ortman, *supra* note 67, at 858 n.182 (proposing bifurcation for recidivism enhancements, but not for "trials where criminal liability," as opposed to a mere enhancement, "turns on the fact of a prior conviction, like the federal felon-in-possession crime"); *cf.* King, *supra* note 26, at 587 ("In a felony firearm case, without information about the

As with Rule 609 reform, there is little to lose and much to gain from more courts and legislatures adopting one or more of these measures.[200] Their aims are relatively narrow and uncontroversial: to accomplish the propensity ban's goals without sacrificing too much with respect to the goal of arriving at an accurate verdict in the case at hand. And they require no deep change in evidence law's basic orientation. Section IV.B's proposal is broader and more controversial.

B. SYSTEMIC INJUSTICE AND THE NEW, BROAD VISION OF EVIDENCE LAW

This Section considers a more fundamental broadening of evidence law's aims—beyond the "traditional, narrow" vision of evidence law as almost exclusively concerned with verdict accuracy, towards a "new, broad" vision that is more cognizant of evidence law's relation to systemic injustice. Section IV.B.1 illustrates how the two views diverge theoretically and practically, using examples from recent case law. Section IV.B.2 highlights the broad view's surprising degree of support in evidence law's formal sources, including the text, history, and purpose of the Rules. Section V.B.2 thus advocates for the new, broad view only in the limited sense of highlighting its grounding in traditional legal sources.[201] Whether one ultimately finds the broad view more compelling than the narrow view in any given context likely depends on a complex set of empirical predictions, beliefs about institutional design, and intuitions about morality. This Section doesn't seek to establish that the broad view's approach is a first-best, second-best, or *n*-best means of addressing the various injustices for which evidence law is but one limited tool. Instead, it merely begins to sketch the broad view's contours and shows that the broad view isn't as radical as it might first appear.

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prior conviction, a jury may be baffled, understandably, about why the prosecutor is trying to convict the defendant for conduct that seems perfectly lawful.").

200. For discussion of each measure's pros and cons, see King, *supra* note 26, at 579–87; Nancy J. King, *Handling Aggravating Facts After* Blakely*: Findings from Five Presumptive Guidelines States*, 99 N.C. L. REV. 1241, 1285–95 (2021); Nancy J. King, *Sentencing and Prior Convictions: The Past, the Future, and the End of the Prior-Conviction Exception to* Apprendi, 97 MARQ. L. REV. 523, 537–49 (2014). For examples of courts rejecting such measures, see, for example, United States v. Chevere, 368 F.3d 120, 122 (2d Cir. 2004) ("We therefore conclude that, in a prosecution under Sec. 922(g)(1), there are no circumstances in which a district court may remove the element of a prior felony conviction entirely from the jury's consideration by accepting a defendant's stipulation as to that element."); United States v. Clark, 184 F.3d 858, 865–68 (D.C. Cir. 1999); *see also* State v. Hill, 145 N.E.3d 1128, 1156 (Ohio Ct. App. 2019) ("[A criminal] defendant is not entitled to bifurcated proceedings, nor . . . [is] he [entitled to] waive [a] jury trial on [that] . . . element alone."); State v. Roswell, 196 P.3d 705, 706 (Wash. 2008) (holding that, while trial bifurcation is permitted, defendants may not selectively waive their right to a jury trial on a prior conviction element alone).

201. I don't claim that the traditional, narrow view lacks similar pedigree and grounding.

1. The Broad Vision Illustrated

What's the difference between the traditional, narrow view of evidence law and the new, broad view? On the narrow view, evidence law aims almost exclusively at steering the jury toward an accurate verdict in the case at hand.[202] In the Rules' terms, the narrow view treats an accurate verdict as a "just determination" of the case; "prejudice" is "unfair" only when and to the extent that it makes an accurate verdict less likely.[203] The broad view, on the other hand, is more cognizant of the trial's place within a broader system and broader set of justice-related considerations. It thus treats certain forms of "prejudice" as more "unfair" than others, or more likely to "outweigh" considerations favoring admission, insofar as those forms of prejudice perpetuate or compound broader societal injustices.[204] And the broad view appreciates that pursuing a "just determination" may involve, for example, considering the way evidentiary rules affect plea bargaining and prosecutorial incentives beyond the case at hand, in addition to verdict accuracy.[205]

To make things more concrete, let's move from the text of the Rules to some recent examples of cases in which judges adopted the broad view. To start, recall the Supreme Court's decision in *Peña-Rodriguez*, which concerned the admissibility of jurors' mid-deliberation statements of overt racial or ethnic prejudice, despite a rule generally barring inquiry into jurors' mid-deliberation statements.[206] The *Peña-Rodriguez* majority effectively adopted the broad view of evidence law: the evidence was admissible on the grounds that "racial prejudice in the jury system" is more troublesome, more important to detect and eradicate, than some other forms of unfair prejudice—not because it's somehow *per se* more likely to render a verdict inaccurate, but instead because it "implicates unique historical, constitutional, and institutional concerns."[207]

In contrast, Justice Alito's dissenting opinion effectively adopted the narrow view, under which the broader implications of a given accuracy-undermining consideration (which in this case just happened to be racial prejudice) are beside the point. On this view, the historical causes or societal consequences of racial bias have nothing "to do with the scope of an *individual criminal defendant's* . . . right to be judged impartially" in the case at hand.[208] "[D]ifferent *types* of juror bias" should be "treated the same way": they should be weighed and guarded against exclusively according to the degree to which

202. *See* G. Alexander Nunn, *The Incoherence of Evidence Law*, 99 NOTRE DAME L. REV. (forthcoming 2023) (manuscript at 6) (on file with author) ("[B]oth historical tradition and modern reasoning" support the view that "truth is at the heart of evidence law," and that "facilitating verdict accuracy . . . is evidence law's *raison d'etre*.").

203. *See* FED. R. EVID. 102, 403.

204. *See* FED. R. EVID. 102, 403.

205. *See* FED. R. EVID. 102.

206. Peña-Rodriguez v. Colorado, 580 U.S. 206, 212–14 (2017).

207. *Id.* at 223–24.

208. *Id.* at 251 (Alito, J., dissenting).

they risk rendering inaccurate the verdict in the case at hand.[209] Justice Alito's adoption of the narrow view of evidence law thus led to a different conclusion with respect to the admissibility of jurors' overtly racist mid-deliberation statements.[210] The majority would admit, he would exclude. But more importantly for present purposes, those divergent conclusions reflect fundamentally different visions of evidence law—different views about its proper aims, and, consequently, about the kinds of considerations that legitimately influence the decision to admit or exclude a given piece of evidence. That more fundamental difference in outlook can lead to different results in a variety of contexts beyond *Peña-Rodriguez*'s concern with racism and jury deliberation.

A second area of potential divergence between the narrow and broad view concerns the relevance of parties' disparate finances in deciding whether to admit or exclude evidence. In *Commonwealth v. Serge*, the Pennsylvania Supreme Court considered whether, in the murder trial of an indigent defendant, the prosecution should have been allowed to introduce into evidence an expensive computer-generated animation ("CGA") illustrating the prosecution's theory of the case.[211] The *Serge* court, expressing a desire "to level the playing field" between the parties,[212] first concluded that it could not require the state "to provide the defendant the finances necessary to create a CGA of his or her own."[213] But this left the court to decide whether, in light of the parties' disparate finances, the CGA evidence could be excluded on grounds of "unfair prejudice" under Pennsylvania's version of Rule 403, which, like its federal counterpart, permits judges to exclude evidence whose "danger of . . . unfair prejudice" outweighs its "probative value."[214]

The *Serge* majority, along with several concurring justices, effectively adopted the broad view. The court held that "the relative monetary positions of the parties are relevant for the trial court to consider" in balancing the evidence's probative value against its potential for "unfair prejudice" under Rule

209. *Id.* at 250–52.

210. The claim that one or another view of evidence law *led to* a given conclusion is meant as a principled reconstruction, not as a claim about the Justices' subjective reasoning processes.

211. Commonwealth v. Serge, 896 A.2d 1170, 1173–76 (Pa. 2006).

212. *See id.* at 1183–85; Pugh v. State, 639 S.W.3d 72, 103–05 (Tex. Crim. App. 2022) (Walker, J., concurring); *see also Serge*, 896 A.2d at 1183 (noting that the state's CGA cost more than the entire state-provided defense fund).

213. *Id.* at 1184–85 (discussing case law concerning requirements for indigent defense funding under state and federal law).

214. *See* FED. R. EVID. 403 (permitting exclusion of evidence whose "probative value is substantially outweighed by a danger of . . . unfair prejudice"); PA. R. EVID. 403 (omitting the word "substantially" but otherwise tracking Federal Rule of Evidence 403).

403.[215] But one justice, channeling the narrow view, vehemently disagreed.[216] On his view, party finances are an "irrelevant" and "dangerous" consideration.[217] "Suggesting that disparate resources can comprise a reason to exclude evidence presages the triumph of social sensitivity over legal reason."[218]

To be sure, what the *Serge* majority did is rare: judges almost never state that they excluded evidence in order to level the playing field among those with disparate finances.[219] Still, the thought isn't unheard of. A Texas appellate judge, for example, recently penned a lengthy concurrence advocating for consideration of disparate party finances in cases like *Serge*.[220] And one could imagine similar reasoning serving as a basis for excluding prosecutors' use of expensive expert witnesses outside the context of CGA evidence.[221] Whether or not trial court judges view Rule 403 as an appropriate—

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215. *See Serge*, 896 A.2d at 1185; *see also id.* at 1188 (Cappy, C.J., concurring) (noting the relevance of the monetary disparity between the Commonwealth and defense); *id.* at 1190 (Castille, J., concurring in the result) (emphasizing that so long as the state denies indigent defendants the funding required to produce a competing CGA, "the wisest course for the trial judge might be to exclude such evidence entirely").

216. *See id.* at 1190–91 (Eakin, J., concurring in the result).

217. *Id.* at 1190.

218. *Id.*

219. Though Wright and Graham note that "[p]rior to the Evidence Rules, courts sometimes took economic inequality into account in evidentiary rulings." CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., 21 FEDERAL PRACTICE AND PROCEDURE § 5023.1 (2d ed. 2005); *see also id.* § 5023.1 n.75 ("Rule 102 was described as similar to the equivalent provision of the Civil Rules and cited in support of the proposition that in applying the rules a court can take into account the disparity in economic resources between the parties.").

220. *See* Pugh v. State, 639 S.W.3d 72, 99–105 (Tex. Crim. App. 2022) (Walker, J., concurring). Indeed, the concurrence arguably went further than the *Serge* Court in basing its decision on factors that the narrow view of evidence law would deem inappropriate. Not only did the concurrence seek to "level the playing field," but one could also read the concurrence as implying that evidentiary exclusion under Rule 403 is sometimes *preferable* to the state's providing indigent defendants with the funding necessary to counter the prosecution's evidence: "Rule 403 may provide the necessary balance—the 'wisest course'—because it may be more cost-effective to level the playing field *by keeping the prosecution's animation out*," rather than by requiring the state to provide the funds necessary for the defendant to introduce similarly expensive competing evidence. *Id.* at 105 (emphasis added). Under the narrow view of evidence law, decisions to admit or exclude evidence should be influenced neither by judges' desire to "level the playing field" nor by judges' opinions about the desirability of doing so via increased spending on public defense versus decreased spending on public prosecution. But on the broad view of evidence law, these considerations may be relevant to the decision whether to admit or exclude a given piece of evidence.

221. *See, e.g.*, United States v. Stifel, 433 F.2d 431, 441 (6th Cir. 1970) (explaining in dicta that "[w]hile we believe that the neutron activation analysis evidence meets the test of admissibility in this case, we also note that like any other scientific evidence, this method can be subjected to abuse. In particular, if the government sees fit to use this time consuming, expensive means of fact-finding, it must both allow time for a defendant to make similar tests, and in the instance of an indigent defendant, a means to provide for payment for same"); Gideon Parchomovsky & Alex Stein, *The Relational Contingency of Rights*, 98 VA. L. REV. 1313, 1358 (2012) (noting that with respect to expert witnesses, "prosecutors . . . have an overwhelming advantage

let alone ideal—tool for addressing issues of economic inequality in the criminal legal system, it is in many cases one of their only tools.[222] Judges who are both sensitive to economic injustice and drawn to the broad view of evidence law may favor using it,[223] whether or not they choose to publicize their consideration of disparate party finances.

As a third and final example illustrating the difference between the broad and narrow views of evidence law, consider the decision to admit testimony that explicitly references or appeals to a party's race or other protected trait.[224] Courts fervently denounce the "injection of" race, ethnicity, and so on, "into a trial" that would be race-neutral, ethnicity-neutral, and so on, absent the evidence referencing the protected trait.[225] While courts' assumptions about neutrality at trial in the absence of such evidence are interesting in their own right,[226] the main point here is that courts profess not to be troubled

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when compared to defense counsel," creating incentives for indigent defendants to plead guilty even when factually innocent).

222. *See* Commonwealth v. Serge, 896 A.2d 1170, 1184–85 (Pa. 2006) (noting the limited circumstances under which current doctrine allows courts to require additional funding for indigent defendants); *see also* Parchomovsky & Stein, *supra* note 221, at 1360–61 (noting potential solutions not including evidentiary decisions to exclude).

223. Especially insofar as they believe that their evidentiary decisions can have positive downstream effects on prosecutorial incentives, plea bargaining dynamics, or legislative decisions about funding for public defenders or prosecutors' offices. *See Serge*, 896 A.2d at 1189–90 (Castille, J., concurring) (discussing court's reference to the relative cost-effectiveness of reducing prosecutorial costs versus increasing indigent defense costs).

224. An additional related example involves references to a defendant's poverty. While poverty is not a protected trait, courts typically prohibit prosecutors from arguing that a defendant's poverty provided a motive for theft. I thank Jeffrey Bellin for suggesting this point.

225. *See, e.g.*, Jinro Am., Inc. v. Secure Invs., Inc., 266 F.3d 993, 1008 (9th Cir. 2000) (explaining that testimony was "unfairly prejudicial under Rule 403" because it "inject[ed] defendants' [ethnicity] into the trial" (quoting United States v. Cabrera, 222 F.3d 590, 597 (9th Cir. 2000) (holding that testimony which "inject[ed] [defendants'] national origin into the trial" ran afoul of Rule 403))); *id.* ("Our sister circuits, too, have condemned the inappropriate injection of race or ethnicity into a trial.") (discussing examples); United States v. Bowman, 302 F.3d 1228, 1240 (11th Cir. 2002) ("This limited probative value was, in our view, outweighed by the danger of unfair prejudice. The uneasy racial history of criminal law in the United States has yielded a simple rule-of-thumb: 'There is no place in a criminal prosecution for gratuitous references to race . . . .' [T]he court could have, and should have, prevented the injection of racial issues . . . ." (citations omitted) (quoting Smith v. Farley, 59 F.3d 659, 663 (7th Cir. 1995)).

226. *See, e.g.*, *Stifel*, 433 F.2d at 441. Courts' emphatic condemnation of appeals to racial and other biases is often warranted, but there is something disconcerting about the degree of rhetorical firepower aimed at explicit references to race, compared to that which is aimed at more subtle ways race influences trial outcomes. After all, research shows that race salience often *decreases* juror biases. *See supra* note 104 and accompanying text. *See, e.g.*, Tate v. State, 784 So. 2d 208, 215 (Miss. 2001) ("'That no man shall be convicted upon an appeal to the race issue is a firm and settled proposition in this Court.' 'The race question and all of its vexations and perplexities should be dropped at the outer door of all courts of justice.'" (citations omitted) (first quoting Gore v. State, 124 So. 361, 361 (Miss. 1929); then quoting Clark v. State, 59 So. 887, 888 (Miss. 1912))); State v. Varner, 643 N.W.2d 298, 304 (Minn. 2002) ("[R]acial considerations . . . can affect a juror's impartiality and must be removed from courtroom

merely by the potential for inaccurate verdicts but also by broader concerns about systemic injustice, the appearance of fairness, and the legitimacy of the legal system as a whole.[227] In this context, where courts cannot help but notice the potential for unfairness, they are vocal in emphasizing the sorts of broad goals that the broad view encourages evidentiary decision makers to keep in mind.

As a doctrinal matter, these courts claim that Rule 403's balancing test provides an "especially important" tool for excluding evidence that would "inject" race or some other protected trait into the proceedings.[228] And despite the wide discretion typically granted to trial courts under Rule 403, appellate courts are quick to emphasize that they "carefully review the trial court's rulings in such situations."[229] Noting this tendency in appellate courts, Wright and Graham explain that "in a multi-cultural society like ours, fairness in adjudication does not consist entirely in the accuracy of the factual determinations but may require some sacrifice of accuracy to avoid the suspicion that the decision rests on prejudice."[230]

In further recognition of these broader fairness and legitimacy concerns, some jurisdictions have formal procedures and doctrines that single out for special treatment evidence of a party's protected trait. For example, some states' rules of evidence require an affirmative showing that any such evidence passes a more rigorous balancing test.[231] And, in appellate courts, certain

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proceedings to the fullest extent possible."); State v. Muskin, No. 2006ap1636-cr, 2008 WL 2512784, at *6 (Wis. Ct. App. June 12, 2008) ("To raise the issue of race is to draw the jury's attention to a characteristic that the Constitution generally commands us to ignore. Even a reference that is not derogatory may carry impermissible connotations, or may trigger prejudiced responses in the listeners that the speaker might neither have predicted nor intended.").

227. *E.g.*, cases cited *supra* notes 220–21.

228. *E.g.*, *Cabrera*, 222 F.3d at 597.

229. *E.g.*, Floudiotis v. State, 726 A.2d 1196, 1202 (Del. 1999) ("The trial court's duty to balance evidence under D.R.E. 403 becomes especially important when the evidence tends to be racially charged. In past decisions, this Court has carefully reviewed the trial court's rulings in such situations."); Pierce v. State, No. 45, 2007, 2007 WL 3301027, at *4 (Del. 2007) ("The same reasoning applies to issues of religion.").

230. CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5179 (1978) (explaining why "[t]rial judges can expect much less leeway in appellate review of relevance rulings that involve . . . classifications [of race, religion, and sex]"); *see also* People v. Robinson, 454 P.3d 229, 233–34 (Colo. 2019) (noting the Supreme Court's admonition in *Peña-Rodriguez* that "an appeal to racial bias should be treated with 'added precaution,'" and concluding that "any probative value of these statements was substantially outweighed by the risks of unfair prejudice and the perception of an appeal to racial prejudice and stereotypes").

231. *See, e.g.*, WASH. R. EVID. 413; CAL. EVID. CODE 351.2; *see also* Serrano v. Underground Utils. Corp., 970 A.2d 1054, 1073 (N.J. Super. Ct. App. Div. 2009) (Carchman, J., concurring) ("I urge that we go further and suggest that the proper methodology for balancing the Evidence Rule 403 factors is to start with a presumption that any inquiry into matters of immigration status is not appropriate and place the burden on the proponent to demonstrate, beyond the issue of credibility, why such inquiry is germane to the issues in dispute."). Pennsylvania state legislators recently proposed a similar burden-shifting rule, under which evidence is initially presumed irrelevant if it is "of a person's race, sex, gender identity or expression, religion, national origin,

references to a party's race, for example, may be deemed "incurably harmful," and therefore exempt from harmless error analysis—not because they inevitably lead to an inaccurate verdict, but because they "strike[] at the appearance of and the actual impartiality, equality, and fairness of justice rendered by courts."[232] These doctrines stand in stark contrast to the narrow view's single-minded focus on reaching accurate verdicts. On that view, the bias introduced by evidence of a party's protected trait is no different in kind from any other type of bias. They should all be "treated the same way"—i.e., evaluated and guarded against according to their risk of causing an inaccurate verdict.[233]

2. The Broad Vision's Roots

Were the judges who adopted the broad view in the above cases simply going rogue? Does the broad view of evidence law require a radical departure from evidence law's core principles? No. At least in some contexts, the Rules and the common law quite clearly allow broader policy concerns—concerns about the negative downstream effects of a given rule, including on things other than accuracy in factfinding—to trump verdict accuracy in the case at hand. In this respect, then, the broad view of evidence law represents merely an expansion of considerations already present in traditional law. Consider the Rules on privilege, and the so-called "specialized relevance" Rules. Rule 501, providing for the exclusion of privileged communications, is "not designed to enhance the reliability of the fact-finding process. On the contrary," it "impede[s] the search for truth by excluding evidence that may be highly probative."[234] But it's justified because it accomplishes goals other than accuracy in factfinding, including protection of privacy and encouragement of "the free flow of information in certain relationships."[235] Rules 407–411, the so-called "specialized relevance rules," work in a similar manner.[236] Rules 408 and 410, for example, bar evidence of statements made during settlement and plea negotiations, not because such statements are unreliable but because

immigration status, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation." Phila. Bar Ass'n Bd. of Governors, *Philadelphia Bar Association Resolution in Support of Proposed Amendment of the Comment to PA Rule of Evidence 401*, PHILA. BAR ASS'N (May 30, 2019), https://philadelphiabar.org/?pg=ResMay19_1&appNum=2 [https://perma.cc/V45H-27WU].

232. Living Ctrs. of Tex., Inc. v. Penalver, 256 S.W.3d 678, 681 (Tex. 2008) (arguing that appeals to race are "incurably harmful not only because of [their] harm to the litigants involved, but also because of [their] capacity to damage the judicial system"); *see also* Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 50 (Tex. 2008) (Johnson, J., concurring in part) ("I would apply the same analysis where appeal to racial prejudice is made though admission of documentary evidence. And, I would hold that pleas for ethnic solidarity or racial prejudice are unacceptable even when not made in explicit terms.").

233. *See* Peña-Rodriguez v. Colorado, 580 U.S. 206, 252 (2017) (Alito, J., dissenting).

234. CHRISTOPHER B. MUELLER, LAIRD C. KIRKPATRICK & LIESA RICHTER, EVIDENCE § 5:1 (6th ed. 2018).

235. *Id.*

236. *See* FISHER, *supra* note 1, at 95 ("All five of these rules serve similar public-policy concerns.").

admitting them would undermine the broader policy goal of encouraging out-of-court dispute resolution.[237] And so on.[238]

So why is the prevailing wisdom that evidence law is primarily about promoting accuracy, rather than other policy objectives?[239] Part of the reason is that each of these Rules is sometimes said to be justified by reference to accuracy concerns.[240] The bigger reason, though, is that these "specialized relevance" and privilege doctrines are typically treated as exceptions that prove the rule; they are often dismissed as a few well-established, longstanding outliers, and in any event are assumed to be a closed set.[241] But, it is a mistake to treat the Rules as if they, their interpretation, and the common law they largely codified, are set in stone.[242] The Rules are not static; they are meant to evolve.[243] They were adopted, as Rule 102 states, to "promote the development of evidence law," not to ossify it.[244] One permissible way for them to do so is to be interpreted, consistent with their text,[245] in a way that furthers so-called

237. *See, e.g.*, Bankcard Am., Inc. v. Universal Bancard Sys., Inc., 203 F.3d 477, 484 (7th Cir. 2000) ("The purpose of Rule 408 is to encourage settlements."); FED. R. EVID. 410 advisory committee's notes on proposed rules ("Effective criminal law administration in many localities would hardly be possible if a large proportion of the charges were not disposed of by such compromises." (quoting CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 251 (1954))).

238. Rule 409 excludes offers to pay medical expenses in the immediate wake of an accident in order to encourage offers of assistance. MUELLER & KIRKPATRICK, *supra* note 44, § 4:61. Rule 407 excludes subsequent remedial measures in order to encourage potential defendants to take safety precautions. *Id.* § 4:49.

239. *See* Nunn, *supra* note 202, at 6; Henry Zhuhao Wang, *Rethinking Evidentiary Rules in an Age of Bench Trials*, 13 U.C. IRVINE L. REV. 263, 274 (2022) ("Of course, the juridical proof process has objectives beyond the search for truth, including the promotion of fairness, efficiency, and other social values . . . and sometimes these other goals clash with that of accuracy. Nonetheless, these other objectives are ancillary aims, secondary to the goal of truth-seeking in juridical fact-finding." (footnote omitted)).

240. Though the policy justifications are acknowledged by the Advisory Committee Notes and outside commentators to be the "more impressive" or "more important" rationale for at least some of these rules. *See, e.g.*, FED. R. EVID. 407 advisory committee's notes on proposed rules; FED. R. EVID. 411 advisory committee's notes on proposed rules.

241. *Compare, e.g.*, United States v. Jackson, 405 F. Supp. 938, 943 (E.D.N.Y. 1975) (relying on Rule 102's "growth and development" clause to justify excluding proof of prior convictions that would otherwise have been admissible under Rule 609), *with* United States v. Brown, 409 F. Supp. 890, 892 (W.D.N.Y. 1976) (criticizing Judge Weinstein for "act[ing] legislatively" in *Jackson*).

242. *See, e.g.*, 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 102.02[4] (Mark S. Brodin ed., Matthew Bender 2d ed. 2023) ("[T]he law of evidence must respond to fundamental changes in our society and judicial procedures if parties are to retain confidence in the courts rather than turn to nonjudicial resolution of disputes."). *See generally* WRIGHT & GRAHAM, *supra* note 219, § 5023.1 (describing divergent views as to the appropriate scope of judicial discretion under the Rules).

243. *See* G. Alexander Nunn, *The Living Rules of Evidence*, 170 U. PA. L. REV. 937, 962–63 (2022).

244. FED. R. EVID. 102.

245. *See supra* notes 200–02 and accompanying text.

"external policy" goals that have been historically overlooked in evidence law, including, e.g., systemic racial and economic justice.[246]

Judges aren't strangers to this "progressive" mode of reasoning about evidence law's aims.[247] Prior to Congress's enactment of Rules 413–415, which allow admission of sex crime defendants' prior sex offenses,[248] courts often singled out such cases for special treatment. Judges created doctrines like "the depraved sexual instinct exception" to the ban on propensity evidence in order to accomplish the broader policy goal of promoting the successful prosecution of sex crimes.[249] Many courts have created similar doctrines with respect to domestic-abuse cases, easing the prosecution's burden by crafting special exceptions to the ban on propensity evidence.[250] Whatever one thinks about these doctrines' merits, they demonstrate that judges sometimes recognize evidence law's legitimate role in accomplishing policy goals beyond the narrow confines of the privilege and "specialized relevance" rules, even when the Rules do not explicitly name the policy goal in question.[251] Put another way, when judges see a problem, and see evidence law's role in either perpetuating or ameliorating it, evidence law often provides them the discretion to choose amelioration.[252] As many of the cases discussed above illustrate, systemic racial and economic injustice needn't be any different, so long as judges see the problem.

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246. *See supra* notes 199–202 and accompanying text; WRIGHT & GRAHAM, *supra* note 219, § 5023.1 ("The Evidence Rules have been justly said to be 'an integrated whole' but the task of interpretation goes beyond noting the relationship among the Rules to include their relationship with the goals of the judicial system and the integration of public morality into the 'justice' that citizens expect." (quoting NEIL P. COHEN, SARAH Y. SHEPPEARD & DONALD F. PAINE, TENNESSEE LAW OF EVIDENCE 4 (3d ed. 1995)).

247. Progressive in the sense of changing, not necessarily in favor of modern liberal political causes. *E.g.*, WRIGHT & GRAHAM, *supra* note 219, § 5023.1.

248. *See* FED. R. EVID. 413–15.

249. *See, e.g.*, Stwalley v. State, 534 N.E.2d 229, 231 (Ind. 1989), *abrogated by* Lannan v. State, 600 N.E.2d 1334 (Ind. 1992); *cf.* Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 563 (1997).

250. *See* Collins, *supra* note 47, at 417–18. Some states have enacted rules codifying these doctrines, but in most states where this has happened, they were developed via common law first. *Id.* at 414, 417–18.

251. Granted, these cases concern admission of *more* evidence, not less, and are arguably justified by a judicial desire to increase verdict accuracy. *See, e.g.*, *Lannan*, 600 N.E.2d at 1335 (discussing two justifications for "the depraved sexual instinct exception," including "a recidivism rationale," along with "the need to bolster the testimony of victims"). But rape shield provisions work the opposite way and have some (albeit thinner) roots in judge-made law. *See, e.g.*, FISHER, *supra* note 1, at 328 (noting Arizona case law limiting evidence of a victim's other sexual conduct prior to Arizona's enactment of a rape-shield statute).

252. *But see, e.g.*, Alex Stein, *The Refoundation of Evidence Law*, 9 CANADIAN J.L. & JURIS. 279, 290 (1996) ("[J]udicial fact-finding involves clashes between rectitude of decision, as a means of securing implementation of substantive law, and other important values. . . . These . . . value-conflicts cannot justifiably be resolved by judicial discretion. To suggest the opposite would ascribe judges both moral and political superiority over other citizens and political institutions.").

CONCLUSION

This Article reported the first empirical study of the relationship between defendant race and prior conviction evidence—somewhat startlingly, one of the first empirical studies of the relationship between defendant race and any rules of evidence. It's therefore especially important to bear in mind the obligatory note of caution applicable to any single empirical study: without additional empirical confirmation, the results should not be treated as firm, fixed points. Still, the results reveal a troubling racial disparity in the effects of prior conviction evidence rules. More generally, the results highlight two blind spots in traditional evidence law—biased gap-filling and systemic injustice—each of which perpetuates and compounds the other. These blind spots have pernicious effects throughout evidence law. Moreover, they influence not only what happens at trial, but also what happens at the charging and plea-bargaining stages, when the defendant's race and the rules of evidentiary exclusion are among the few data points known to both parties. This Article suggests reforms to prior conviction evidence rules and considers more fundamental reforms to the way evidentiary decision makers conceive of evidence law's aims. Along these lines, the Article sketched the contours of a new, broader vision of evidence law and highlighted that vision's surprisingly firm grounding in evidence law's traditional sources. With this broader vision of evidence law's aims, and an empirically informed awareness of traditional evidence law's blind spots, judges can make evidentiary decisions that more effectively curb the worst forms of "unfair prejudice"[253] and promote the "just determination" of disputes both inside and outside of court.[254]

253. FED. R. EVID. 403.

254. FED. R. EVID. 102.

APPENDIX[255]

Figure 2: Likelihood-of-Guilt Estimates: Main Study

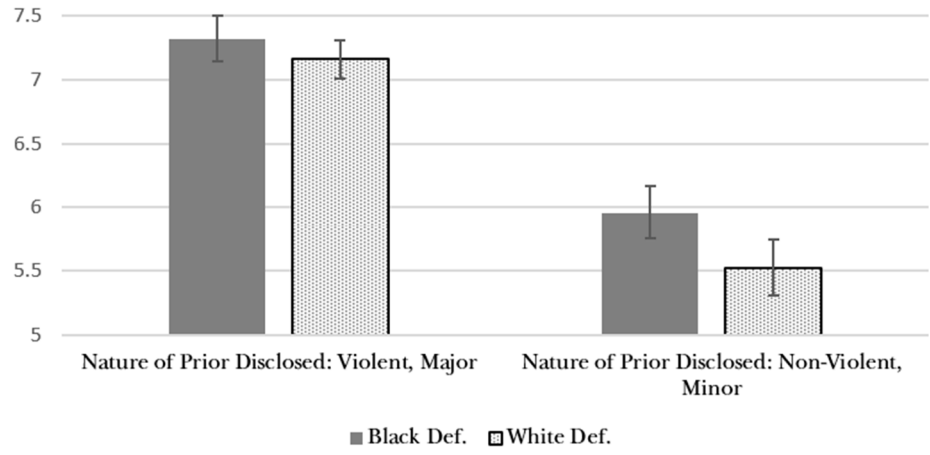
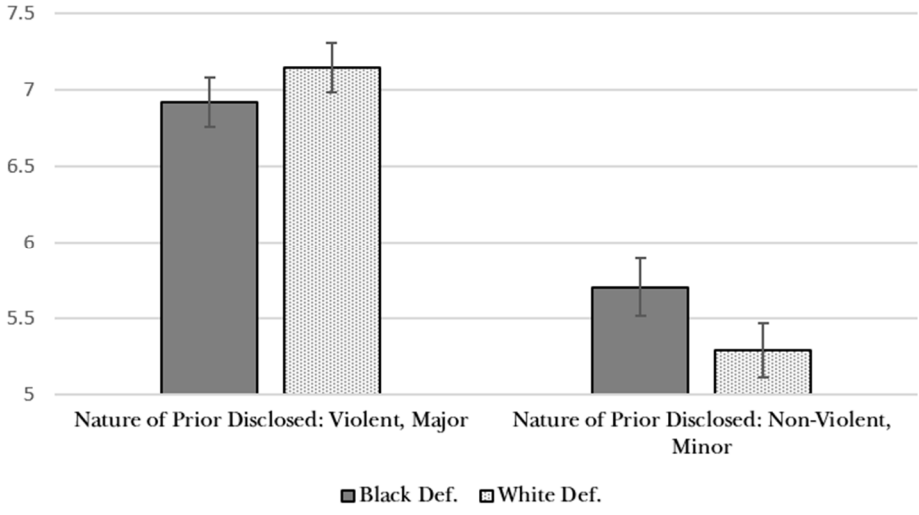


Figure 3: Likelihood-of-Guilt Estimates: Follow-Up Study



255. Error bars indicate standard errors. For demographic and other information regarding participants in each study, see *supra* Section III.B.