Fordham Urban Law Journal

Volume 50
Number 3 *Evidence Reform as Criminal Justice Reform: Rethinking the Federal Rules of Evidence*

Article 1

2023

Evidence Rules for Decarceration

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EVIDENCE RULES FOR DECARCERATION

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ABSTRACT

Two observations about the operation of the criminal legal system are so widely accepted that they are seem undeniable: First, it is a system of pleas, not trials. Second, the system is too punitive and must be reformed. One could easily think, therefore, that the Federal Rules of Evidence, which apply intentionally and explicitly only to the adjudicatory phase of criminal procedure, have nothing to do with the solution. And legal scholarship focusing on decarceration largely reflects this assumption: while many have explored reforms that target front end system actors and processes that lead people into the system (e.g. police, prosecutors, broad criminal statutes), and back end reforms that that seek to lessen the toll of punitive policies (sentencing reform, alternatives to incarceration), markedly fewer have explored how what happens in the middle — adjudication — contributes to mass incarceration.

While this oversight makes sense, it is not justified because it is also equally undeniable that plea bargaining happens in the shadow of trial. This Article examines how the shadow of trial — specifically, the shadow cast by evidentiary rulings about the accused person's past — contributes to the perpetuation of an expansive carceral state. It identifies how evidence rules have been relaxed, tweaked, specialized, or unmoored from their foundational principles in ways that facilitate prosecution and conviction or essentially force plea deals – without regard for the truth, fairness, or justice of the outcome. In other words, it identifies ways that evidence law undermines the Rules' primary purpose, which is to advance fair proceedings "to the end of ascertaining the truth and securing a just determination."

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INTRODUCTION

According to Federal Rule of Evidence (FRE) 102, the FRE "should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[1] Yet, it is increasingly accepted that the criminal legal system does not produce outcomes that are fair, just, or truthful.[2] This disjuncture between evidence rules' purpose and the outcome of the criminal process can be dismissed as probative of nothing: as more than 90% of criminal convictions result from guilty pleas, arguably the rules of evidence, which govern the adjudicatory process, cannot be a part of the problem.[3] In other words, it seems evidence rules are inapposite to

1. FED. R. EVID. 102.

2. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE (2021); KAY WHITLOCK & NANCY A. HEITZEG, CARCERAL CON: THE DECEPTIVE TERRAIN OF CRIMINAL JUSTICE REFORM (2021).

3. John Gramlich, *Only 2% of federal criminal defendants go to trial, and most who do are found guilty*, PEW RSCH. CTR. (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ [https://perma.cc/S5J8-JBBC]; *see also* Lafler v. Cooper, 566 U.S. 156, 170 (2012) ("[T]he reality [is] that criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.").

conversations and visions about how to meaningfully reform our intensely punitive system.

This Article challenges that assumption. It argues that evidence rules — through their application or anticipated application — can unfairly and unjustly stack the deck against people accused of crimes, thereby encouraging conviction through guilty verdict or plea. As such, it contends, evidence law should be part of the broader scholarly conversation about systems and procedures that contribute to the expansive carceral state and targeted as a site for reform. Thus, as we envision a path towards decarceration, we must consider the barriers created by evidence rules, even if defendants often are effectively dissuaded from exercising their right to trial and the rules are never applied.

Scholars, myself included, have explored how specific evidence rules and applications of those rules can facilitate injustice for those accused of crimes.[4] This Article builds on and connects these critiques to examine how evidence rules come together to systemically disadvantage defendants in criminal cases and consider how the rules can function as part of the carceral state apparatus. It does so through a case study into one fundamental tenet of evidence law: that a person who is charged with a crime and goes to trial will be judged based on evidence of what they allegedly did, not who they are. This principle, as embodied in FRE 404, purports to guarantee that the government cannot convict someone based on evidence of their character.[5] As the Article shows, this promise is repeatedly and systemically broken in criminal cases, to the detriment of the accused.

Curiously, the FRE themselves do not define what it means to "administer every proceeding fairly."[6] Commentators have suggested that fairness should be understood as equity in decision-making, as "not unduly favorable or adverse to either side."[7] This case study, therefore, suggests that the rules *do* unduly favor one side — and, therefore, fall short of providing the fairness they promise.

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4. *See, e.g.*, Erin R. Collins, *The Evidentiary Rules of Engagement in the War Against Domestic Violence*, 90 N.Y.U. L. REV. 397, 417–18 (2015); Montré D. Carodine, *"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L. J. 521 (2009); Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 1980 (2016) [hereinafter Roberts, *Conviction by Prior Impeachment*]; Jasmine Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243 (2017).

5. FED. R. EVID. 404.

6. *Id.* 102.

7. *Values for Construction; "Fairness,"* 21 FED. PRAC. & PROC. EVID. § 5023.1 (Wright & Miller eds., 2d ed. 2022).

The analysis proceeds as follows. Part I describes the foundational principles of FRE 404,[8] and Part II explores some of the ways in which these principles are warped to allow in abundant information about a criminal defendant's past.[9] Part III examines how this (mis)application of foundational evidence principles in criminal cases encourages guilty pleas, discourages trials, and ultimately facilitates the expansion of the carceral state.[10]

I. THE PROMISE

"In a very real sense a defendant starts his life afresh when he stands before a jury."[11]

In 1929, Joseph Zackowitz shot and killed Frank Coppola on a Brooklyn street after Mr. Coppola made lewd remarks about Mr. Zackowitz's wife.[12] The key question for the jury to decide when Mr. Zackowitz faced trial for homicide was his state of mind at the time of the shooting: was the act premeditated and deliberate, or the result of a sudden and seemingly uncontrollable impulse?[13] A key piece of evidence, admitted over Mr. Zackowtiz's objection, was proof that at the time of the streetcorner shooting he possessed — in his apartment — weapons other than the gun he used to shoot the victim. In seeking to justify the introduction of this evidence on appeal, the prosecution argued it showed Mr. Zackowtiz was "'a desperate type of criminal,' a 'person criminally inclined.'"[14] As the New York State Court of Appeals explained, it was evidence of "evil character," relevant "only as indicating a general disposition to make use of [the weapons] thereafter . . . a criminal affected with murderous propensity."[15]

The Court ruled that this evidence was improperly admitted because it ran afoul of an evidence rule "long believed to be of fundamental importance for the protection of the innocent," namely that an accused person may not be convicted upon proof of their propensity to act in a certain way.[16] Or, as stated in FRE 404, which codifies this common law rule, parties may not use evidence of a person's character or

8. *See infra* Part I.
9. *See infra* Part II.
10. *See infra* Part III.
11. People v. Zackowitz, 172 N.E. 466, 468 (N.Y. 1930).
12. *Id.* at 466–67.
13. *Id.*
14. *Id.* at 467.
15. *Id.* at 467–68.
16. *Id.* at 468.

character trait to prove that person "acted in accordance with the character or trait" on a specific occasion.[17]

As then-New York State Chief Judge Benjamin Cardozo, writing for the majority, explained, this foundational rule is one "not of logic, but of policy."[18] While this ban on propensity evidence is transubstantive, applying equally to all civil and criminal adjudications, the policies it protects are particularly pronounced in criminal prosecutions. It reflects a fundamental distrust of the jury, a concern factfinders will either focus too much on evidence of the accused person's past and/or convict the accused person to punish them for their past, regardless of the weight of the evidence.[19] As the Supreme Court explained years later in *Michelson v. United States*, the rule:

> simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief . . . even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.[20]

As a practical matter, this rule *should* prevent the government from introducing evidence of a defendant's past actions to prove they are the "type of person" who commits crimes.[21] There is, as the Supreme Court has underscored, "no question that propensity would be an 'improper basis'" for conviction.[22]

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17. *See* FED. R. EVID. 404.

18. *Zackowitz*, 172 N.E. at 468.

19. *See* Rachel Moran, *Contesting Police Credibility*, 93 WASH. L. REV. 1339, 1347 (2018) ("Courts have long recognized that jurors are 'over persuaded' by evidence of a defendant's prior history, and are less likely to believe or presume the defendant innocent if they hear damning evidence about the defendant's past. Instead, jurors who learn about a defendant's criminal history or poor character are much more likely to jump to the conclusion that, because the defendant has done something bad in the past, the defendant is a bad person and necessarily more likely to have committed the charged crime.").

20. Michelson v. United States, 335 U.S. 469, 475–76 (1948).

21. *See* Old Chief v. United States, 519 U.S. 172, 180–81 (1997) (explaining that "generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily)" is unfairly prejudicial to a defendant).

22. *Id.* at 182.

On a symbolic level, this rule reflects something bigger: it acknowledges that people are not a mere product of their past; *even if* they have committed a crime in the past, that does not mean they have or will commit another crime in the future. In other words, it acknowledges that the inference of propensity, as tempting as it is, may not be true. A person accused of a crime, therefore, should be able to go before the jury without their past being used against them.

II. BREAKING THE PROMISE

The rule prohibiting character evidence promises that people charged with crimes will be able to "start their life afresh" before the jury, to be judged based on the evidence of the current charge, not on who they are or what they have done before.[23] It is widely accepted amongst courts, evidence scholars, and the drafters of the rules themselves that this principle is fundamental to our criminal adjudicatory system.[24] These policy considerations against admitting propensity evidence are so strong that they warrant precluding evidence that may, in fact, be probative of guilt and helpful in assessing "the truth."[25] As the Advisory Committee has noted, the principle is "so deeply imbedded in our jurisprudence" that it is considered a rule of "almost constitutional proportions."[26] Yet, as this Part shows, this foundational promise that one will not be prosecuted with character evidence is routinely broken — both explicitly, through exceptions to FRE 404's protections in FRE 413, 414, and 609, and implicitly,

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23. *Zackowitz*, 172 N.E. at 468.

24. *See* Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants*, 118 COLUM. L. REV. 769, 776 (2018) ("Fundamental to the adversary system is the principle that a person should be convicted for what she has done and not for who she is."); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *Background and Purpose*, *in* 1 FEDERAL EVIDENCE § 4:21 (4th ed.) ("[A] defendant should not be convicted because he is an unsavory person, nor because of past misdeeds, but only because of his guilt of the particular crime charged.").

25. *Zackowitz*, 172 N.E. at 468 ("There may be cogency in the argument that a quarrelsome defendant is more likely to start a quarrel than one of milder type, a man of dangerous mode of life more likely than a shy recluse. The law is not blind to this, but equally it is not blind to the peril to the innocent if character is accepted as probative of crime. 'The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge.'").

26. FED. R. EVID. 404 advisory committee's note; *see also* Capra & Richter, *supra* note 24, at 771 ("The prohibition on character evidence is a time-honored tenet of evidence law. The American adversary system was designed to convict defendants based upon their conduct and not based on their general character or past misdeeds.").

through unprincipled rulings under FRE 404(b)(2). Together, these exceptions and systemic misapplications of the rule combine to routinely deny people accused of crimes of the fresh start before the jury to which they are entitled.

A. FRE 413 & 414: Past Acts of Sexual Assault or Child Molestation to Prove a Defendant's Propensity to Commit these Crimes

The proscription in FRE 404 against using evidence of an individual's past as proof of their propensity to act in a certain way applies to all cases and to all parties — except for when it does not. People charged with certain crimes are explicitly and intentionally denied FRE 404's protection altogether.

In 1994 Congress took the radical act of carving out a distinct exception to FRE 404 for cases involving allegations of sexual assault or child molestation.[27] FRE 413 and 414 allow that in criminal cases in which a defendant is charged with sexual assault or child molestation, respectively, "the court may admit evidence that the defendant committed any other act of sexual assault or child molestation."[28] Such evidence may be considered on any matter to which it is relevant, including as a basis for an inference of propensity to commit these acts.[29] In other words, these rules permit the government to prove that a defendant committed sexual assault or child molestation with evidence that they did so in the past — and to explicitly encourage the jurors to adopt propensity reasoning.

The passage of these rules was highly controversial from both a procedural and substantive perspective. To start, Congress bypassed the Rules Enabling Act altogether, which provides the process for promulgating procedural rules, including rules of evidence.[30] The Act vests power to "prescribe . . . rules of evidence" in federal cases in the Supreme Court, which appoints an Advisory Committee to draft rules that are then transmitted to Congress for approval.[31] Instead, Congress bundled the rules as part of the 1994 Violent Crime Control

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27. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified at 28 U.S.C. app. 375–76).

28. *See* FED. R. EVID. 413(a), 414(a).

29. *See id.* Federal Rule of Evidence 415 extends both of these principles to civil cases involving claims for relief based on allegations of sexual assault or child molestation. *See id.* 415(a).

30. *See* 28 U.S.C. §§ 2071–77.

31. *Id.* § 2072(a).

and Law Enforcement Act and allowed after-the-fact review by the Judicial Conference.[32]

Second, upon review, all but one member of the Conference — the representative from the Department of Justice — recommended against the new rules.[33] And many members of Congress also expressed concern, including then-Senator Joe Biden who, echoing the reasoning of *Zackowitz* many decades earlier, characterized the rules as a "very dangerous amendment" that violated "every basic tenet of our system."[34] That he voiced this protest is all the more striking as he was the primary sponsor of the Violence Against Women Act, which was also included in the 1994 crime bill that enacted the new rules. Nevertheless, these rules went into effect in 1995, and many states have since enacted analogues.[35]

The primary justification offered for these exceptions to FRE 404's protection is that the propensity inference is likely to be true in these cases — that if one has committed sexual assault or child molestation in the past, it is likely to be true that they will do it again in the future.[36] But this justification does not withstand even cursory scrutiny. *Even if* it is true that people who commit these specified crimes tend to recidivate at a high rate (a proposition that has been subject to much debate),[37] that would not justify excepting these offenses from FRE

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32. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified at 28 U.S.C. app. 375–76); JUD. CONF. UNITED STATES, REPORT OF THE JUDICIAL CONFERENCE ON THE ADMISSION OF CHARACTER EVIDENCE IN SEXUAL MISCONDUCT CASES, 159 F.R.D. 51, 52 (1995) ("Consideration of Rules 413–415 by the Judicial Conference was specifically excepted from the exacting review procedures set forth in the Rules Enabling Act.").

33. JUD. CONF. UNITED STATES, *supra* note 32, at 52–53.

34. 140 CONG. REC. 18930 (1994).

35. *See* Tamara Rice Lave & Aviva Orenstein, *Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes*, 81 U. CIN. L. REV. 795, 800 (2013) (identifying states with analogous rules to FRE 413–414). A handful of states have adopted similar rules allowing evidence of prior acts of domestic violence to prove propensity to commit such acts. *See* Collins, *supra* note 4 (discussing states and providing citations).

36. *See, e.g.*, 140 CONG. REC. 23603 (1994) (Floor Statement of Rep. Susan Molinari) ("In child molestation cases, for example, a history of similar acts tends to be exceptionally probative because it shows an unusual disposition of the defendant . . . that simply does not exist in ordinary people."); Sherry L. Scott, *Fairness to the Victim: Federal Rules of Evidence 413 and 414 Admit Propensity Evidence in Sexual Offender Trials*, 35 HOUS. L. REV. 1729, 1747 (1999) (arguing that recidivism rates are high for people who commit rape and therefore "whether this is a defendant's first conviction or one hundredth, he should be subject to Rule 413 if propensity testimony is available.").

37. This proposition is the subject of much debate and empirical scrutiny, especially regarding sexual assault. *See, e.g.*, Wendy Sawyer, *BJS Fuels Myths About Sex Offense*

404's prohibition for at least two reasons. First, the animating principle behind FRE 404 is not that propensity evidence is irrelevant, but rather that the overriding policy interests it protects — namely, the presumption of innocence — are greater than the probative value of the evidence the rule excludes. And second, other crimes — including property offenses and drug offenses — have recidivism rates that exceed those for sexual assault, based on recent Bureau of Justice Statistics data.[38] Presumably, if proponents of these rules were truly motived by a concern that 404 blocks truthful and reliable evidence of guilt, they would have targeted all crimes with high recidivism rates.

But they did not. Instead, they focused only on sexual assault and child molestation, revealing that their secondary justification was the true motivating principle: that these types of crimes are often difficult to prosecute, coming down to a credibility contest between the accused and the accuser.[39] Because of this difficulty, they argued, the government should be given evidentiary leeway to help them build their case — even if doing so requires casting aside altogether a foundational principle of evidence law.

For some, this reasoning may be compelling. Indeed, the allegations underlying prosecutions from which FRE 404's protections are withheld are particularly atrocious — and if applying the general rule is a formidable obstacle to conviction, the reasoning goes, perhaps we should forego the rule, just in these cases?[40] But such reasoning engages in the very danger FRE 404 is designed to prevent: it assumes that if the defendant has committed an act of sexual assault in the past, it is a foregone conclusion that they did it as alleged in the present

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Recidivism, Contradicting its Own New Data, PRISON POL'Y INITIATIVE (June 6, 2019) https://www.prisonpolicy.org/blog/2019/06/06/sexoffenses/ [https://perma.cc/3Q3M-ATNR] (describing data from the Bureau of Justice Statistics showing that "people convicted of sex offenses are actually much less likely than people convicted of other offenses to be rearrested or to go back to prison"). *See generally* Lave & Orenstein, supra note 35 (arguing that FRE 413–415 are not supported by empirical evidence).

38. *See* Sawyer, *supra* note 37 (using Bureau of Justice Statistics data to show that recidivism rates, as measured by rearrest, for property, drug, and public order offenses are higher than those for sexual assault).

39. *See, e.g.*, 140 CONG. REC. 23603 (1994) (Floor Statement of Rep. Susan Molinari) ("[A]dult-victim sexual assault cases are distinctive, and often turn on difficult credibility determinations . . . . Knowledge that the defendant has committed rapes on other occasions is frequently critical in assessing the relative plausibility of these claims and accurately deciding cases that would otherwise become unresolvable swearing matches.").

40. Krulewitch v. United States, 336 U.S. 440, 457 (1949) (Jackson, J., concurring) ("There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers.").

charge. If that justification is taken as valid, there is no reason to stop at crafting exceptional rules; we could forego trial altogether and convict based only on an allegation and proof of past conduct. Certainly these hard cases challenge our commitment to our principles. This challenge should cause introspection about whether the application of the rules are worth the cost. But if these principles are worth upholding for some, then all are deserving of their protection — *especially* those accused of the most troubling of crimes.

B. FRE 404(a)(3) & 609: Past Convictions to Impeach a Testifying Defendant

The promise that a defendant will not be judged based on their character is broken more routinely through another exception to FRE 404: the admission of past convictions to impeach a defendant who testifies in their own defense. FRE 404(a)(3) permits an exception to its prohibition for "[e]vidence of a witness's character" under FRE 609.[41] FRE 609 allows the government to impeach a testifying defendant with proof of a felony conviction "if the probative value of the evidence outweighs its prejudicial effect" or of any offense, regardless of severity, that involved a dishonest act or false statement.[42] Forty seven states have adopted similar rules allowing the use of prior convictions to impeach criminal defendants who testify on their own behalf.[43]

The practice of prior conviction impeachment is based on a series of inferences that connects a criminal conviction to a person's character for truthfulness. It allows and encourages factfinders to infer that people who have been convicted of crimes tend to lie — and therefore the jury should doubt the credibility of their testimony.[44] Professor Anna Roberts has laid bare all of the weaknesses in this chain of inferences — highlighting, for example, that "in an age of wrongful convictions, and mass production of convictions, it cannot be taken as a given that a conviction correlates to a commission of the crime."[45] And even if the conviction is proof of past culpability, the conviction

41. FED. R. EVID. 404(a)(3).

42. *Id.* 609(a)(1)(B), (a)(2). The rule also allows impeachment of any other witness with proof of criminal convictions but, because this article is focused on the impact of evidence rules on criminal defendants, those provisions are beyond the scope of this article.

43. *See* Roberts, *Conviction by Prior Impeachment*, *supra* note 4.

44. *See id.* at 1984–85 (describing rationale).

45. *See id.* at 1993.

tells us little about the person's character for truthfulness. Thus, there are many reasons to suspect the probative value of this evidence.

This unfounded rule is instrumental in perpetuating unfairness in the criminal legal system.[46] Even assuming, arguendo, proof of a criminal conviction has some bearing on credibility, courts tend to overvalue it.[47] When faced with a defendant who has criminal convictions, trial courts should consider each prior conviction and carefully weigh the how probative the conviction is *on the issue of the defendant's truthfulness* against the possibility that its admission will unfairly prejudice the defendant. And they should make this ruling while guided by a number of factors, including the nature of the past crime, its similarity to the charged crime, and how central the defendant's testimony is to the resolution of the instant allegation.[48] Instead, they often engage in a perfunctory review and allow impeachment use of at least a few, and sometimes many, of a defendant's prior convictions.[49]

Scholars have noted that state courts and legislatures are increasingly permissive in permitting prior conviction impeachment, leading towards what one has characterized as "judicial anarchy."[50] Appellate review standards do little to give order to this anarchy. In federal courts and some state courts, if a defendant disagrees with the

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46. *See id.*; *see also* Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563 (2014) (critiquing the assumption that convictions reliability indicate culpability); 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, 838 (2016) [hereinafter Roberts, *Implicit Stereotyping*].

47. *But see* Teree E. Foster, *Rule 609(a) in the Civil Context: A Recommendation for Reform*, 57 FORDHAM L. REV. 1, 5 (1988) ("Rule 609 is the product of the law's long-standing and dogmatic assumptions that criminal convictions reflect character, and that character determines veracity. Although intuitively appealing, this assumption has been thoroughly undermined by social psychology research.").

48. *See, e.g.*, United States v. Hernandez, 106 F.3d 737, 739–40 (7th Cir. 1997); *see also* Roberts, *supra* note 4, at 1983 (discussing factors that courts should consider when determining the probative value of the relevant conviction).

49. *See* Roberts, *Conviction by Prior Impeachment*, *supra* note 4, at 2001. In an attempt to cabin the prejudicial effect of such evidence, courts may preclude evidence of the nature of the crime, but allow details about the recency and severity of past convictions, as well as the length of the sentence imposed. *See id.* at 1985 (discussing case law). However, limiting such information may do little to restrain the prejudice, as jurors will inevitably draw on their racialized and gendered scripts to fill in gaps in information. *See* I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826 (2013) (developing this argument in the context of "rape shield" laws).

50. *See* Dannye R. Holley, *Judicial Anarchy: The Admission of Convictions to Impeach: State Supreme Courts' Interpretative Standards, 1990-2004*, 2007 MICH. ST. L. REV. 307, 310–11 (2007); *see also* Roberts, *Implicit Stereotyping*, *supra* note 46, at 838 (noting "trends in impeachment law . . . to make the granting of motions to impeach by prior conviction the default").

court's decision and wants to appeal it, they must testify — and not affirmatively address their convictions on direct.[51] If defendants do not agree with the court's ruling but decide not to testify in order to keep the jury from learning of their convictions and are ultimately convicted, they cannot appeal the trial court's FRE 609 ruling.[52] Nor can they appeal the decision if they do testify, despite the impeachment ruling, and affirmatively address their convictions on their direct examination.[53] Thus, FRE 609 decisions, no matter how erroneous or unfair, are effectively immunized from appellate correction in many cases.

C. FRE 404(b)(2): Past Acts for (Purportedly) "Non-Propensity" Purposes

A final common way that a defendant's past may continue to cast a shadow over the adjudication of their guilt is through the application — or misapplication, as it may be — of the principle announced in FRE 404(b)(2). FRE 404(b)(2) underscores that the FRE's prohibition on the use of past acts or character to prove propensity is a rule of limited exclusion; it does not preclude the introduction of such evidence for "another purpose," such as proof of motive, intent, knowledge, or identity.[54] In other words, it tells us that FRE 404 *only* prohibits evidence offered to prove character and does not preclude the introduction of past–acts evidence for other purposes. FRE 404(b)(2) is the most frequently cited evidence rule and the one to which the most court ink has been spilled.[55] Although any party may, in theory, avail itself of this rule to admit evidence of past acts, in criminal cases it is overwhelmingly and almost exclusively used by prosecutors to admit a defendant's past acts.[56]

Importantly, FRE 404(b)(2) is not an exception to FRE 404's general ban on character evidence — it does not authorize admission of evidence for a non-propensity purpose if doing so requires a

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51. *See, e.g.*, Luce v. United States, 469 U.S. 38, 41–42 (1984).

52. *See id.* at 43.

53. *See* Ohler v. United States, 529 U.S. 753, 760 (2000).

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

55. Capra & Richter, *supra* note 24, at 771 (FRE 404(b)(2) "is the most frequently utilized and cited rule of evidence and 'has generated more published opinions than any other subsection of the rules'").

56. FED. R. EVID. 404(b) advisory committee's notes to 1991 amendment ("Although there are a few reported decisions on use of such evidence by the defense . . . the overwhelming number of cases involve introduction of that evidence by the prosecution.").

propensity inference.[57] However, the way the government proffers and courts admit "other acts" evidence under FRE 404(b)(2) often obscures this distinction, as the following discussion reveals.

Many courts misconstrue or ignore the foundational tenets of FRE 404(b)(2) by characterizing the theories of admissibility it delineates as "exceptions" to 404's ban, thereby admitting evidence that suggests propensity as long as it ultimately is probative of motive, intent, identity, etc.[58] Moreover, under foundational FRE 404(b)(2) principles, a court should admit evidence for a non-propensity purpose only if that factor is "in issue" in the case. If, for example, a person charged with assault concedes that they physically harmed the alleged victim but claims they did so unintentionally or that they were acting in self-defense, they are not contesting their identity as the person who caused harm. Therefore, proof of their past acts should not be admitted to prove that they were the person who physically harmed the victim — that issue is not in dispute. In contrast, *if* the defendant concedes the victim was harmed, but argues that they were not the person who committed the assault, under certain circumstances, proof of their prior conduct may possibly be relevant and admissible to prove their identity as the assailant. In other words, whether evidence is admissible for a proper non-propensity purpose is an inherently context-specific inquiry which will often turn on the specific theory of defense.

Yet, many courts reason a defendant puts all elements "in issue" simply by pleading not guilty.[59] This occurs frequently in drug trafficking prosecutions.[60] In such cases, the government must prove, essentially, that a defendant knowingly possessed a controlled

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57. U.S. v. Gomez, 763 F.3d 845, 856 (7th Cir. 2014) ("Rule 404(b) is not just concerned with the ultimate conclusion, but also with the chain of reasoning that supports the non-propensity purpose for admitting the evidence . . . . In other words, the rule allows the use of other-act evidence only when its admission is supported by some propensity-free chain of reasoning.").

58. *See* Dora W. Klein, *The (Mis)application of Rule 404(b) Heuristics*, 72 U. MIA. L. REV. 706, 716–18 (2018) (providing examples from cases).

59. David A. Sonenshein, *The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts*, 45 CREIGHTON L. REV. 215, 242 (2011) ("[M]ost circuits recognize that a not guilty plea to a crime requiring the government to specifically prove an element, such as intent, puts that element in issue and opens the door to the admissibility of Rule 404(b) other acts evidence."); *see also* Capra & Richter, *supra* note 24, at 779–82 (providing examples from case law); Deena Greenberg, *Closing Pandora's Box: Limiting the Use of 404(b) to Introduce Prior Convictions in Drug Prosecutions*, 50 HARV. C.R.-C.L. L. REV. 519, 530–32 (2015) (providing examples).

60. *See generally* Greenberg, *supra* note 59 (discussing the admission of prior convictions against people accused of drug offenses).

substance with the intent to distribute it. If a defendant proceeds to trial denying the allegations in their entirety, courts often improperly conclude the defendant has put both knowledge and intent in issue, thereby opening the door to proof of a prior conviction for or allegation of drug possession on a prior date to prove both of these elements.[61] And they do so even if the prior possession was a different substance than the one charged, and even if the prior possession occurred many years in the past.[62] In fact, many courts adopt a "categorical" or "presumptive" approach to the introduction of prior convictions in drug related prosecutions, admitting prior acts without engaging in a case-specific analysis that requires the government to show that such evidence is even relevant in the instant case.[63] For example, under this approach the Ninth Circuit upheld admission of a 13 year old conviction for sale of cocaine to prove the defendant's "intent, knowledge, motive, opportunity, and absence of mistake or accident" in a methamphetamine distribution prosecution — even though the theory of defense was that the defendant's wife, and not the defendant, was the person who manufactured and distributed the drugs.[64]

But perhaps the most egregious distortion of FRE 404(b)(2) has occurred in the evolution and application of the "inextricably intertwined" theory of admissibility for other acts evidence. This purportedly non-propensity theory of admissibility supports admission of uncharged acts that are so closely linked with the charged act that they should be considered part of its res gestae.[65] It *should* admit only acts that are *so* "causally, temporally, or spatially" connected to the charged act that the government cannot tell a comprehensive narrative to the jury without also telling jurors about these other uncharged

61. *See id.* at 531–32 (discussing cases).

62. *See id.* at 519–20 (discussing prosecution of Rick Vo).

63. *See id.* at 530 (describing the "presumptive" approach to 404(b)(2)).

64. *See id.* at 533–34 (discussing the prosecution of Rick Vo). And the Eighth, Fifth, and Eleventh Circuits routinely uphold the admission of past convictions for possessing small amounts of a controlled substance for personal use to prove knowledge or intent in subsequent drug distribution prosecutions — even if the defendant has simply denied all allegations. *Id*. at 532–33.

65. Collins, *supra* note 4, at 425.

acts.[66] For this reason, the "inextricably intertwined" theory is also referred to as the "completing the narrative" theory.[67]

In practice, however, the "inextricably intertwined" theory is notoriously vague and malleable, thus providing ample opportunity for misapplication and distortion[68] and allowing courts to "engage in 'result-oriented' decision-making."[69] It empowers courts to subjectively determine what the narrative of the crime is — and what, therefore, the jury needs to know in order to have a complete understanding of the allegations. Suppose the court interprets the narrative of the crime broadly, it may then admit many prior acts, even if divorced in time and location from the charged acts, under the guise of facilitating the jury's understanding of the allegations.

This opportunity for result-oriented decision-making can be particularly enticing in cases involving particularly troubling allegations, including those involving charges of sexual assault or domestic violence.[70] As noted above, because of the evidentiary difficulties in these types of cases, some jurisdictions exempt these offenses from FRE 404's ban altogether. Many others deal with this tension by stretching the non-propensity theories past their breaking point. In prosecutions for domestic violence-related assault, for example, in which a person is accused of a single assaultive act towards their partner, courts regularly admit evidence the defendant allegedly committed similar assaults in the past for ostensibly "non-propensity"

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66. *See* Jennifer Y. Schuster, *Uncharged Misconduct Under Rule 404(b): The Admissibility of Inextricably Intertwined Evidence*, 42 U. MIA. L. REV. 947, 972 (1988); *see also* Collins, *supra* note 4, at 425–26. If, for example, a defendant is charged with resisting arrest, this theory may allow the prosecution to prove what allegedly criminal actions prompted the police to arrest the defendant. Such alleged acts, occurring immediately before the charged offense, could be considered part of the series of actions leading up to the resisting arrest charge.

67. It also is referred to by other names, causing further confusion. Capra & Richter, *supra* note 24, at 786 ("[D]ifferent phrases to capture the concept, such as acts that are "intrinsic" to the crime charged; acts that form part of a 'single criminal episode'; acts that are an 'integral part' of the crime; and acts that 'complete [] the story' or 'explain [] the context' of the crime.").

68. Edward J. Imwinkelried, *The Second Coming of Res Gestae: A Procedural Approach to Untangling the "Inextricably Intertwined" Theory for Admitting Evidence of an Accused's Uncharged Misconduct*, 59 CATH. U. L. Rev. 719, 728 (2010) (arguing this theory "has been sharply criticized for two reasons: (1) the doctrine is vague, and (2) the doctrine's very vagueness makes it prone to abuse"). For these reasons, some courts have sought to ban this theory of admissibility altogether. Capra & Richter, *supra* note 24, at 773 ("[S]ome courts have sought to eliminate the ill-defined "inextricably intertwined" doctrine . . . on the theory that the evidence is vaguely connected to the charged offense.").

69. Imwinkelried, *supra* note 68, at 729.

70. *See generally* Collins, *supra* note 4, at 426.

purposes under the inextricably intertwined theory.[71] Courts reason that these prior acts are part of the narrative or context of the charged assault — even if they occurred months or even years before the charged incident, and even if the alleged victim was a different partner.[72] But, as I have argued elsewhere, such purportedly "non-propensity" rationales engage in not-so-thinly-veiled propensity reasoning.[73] For, what the courts determine here is that the "narrative" of the case is that the accused is the type of person who repeatedly assaults their partner — making it more likely they committed the charged assault. In other words, the theory of relevance is that the accused person has the propensity to act in this way. This theory ought therefore be inadmissible under FRE 404(b), which prohibits propensity arguments.

Even evidence that is genuinely probative of a non-propensity purpose under FRE 404(b)(2) is inherently prejudicial because jurors may use it to draw an impermissible propensity purpose.[74] Thus, courts *should* carefully consider the proffer of evidence under FRE 404(b)(2), mindful that even properly instructed jurors will be tempted to use it unfairly. In practice, however, courts often adopt a permissible approach, summarily admitting proffered evidence as long as the prosecution has uttered at least one of FRE 404(b)(2)'s non-propensity purposes.[75]

D. The Implications

Because of these distortions between the rules' promises to criminal defendants and practice discussed above, many people charged with crimes face the prospect of a trial at which their past actions — or

71. *Id.* (providing examples from caselaw).

72. *Id.*

73. *Id.*

74. U.S. v. Caldwell, 760 F.3d 267, 277 (3d Cir. 2014) ("[F]ew categories of evidence bring greater risk of prejudice to the accused under Rule 403.") (quoting MUELLER & KIRKPATRICK, *supra* note 24, § 4:28, at 731).

75. Capra & Richter, *supra* note 24, at 778 (noting federal courts have grown "increasingly permissive in allowing" 404(b)(2) evidence and describing the cursory review process as follows: "Typically, a court presented with a Rule 404(b) objection takes three quick steps: 1) emphasize that Rule 404(b) is a rule of "inclusion" and not exclusion; 2) find that the proffered bad act is probative of one (and often more than one) noncharacter purpose, regardless of whether the defendant actually is contesting that purpose; and 3) declare summarily that the probative value for the proper purpose is not "substantially outweighed" by unspecified prejudicial effect to the defendant").

allegations of past actions — will be laid bare for the jury.[76] And it impacts more than those with past convictions. While FRE 609's reach is limited to impeachment use of past *convictions*, the other practices discussed above do not require that the past act result in a conviction or be supported by proof beyond a reasonable doubt. In fact, the act need not have even resulted in charge or arrest. Rather, the threshold burden is simply to produce enough evidence to show that a jury could find, by a preponderance, that the act occurred.[77] In other words, to be admissible under FRE 413–415 or FRE 404(b)(2), the government needs to show that it is more likely than not — a likelihood greater than 50% — that the defendant committed the past act.[78] For this reason, the government can admit, under these provisions, proof that a defendant committed another act *even if* they were acquitted of that past act after trial.[79]

A defendant charged with sexual assault or child molestation can do very little to prevent the jury from learning of evidence proffered under FRE 413 or 414 *to prove propensity to commit the charged act.* These acts are admissible "for any purpose" upon showing the defendant is charged with a specified offense and there is proof by a preponderance they committed a similar act in the past. While FRE 403's balancing test technically applies to such evidence, invoking it will likely do little to persuade a court to keep it out. Since the rule explicitly allows evidence to prove propensity, the defendant's most persuasive argument in attempting to preclude past acts evidence — that the jury will engage in propensity reasoning — is inapplicable, as the jury is explicitly allowed to do just that in these cases.

A defendant faced with a pretrial ruling admitting past convictions to impeach under FRE 609 has a few more options, but all come with significant downsides for the defense, and all also lead towards conviction.[80] They may face the jury, testify, and be impeached with

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76. Moran, *supra* note 19, at 1351 ("Many defendants have prior convictions. A 2006 study of the seventy-five largest counties in the country revealed that 43% of defendants facing felony charges already had felony convictions.").

77. This is the "*Huddleston*" standard. *See* Huddleston v. United States, 485 U.S. 681, 690 (1988); *see also* United States v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998) (summarizing the *Huddleston* standard as requiring a "preliminary finding that a jury could reasonably find by a preponderance of the evidence that the "other act" occurred").

78. *See Enjady*, 134 F.3d at 1433 (applying the *Huddleston* standard to evidence offered under FRE 413).

79. *See* Dowling v. United States, 493. U.S. 342 (1990).

80. Roberts, *Conviction by Prior Impeachment*, *supra* note 4, at 2000–03 (2016) (describing some of these options); Moran, *supra* note 19, at 1354–55 (describing additional options).

proof of their past convictions. While they would be entitled to have the jurors instructed to use this proof of convictions only to the extent that they find it probative of veracity, all know this to be an ineffective corrective measure that does not and cannot uphold its promise.[81] Second, they may face the jury and not testify — thereby foregoing what may be the strongest possible evidence in their defense and depriving the jury of the evidence they are theoretically best at assessing: live, in court testimony.[82] This systemic silencing of defendants is cause of concern in and of itself.[83] But it also matters because it impacts the outcome: this silence also prejudices the jury against the defendant, as it runs counter to juror's common assumption that an innocent defendant will testify in their own defense.[84] Many people who were convicted and later exonerated — factually innocent people — waived their right to testify to avoid prior conviction impeachment.[85] Third, and perhaps most commonly, seeing the outcome of trial being all but inevitable, they may plead guilty in the hopes of avoiding a "trial penalty" — a higher sentence imposed than they would receive for a pre-trial plea.[86]

When the government offers evidence of a defendant's past actions for an allegedly "non-propensity" purposes under FRE 404(b)(2), the accused person may have some flexibility in avoiding its admission. They may craft a defense that renders the evidence irrelevant by not putting purportedly non-propensity factor "in issue." For example, if they are charged with assault and their theory is self defense, they have conceded they harmed the victim and therefore the identity of the person who caused the harm should not be "in issue." In such a scenario, the prosecution should not be able to admit proof the accused person committed a similar assault in the past — even if it bears unique

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81. *See* Roberts, *Conviction by Prior Impeachment*, *supra* note 4, at 2003.

82. *See id.* at 2013.

83. *See* M. Eve Hanan, *Talking Back in Court*, 96 WASH. L. REV. 493, 495 (2021); *see also* Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1449 (2005).

84. Moran, *supra* note 19, at 1351–52 ("[D]efendants with prior convictions are also significantly less likely to testify at trial if their convictions will be admitted against them. This is a further boon to the government, because statistics show that many jurors expect defendants to tell their side of the story and assume defendants who do not testify probably are not innocent.").

85. *See* Roberts, *Implicit Stereotyping*, *supra* note 46, at 836–37 (discussing a study showing that many people convicted and later exonerated by DNA had waived their right to testify to avoid prior conviction impeachment).

86. Roberts, *Conviction by Prior Impeachment*, *supra* note 4, at 2012 ("The threat of the admission of [convictions for impeachment] evidence makes it more likely that defendants will accept plea bargains, and, in particular, 'unfavorable' plea bargains.").

similarities to the charged assault — to prove identity. But a defendant cannot plan around all non-propensity theories — including, most notably, the deeply problematic "inextricably intertwined" theory. In any event, as discussed above, many courts are willing to find a defendant puts *all* elements "in issue" simply by pleading not guilty.

Thus, many criminal defendants who have been convicted of or even suspected of committing a crime or other "bad act" in the past will receive a pre-trial ruling that some or many of these past acts will be admissible for one, two, or all of the purposes outlined above if they go to trial. And they will have a decision to make: forge ahead with trial or plead guilty.

III. ASSESSING THE IMPACT

People accused of crimes do not have to spend much time wondering how the jury will interpret evidence about their past. We know it has a "powerful and prejudicial impact" on the jury.[87] As the Tenth Circuit has said, it is "an obvious truth . . . that once prior convictions are introduced the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality."[88] This is widely accepted by courts[89] and commentators,[90] alike, and confirmed by empirical studies.[91]

We also know that jurors who hear about a defendant's past convictions and other acts — under the guise of FRE 609 prior conviction impeachment or an ostensible "non-propensity" theory — will likely use that evidence to infer guilt of the charged crime *even if* they are instructed they may not do so.[92] Indeed, it is an "unmitigated fiction" that jurors will follow instructions about how to properly use such evidence.[93] This observation, too, has been substantiated by

87. U.S. v. Johnson, 27 F.3d 1186, 1193 (6th Cir. 1994).

88. U.S. v. Gilliland, 586 F.2d 1384, 1389 (10th Cir. 1978).

89. *See id.*

90. *See* Capra & Richter, *supra* note 24, at 772 ("Proof of a criminal defendant's past crimes has a dramatic effect on a jury, almost guaranteeing conviction."); Roberts, *Conviction by Prior Impeachment*, *supra* note 4, at 2003 ("Prior conviction evidence tends to 'turn a jury against a defendant,' and thus . . . 'the presumption of innocence is reversed.'").

91. *See* Moran, *supra* note 19, at 1351–52 (discussing studies, including one showing that "admitting evidence of a defendant's prior conviction in a jury trial increased the rate of conviction for the charged offense by 27%").

92. *Gilliland*, 586 F.2d at 1389 (stating that the admission of past convictions essentially guarantees conviction "regardless of the care and caution employed by the court in instructing the jury").

93. Krulewitch v. United States, 336 U.S. 440, 453 (1949) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing

empirical studies.[94] Thus, the admission of prior acts evidence, for any purpose practically guarantees the jury will convict the defendant.[95] The virtual certainty of conviction and the resultant pressure to plead from the cumulative impact of these rules, together, is even greater. Prosecutors know all of this, too — and as the Sixth Circuit candidly acknowledged, that "of course, is why the prosecution uses such evidence whenever it can."[96]

In short: it is an open secret that rules that permit introduction of incidents from a defendant's past are immensely helpful tools that the government may use to secure a conviction. For this reason, a pretrial ruling that a defendant's past actions will be admissible if they go to trial can be instrumental in persuading them to plead guilty — regardless of whether the government has evidence to convict them, beyond a reasonable doubt.[97] In other words, these exceptions and distortions to FRE 404 are yet another tool in the prosecutor's robust toolkit that can be used to encourage a defendant to forgo their right to trial, independent of the actual weight of the evidence of guilt.

The problem is not just that these rules cause people who are innocent to plead guilty — though of course that is a possible and likely effect. *Even if* these evidence rules help secure convictions or pleas for people who are factually guilty, the way we secure convictions matters — at least that is what the Supreme Court tells us: "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."[98]

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lawyers know to be unmitigated fiction."); United States v. Johnson, 27 F.3d 1186, 1193 (6th Cir. 1994) ("When prior acts evidence is introduced, regardless of the stated purpose, the likelihood is very great that the jurors will use the evidence precisely for the purpose it may not be considered; to suggest that the defendant is a bad person, a convicted criminal, and that if he "did it before he probably did it again.").

94. *See* John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record — Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477 (2008); Sally Lloyd-Bostock, *The Effects on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study*, 200 CRIM. L. REV. 734 (2000); Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 3, 26 (1997).

95. *See Gilliland*, 586 F.2d at 1389.

96. *Johnson*, 27 F.3d at 1193.

97. It is not my claim that this is the sole reason people plead guilty. Certainly, other coercive factors — like the litany of charges from which a prosecutor can select to charge, and the largely unchecked discretion of prosecutors to select from those charges to encourage someone to take a plea deal — are at play here. And some people, of course, plead guilty because they are guilty and want to accept responsibility.

98. Brady v. Maryland, 373 U.S. 83, 87 (1963).

Maintaining the image that a defendant who goes to trial will be assessed for what they did, not who they are — while allowing a system that does the opposite — undermines the integrity of the system as a whole. This concern comes into even sharper focus when we examine the impact of these rules in light of other things we know about the operation of the current criminal legal system. These rules most severely impact people facing criminal charges who have had contact with the criminal system in the past. We also know that the focus of law enforcement's surveillance and arrest apparatus is not focused equally on all people and all actions. Instead, certain communities, specifically low-income communities of color, are targeted disproportionately by police for arrest and prosecutors for charging. People from these surveilled and policed communities, it follows, will have more past allegations and convictions that can then be offered against them at trial. Thus, the impact of past acts evidence amplifies the punitive impact of a history of bias and discrimination in the criminal system upon people of color. So this is not just an issue about procedural integrity and evidentiary principles, but also about the perpetuation of racial bias in the system writ large.

This is simply one case study into a singular fissure between the promise and practice of evidence law. There are inevitably many more that require similar scrutiny, with an eye towards examining how purportedly neutral procedural rules of adjudication have an imbalanced systemic impact — even if they are never directly applied to a particular case.[99]

So what do we do? While evidence rules are, in theory, outcome neutral, we should start by being honest about how particular rules — as written or applied — do shape outcomes into predictable patterns, on a systemic level. And this honesty requires a critical re-examination of *all* evidence rules, asking whether the justificatory purposes are sound, and, if so, whether they are applied in a way that aligns with that purpose and the purpose of evidence law in general. This re-examination will inevitably lead to the conclusion that some rules are so unprincipled and/or unjustified that they should be abolished,[100] and

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99. *See, e.g.*, *Values for Construction; "Fairness," supra* note 7, at n.57 (providing examples of evidence rules that "lean to the prosecution's side of the case," including FRE 801(d)(2)(A), which admits everything a defendant says as an exclusion from hearsay, without reciprocal introduction of statements by law enforcement against the government, and the requirement a defendant (but not the government) corroborate a statement against penal interest before it is excepted from hearsay under FRE 804(b)(3)).

100. *See, e.g.*, Roberts, *Conviction by Prior Impeachment*, *supra* note 4 (proposing a model for the abolition of prior conviction impeachment).

that others should remain, but must be recalibrated so all benefit from their protection.

Recall that the primary purpose of the FRE is to ensure fair proceedings "to the end of ascertaining the truth and securing a just determination."[101] Yet, the Rules do not define fairness or justice. And when courts do reference FRE 102, they tend to simply recite the rule without explaining it, as if the terms are themselves self-evident,[102] or omit the FRE's reference to fairness completely.[103] But many processes and procedures that have been deemed fair in the past do not comport with contemporary notions of fairness and justice. Given all that we know about the operation of the criminal system, including the way it is built upon and perpetuates white supremacy and inequality, we can no longer pretend that the application of purportedly objective rules and procedures result in unbiased or fair outcomes. And we cannot and should not countenance a view that unquestioningly equates justice with conviction and incarceration with safety. Thus, in addition to reconsidering individual rules, we must systemically examine what it means to advance fairness and justice in criminal adjudication, in general, and evidence law, in particular.

Counterintuitively, evidence law itself may provide some of the tools for the necessary redesign of evidence rules for decarceration. Drawing on the FRE's drafting history, commentators and courts have suggested that FRE 102's mandate that the rules advance fairness and justice are intended to allow and encourage judicial discretion when a rigid application of the rule would frustrate the FRE purposes.[104] Thus,

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101. FED. R. EVID. 102.

102. *See, e.g.*, United States v. Hutchings, No. 19-361, 2021 WL 4589850, at *2 (D.D.C. 2021); United States v. Smith, No. 19-324, 2020 WL 5995100, at *4 (D.D.C. 2020).

103. *See*, *e.g.*, Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152–53, 238 (1999) ("[T]he Rules seek to avoid 'unjustifiable expense and delay' as part of their search for 'truth' and the 'jus[t] determin[ation]' of proceedings.") (citing FED. R. EVID. 102); *see also* United States v. Frazier, 387 F.3d 1244, 1272 (11th Cir. 2004).

104. Tracy Bateman et al., *Construction of Federal Rules of Evidence to Secure Fairness in Administration*, 12 FED. PROC., L. ED. § 33:14 (2022) ("The framers of the Rules recognized the responsibility of the court under Fed. R. Evid. 102 to supervise the introduction of testimony to assure a fair trial, and a court is not required to adhere blindly to a rule of evidence, which is by its nature arbitrary, when there is danger that the very purposes of the Rules of Evidence would be abrogated."); George Blum et al., 29 AM. JUR. 2D *Evidence* § 21 (2022) ("[A] trial court may properly exercise its discretion by reason of the Rules in not rigidly applying in isolation a particular Rule which would obstruct and defeat the central purpose of the Rules as a whole, and the court may apply a balancing test of the peculiarities and relevant factors of the individual case."); quoting MUELLER & KIRKPATRICK, *supra* note 24, § 1:2 ("The purpose behind Rule 102 is not so much to guide courts toward answers when the Rules

judges are *already* empowered — and expected — to identify ways that the current applications of the rules fail to achieve justice and fairness and rule accordingly. The claim here is not that we should tilt the evidentiary scale in favor of people accused of crimes for the sake of avoiding convictions. Rather, it is that we must acknowledge that the operation of many purportedly neutral evidence rules already tilts the scale in favor of the prosecution, and therefore enhances the likelihood of conviction through guilty plea or jury verdict — for reasons that are independent of the strength of the evidence of actual guilt in any particular case.

CONCLUSION

The FRE took effect in 1975, as the criminal system was undergoing a dramatic transformation. The Warren Court era, along with its criminal procedure revolution had come to an end, and outside the Court shifting tides were turning sharply towards a new, tough on crime era. Courts' original interpretations of these new rules were undoubtedly influenced by the sociopolitical climate. Many are now urging for another fundamental shift in the criminal system, with an increasingly formidable call for polices that advance decarceration. As we envision and create this new future for the criminal system, this Article invites us to think critically and strategically about both how evidence law helped facilitate the rise of mass incarceration — and the roles it can play in charting a different future.

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do not seem to provide them, but to urge courts to be constructive in their approach to the Rules and to judge cases with these aims in mind, as they always should."); U.S. v. Narciso, 446 F. Supp. 252, 290 (E.D. Mich. 1977) ("This Court knows of no requirement that it must adhere blindly to a rule of evidence, which is by its nature arbitrary, when there is danger that the very purposes of the Rules of Evidence would be abrogated. The framers of the Rules recognized the responsibility of the Court to supervise the introduction of testimony to assure a fair trial."); U.S. v. Opager, 589 F.2d 799, 802 (5th Cir. 1979) ("We believe that the ultimate purpose of the rules of evidence should not be lost by a rigid, blind application of a single rule of evidence.").