Benched Judges

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In multiple jurisdictions, if the prosecutor wants to attack the credibility of a person testifying in their own defense with that witness's prior felony convictions, the judge has no power to say no. Judges decry their powerlessness. Their opinions reveal three types of concerns: that these convictions lack probative value on the issue of credibility, that they inflict unfair prejudice that jury instructions cannot ameliorate, and that the power transferred by these provisions from judge to prosecutor is undeserved and abused.

There is much that could be done to address these concerns. The rules could be reinterpreted or rewritten to permit judicial exclusion. Even absent such a change, judges could push back with improved jury instructions, expert witnesses, or dismissal. Finally, there is new momentum to prohibit this prosecutorial tool altogether.

In choosing between these options, two considerations are critical. First, the caution of abolitionists that certain kinds of criminal reform risk sanitizing and entrenching harmful systems. Second, the extent to which standard academic discourse reinforces the assumptions underlying these provisions. For just as these provisions imbue prior convictions with unwarranted weight, traffic in unsupported assumptions about the ability of the system to protect against unfairness, and place their confidence in the judgment of the prosecutor, so academics in their explicit and implicit assertions do the same.

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INTRODUCTION

In 2022, William Aranda was put on trial in Oregon for first-degree rape. The state alleged that after a birthday tour of Oregon wine country he had raped another member of the tour group. Mr. Aranda's response was that less had happened than the prosecution alleged and that what had happened had been consensual. There were witnesses who supported the state's allegations and witnesses who supported Mr. Aranda's. Mr. Aranda opted to testify.

The prosecution announced its intention to cross-examine Mr. Aranda about his prior convictions, which included two convictions for first-degree sexual abuse.[1] Both stemmed from an alleged act involving a family member when Mr. Aranda was a teenager.[2]

There is a provision in Oregon—and it is mirrored in eight other jurisdictions[3]—that mandates admission of felony convictions when they are proffered for impeachment.[4] It prohibits the judge from excluding these convictions, no matter how inflammatory they are or how similar they are to the charge at hand.[5] In Mr. Aranda's case, all that the judge was able to offer were cautionary instructions to the jurors, telling them to use the convictions only on the issue of Mr. Aranda's credibility.[6]

In closing argument, the prosecutor returned with gusto to the impeachment, "repeatedly invit[ing] the jury to consider [Mr. Aranda's] felony convictions in evaluating [his] credibility relative to the credibility of the state's felony-free witnesses."[7] Mr. Aranda was convicted and is serving a ten-year prison sentence.

If your sympathy for Mr. Aranda was limited as you read because of a concern that he might be a "serial sex offender," that is no surprise. Prior conviction impeachment fosters such thoughts, even while purporting to prohibit them.

Social science offers insights that this area of the law seems to ignore. First, social science fails to support the assumed connection between prior convictions and a witness's character for truthfulness.[8] And second, it reveals the inability of jury instructions to prevent jurors from using this evidence in unfairly prejudicial and

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1. *See* Respondent's Corrected Brief on the Merits of Defendant-Appellant at 2, State v. Aranda, 550 P.3d 363 (Or. 2024) (No. 19CR07375), 2023 WL 1966912, at *2 [hereinafter Aranda Resp. Br.]; State v. Aranda, 550 P.3d 363, 366 (Or. 2024) (stating that Mr. Aranda "had pleaded no contest to two counts of first-degree sexual abuse for events that had occurred in 2002, when he was 15"). Since Oregon has no equivalent to Federal Rule of Evidence 413, this was the only route by which these would come in. *See* FED. R. EVID. 413(a) (allowing evidence of past sexual assault, for any purpose, at a federal sexual assault trial).

2. *See* Aranda Resp. Br., *supra* note 1, at 2. At the time of trial, Mr. Aranda was 32 years old. *Id.* at 12.

3. Colorado, Washington, D.C., Indiana, Kentucky, Missouri, Nebraska, North Carolina, and Virginia.

4. OR. REV. STAT. § 40.355(1)(a).

5. As will be discussed below, the more similar the convictions, the more risk of unfair prejudice there is thought to be in this context.

6. *Aranda*, 550 P.3d at 368. Defense counsel had decided to bring out the fact of the convictions on direct examination without identifying them by name. On cross-examination, the prosecution brought out their names. *Id.*

7. Aranda Resp. Br., *supra* note 1, at 13; *see also Aranda*, 550 P.3d at 368.

8. *See* Julia Simon-Kerr, *Credibility by Proxy*, 85 GEO. WASH. L. REV. 152, 211 (2017) [hereinafter Simon-Kerr, *Credibility by Proxy*]; Julia Simon-Kerr, *Credibility in an Age of Algorithms*, 74 RUTGERS U. L. REV. 111, 132 (2021) [hereinafter Simon-Kerr, *Credibility in an Age of Algorithms*] ("[T]here is no empirical support for the notion that prior crimes or other past behavior can predict a *propensity* or *likelihood* that a witness will lie.") (emphasis in original). The relationship between credibility and truthfulness will be discussed *infra*.

prohibited ways[9]: to support an inference, for example, that Mr. Aranda is a serial sex offender and is thus likely to be guilty of the crime charged.

In the federal system, judges have the power to consider this kind of social scientific insight, since they can admit prior felony convictions to impeach the person on trial only if they find that the probative value outweighs the risk of unfair prejudice. But in these nine jurisdictions, if there is to be any balancing, it is done by the prosecution. And there is no indication that it is done.

These rules have never been identified and examined as a group before, and this Article makes that contribution. Also new is an examination of the case law interpreting these provisions, and its findings are striking.

Judges decry their powerlessness, with their opinions revealing concerns of three sorts. First, they question the legislative assumptions about probative value, expressing doubt about whether it really is the case that felony convictions reveal untruthful character. Second, they vividly describe the risk of unfair prejudice, expressing doubts about whether a jury instruction really can prohibit forbidden inferences. And third, they bemoan the fact that the power to balance these considerations now lies not with them but with the prosecution—and it is often gravely abused.

Judges are not powerless, however. Mr. Aranda himself reminds us that the Constitution is not dead, and judges can call for change. An intermediate appellate court hearing his appeal found that the due process clause requires judicial balancing,[10] and even while he lost four-to-three before the Oregon Supreme Court, both majority and dissent used the opportunity to suggest legislative reform.[11] Judge-led and other routes to rule change, reinterpretation, or abandonment merit consideration. And even if the rules stay as they are, there are measures that judges can consider, such as improved jury instructions, expert witnesses, and dismissal.

Indeed, the options and arguments for change are so plentiful that one needs a way to choose between them. Two sets of considerations offer vital guidance (and caution) about how to proceed.

The first set of considerations comes from abolitionist work. Abolitionists warn of the risk that proposing a reform to a supposedly discrete issue may serve to entrench and sanitize broader systems. In response, this Article suggests ways to select and frame change efforts so that they have the potential to illuminate broader phenomena, unsettle foundational logic, and expose the value of frank examination as opposed to "myth as mortar."[12]

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9. *See* Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1357–61 (2009).

10. State v. Aranda, 509 P.3d 152, 158–59 (Or. Ct. App. 2022), *rev'd*, 550 P.3d 363 (Or. 2024).

11. *See Aranda*, 550 P.3d at 386 ("[T]he legislature may well be interested in further exploring the issues raised by the dissent."); *id.* at 388 (Walters, S.J., dissenting) (stating that a motivation for writing the dissenting opinion was "to call on the legislature to explicitly align the Oregon rules of evidence with those in other state and federal courts law [sic] to ensure defendants' rights to a fair trial").

12. *See* H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 777 (1993) (suggesting that "myth is the mortar

The second set of considerations stems from the importance of recognizing one's own implication. What judges and others decry about this regime includes the decontextualized attribution of meaning to a prior conviction,[13] the unfounded ameliorative assumptions about the system's safeguards,[14] and the trust placed in the prosecution to strive toward fairness and justice.[15] What complicates the project of academics pushing for reform is that our standard academic discourse often exhibits those same phenomena, in both our explicit and implicit assertions.

Part I describes the contours of this unique set of provisions. Part II identifies three sets of concerns found in the case law, relating to probative value, unfair prejudice, and the transfer of power to the prosecutor. Part III proposes possible changes applicable to each of these concerns, whether adjustments to the rules, abandonment of the rules, or bold judicial efforts to work with what we have. Part IV offers two vital sets of considerations, discussed earlier, aimed at helping us sort and structure any such change efforts.

I. THE PROVISIONS

Under Federal Rule of Evidence (FRE) 609, prosecutors can use a prior felony conviction to impeach someone on trial only if they can satisfy a judicial balancing test.[16] They must persuade the trial judge that the probative value of the conviction outweighs its prejudicial effect on the witness.[17] Thus, judges are supposed to analyze the extent to which the conviction sheds light on the witness's "character for truthfulness,"[18] and to consider whether it outweighs the risks of unfair prejudice. Those risks can include forbidden propensity reasoning (that is, "if they did it before, they must have done it this time") or a desire to convict the person regardless of the strength of the case against them.[19]

This Article uncovers the fact that nine jurisdictions deprive judges of this power.[20] Mandatory rules decree that if the prosecutor proffers felony convictions—

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of the justice system").

13. *See infra* notes 62, 65.

14. *See infra* notes 105–19 and accompanying text.

15. *See infra* notes 136–38 and accompanying text.

16. FED. R. EVID. 609(a)(1)(B). This Article leaves to one side those provisions, like FRE 609(a)(2), that deal with convictions said to have probative value because of their connection to dishonesty or false statements. This Article also leaves aside the use of prior conviction impeachment by parties other than the prosecution.

17. FED. R. EVID. 609(a)(1)(B). This language is commonly understood to refer to *unfair* prejudice.

18. FED. R. EVID. 609(a).

19. *See* State v. McClure, 692 P.2d 579, 582–83 (Or. 1984).

20. *See, e.g.*, People v. Velarde, 586 P.2d 6, 9 (Colo. 1978); Langley v. United States, 515 A.2d 729, 735 (D.C. 1986) ("[T]he trial court has no discretion to preclude the use of prior convictions for impeachment, including reference to the nature of the crimes, . . . even though in a particular case the prejudicial impact on the party they are used against may outweigh the probative value to the party who elicits them."); Jenkins v. State, 677 N.E.2d 624, 627 (Ind. Ct. App. 1997); State v. Hoopingarner, 845 S.W.2d 89, 94 (Mo. Ct. App. 1993); State v. Brown, 584 S.E.2d 278, 283 (N.C. 2003); State v. Dick, 754 P.2d 628, 629 (Or. Ct. App. 1988); Olson v. Little, 604 F. App'x. 387, 389–90 (6th Cir. 2015); State v. Jackson, 601

and in some of these jurisdictions, misdemeanors too[21]—the judge must admit them, no matter how low their probative value or how grave the unfair prejudice.

Certainly, there is variation within this group of provisions, including variation in who enacted them. While most were passed by legislatures, there is an interesting outlier. Oregon used to permit judicial balancing in connection with witnesses testifying in their own defense, but in 1986 the voting public, acting "as legislators,"[22] passed a "Crime Victims' Bill of Rights" that, inter alia, eliminated the balancing test:

> Section 2 of the measure stated an overall purpose for the measure that explains the change in [Oregon Evidence Code] 609: "The purpose of this ballot measure is to declare to our legislature and our courts that victims' rights shall be protected at each stage of the criminal justice system. We reject the notion that a criminal defendant's rights must be superior to all others. By this measure we seek to secure balanced justice by eliminating unbalanced rules."[23]

There is also variation in the kinds of convictions that are mandatorily admissible. While most of these provisions—those in Colorado,[24] Washington, D.C.,[25] Kentucky,[26] Nebraska,[27] and Oregon[28]—apply to all felonies, Indiana's rule covers

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N.W.2d 741, 748–49 (Neb. 1999); Shifflett v. Commonwealth, 766 S.E. 906, 907–08 (Va. 2015).

21. *See, e.g.*, MO. ANN. STAT. § 491.050 (West 2024).

22. State v. Minnieweather, 781 P.2d 401, 403 (Or. Ct. App. 1989) ("Instead of having a judge 'balance' in the context of a specific case, the people, as legislators, have resolved the policy issues involved in the use of evidence of previous convictions and have established general rules for the courts to follow.").

23. State v. Pratt, 853 P.2d 827, 834 (Or. 1993); *see also* OR. REV. STAT. § 147.410 (1987).

24. COLO. REV. STAT. § 13-90-101 (2024) ("In every case the credibility of the witness may be drawn in question, as now provided by law, but the conviction of any person for any felony may be shown for the purpose of affecting the credibility of such witness.").

25. D.C. CODE § 14-305(b)(1) (2024) ("[F]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a criminal offense shall be admitted if offered, either upon the cross-examination of the witness or by evidence aliunde, but only if the criminal offense (A) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or (B) involved dishonesty or false statement (regardless of punishment).").

26. KY. R. EVID. 609(a) ("For the purpose of reflecting upon the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record if denied by the witness, but only if the crime was punishable by death or imprisonment for one (1) year or more under the law under which the witness was convicted.").

27. NEB. REV. STAT. § 27-609(1) (2024) ("For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination, but only if the crime (a) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (b) involved dishonesty or false statement regardless of the punishment.").

28. OR. REV. STAT. § 40.355(1) (2024) ("For the purpose of attacking the credibility of a

a narrower group of felonies,[29] and several jurisdictions go broader: North Carolina embraces all felonies and all but the most minor misdemeanors,[30] Virginia embraces all felonies as well as misdemeanors "involving moral turpitude,"[31] and Missouri includes all convictions.[32]

Other differences include temporal scope—some of these jurisdictions set a time limit while others mandate eternal admissibility[33]—and the presence or absence of

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witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record, but only if the crime: (a) Was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted; or (b) Involved false statement or dishonesty."). Oregon also has a provision exposing those charged with "committing one or more [specified] crimes against a family or household member" to impeachment with certain kinds of misdemeanor convictions, if those convictions involved complainants who were family or household members. *Id.* § 40.355(2). That provision will be put to the side for the purposes of this Article.

29. IND. R. EVID. 609(a) ("For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or an attempt of a crime must be admitted but only if the crime committed or attempted is (1) murder, treason, rape, robbery, kidnapping, burglary, arson, or criminal confinement; or (2) a crime involving dishonesty or false statement, including perjury.").

30. N.C. GEN. STAT. § 8C-1-609(a) (2024) ("For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter."). The only type of misdemeanor omitted is Class 3, consisting of infractions at the bottom of the penal hierarchy. *See* Daniel R. Tilly, *Victims Under Attack: North Carolina's Flawed Rule 609*, 97 N.C. L. REV. 1553, 1589–92 (2019).

31. VA. R. EVID. 2:609 ("Evidence that a witness has been convicted of a crime may be admitted to impeach the credibility of that witness subject to the following limitations: (a) Party in a civil case or criminal defendant. (i) The fact that a party in a civil case or an accused who testifies has previously been convicted of a felony, or a misdemeanor involving moral turpitude, and the number of such convictions may be elicited during examination of the party or accused."). Case law suggests that the "moral turpitude" phrase encompasses convictions "involving lying, cheating[,] or stealing." Shifflett v. Commonwealth, 766 S.E.2d 906, 907–08 (Va. 2015); Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001, 1037 n.260. Because of that limitation, this Article will focus only on the felony provision.

32. MO. REV. STAT. § 491.050 (2024) ("Any person who has been convicted of a crime is, notwithstanding, a competent witness; however, any prior criminal convictions may be proved to affect his credibility in a civil or criminal case and, further, any prior pleas of guilty, pleas of nolo contendere, and findings of guilty may be proved to affect his credibility in a criminal case.").

33. Colorado has a five-year time limit, but only in civil cases. COLO. REV. STAT. § 13-90-101 (2024); People v. Yeager, 513 P.2d 1057, 1059–60 (Colo. 1973). Washington, D.C., Nebraska, Indiana, and Kentucky have a ten-year limit for all cases. D.C. CODE § 14-305(b)(2)(B); NEB. REV. STAT. § 27-609(2) (2024); IND. R. EVID. 609(a); KY. R. EVID. 609(b). The North Carolina time limit is more complex. *See* N.C. GEN. STAT. § 8C-1-609(b) ("Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect."). Missouri and

mandatory language. For while some of these provisions include statutory language that reads as mandatory,[34] others have language that appears permissive but that has been interpreted as mandatory.[35] Perhaps this contributed to the previous lack of scholarship identifying these provisions as a unified group.

Mr. Aranda's case helps to illustrate the impact of this kind of provision. If the Oregon trial court had been empowered to balance probative value against prejudicial effect, Mr. Aranda could have made a multi-pronged argument. On probative value, to bolster an argument that these convictions had nothing to offer on the question of his credibility, he could have pointed to the age of his convictions, for example.[36] In terms of unfair prejudice, he could have emphasized the similarity of the prior convictions to the charge at hand. He could have argued that the similarity made it impossible for jurors to obey their instruction to consider his prior convictions only on the issue of credibility, as opposed to either propensity to commit sex offenses or desirability of conviction regardless of the evidence against him.

The trial court did not balance any of these considerations and instead permitted the prosecutor to cross-examine Mr. Aranda about his convictions.[37] The prosecution returned to the convictions with vehemence in closing argument, "repeatedly invit[ing] the jury to consider [Mr. Aranda's] felony convictions in evaluating [his]

Virginia have no time limit. *See, e.g.*, Sherrer v. Bos. Sci. Corp., No. WD 80010, 2018 WL 3977539, at *11 (Mo. Ct. App. Aug. 21, 2018), *aff'd on other grounds*, 609 S.W.3d 697 (Mo. 2020); State v. Givens, 851 S.W.2d 754, 759 (Mo. Ct. App. 1993) (no error in the use of forty-year-old conviction). Oregon has a fifteen-year time limit. *See* State v. Rowland, 262 P.3d 1158, 1162 (Or. Ct. App. 2011) ("[T]he tarnishing effect of a prior conviction on a person's credibility diminishes over time.").

34. Indiana states that qualifying convictions "must" be admitted. IND. R. EVID. 609(a). Kentucky uses the language "shall be admitted," KY. R. REV. 609(a), as do Nebraska, North Carolina, Oregon, and D.C. *See* NEB. REV. STAT. § 27-609(1) (2024); N.C. GEN. STAT. § 8C-1-609(a) (2024); OR. REV. STAT. § 40.355(1) (2024); D.C. CODE § 14-305(b)(1) (2024).

35. Colorado indicates that the convictions "may be shown," COLO. REV. STAT. § 13-90-101 (2024), Missouri that they "may be proved," MO. REV. STAT. § 491.050 (2024), and Virginia that they "may be admitted," VA. R. EVID. 2:609. For examples of Missouri cases discussing that state's mandatory rule, see *infra* notes 62–65. Note that in some states even though the language appears mandatory, judges have interpreted it as requiring a balancing test. *See, e.g.*, FLA. STAT. § 90.610(1) (2024) ("A party may attack the credibility of any witness, including an accused, by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted . . . ."); Riechmann v. State, 581 So. 2d 133, 140 (Fla. 1991) (holding that the state rule "bars prior-conviction impeachment evidence 'if the probative value is substantially outweighed by the danger of unfair prejudice'") (quoting State v. Page, 449 So. 2d 813, 816 (Fla. 1984)); People v. Castro, 696 P.2d 111, 113 (Cal. 1985) (holding that that state's rule, whose language appeared to make all felony convictions admissible, had to be restricted on Due Process grounds to those felony convictions that were relevant to truthfulness, noting that the codes are "littered" with felonies that are not relevant to truthfulness, and holding that the rule left intact judicial discretion to exclude prior convictions on the basis of prejudice); Whisler v. State, 116 P.3d 59, 62–63 (Nev. 2005); State v. Tolbert, 849 So. 2d 32, 38 (La. 2003).

36. *See supra* note 2 and accompanying text.

37. Aranda Resp. Br., *supra* note 1, at 13.

credibility relative to the credibility of the state's felony-free witnesses."[38] The judge gave the jury a bare bones instruction on how to use the evidence.[39] Mr. Aranda was convicted and has started his sentence of ten years in prison.[40]

Case law from these nine jurisdictions reveals that he is far from alone. Prosecutors have proffered, and judges have admitted, rape convictions in rape trials,[41] a sexual abuse conviction in a sexual abuse trial,[42] a "failure to register as a sex offender" conviction in a "failure to report as a sex offender" trial,[43] robbery and burglary convictions in robbery and burglary trials,[44] drug convictions in drug trials,[45] and an "indecent liberties" conviction that arose from the same alleged incident with which the person was charged.[46] They have proffered and admitted convictions of murder,[47] manslaughter,[48] terroristic threats,[49] "sodomy of a child under the age of fourteen years,"[50] "gross sexual imposition,"[51] and "contributing to the sexual delinquency of a child."[52] They have proffered and admitted huge compilations of convictions in single cases, such as "disorderly conduct, indecent exposure, communicating threats, resisting an officer, possession of drug paraphernalia, public disturbance, attempt to assault a government official, and misdemeanor larceny"[53] and "Failure to Register as a Sex Offender, Theft in the Second Degree, Unauthorized Use of a Vehicle, Felony Eluding, Felon in Possession of a firearm, Assault in the Third Degree, and Burglary in the Second Degree."[54] Judges have not always been happy to be benched, as the next Part will discuss.

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38. *Id.*

39. *See* Brief on the Merits of Petitioner on Review, State of Oregon at 6, State v. Aranda, 550 P.3d 363 (Or. 2024) (No. SC S069641), 2022 WL 18671904, at *6 [hereinafter Aranda Pet'r Br.] ("[I]f you find that a witness has been convicted of a crime, you may consider this conviction only for its bearing, if any, on the credibility of the witness.").

40. Aranda Resp. Br., *supra* note 1, at 13.

41. *See, e.g.*, State v. Busby, 486 S.W.2d 501, 503 (Mo. 1972) ("It may be that the right [to show convictions] should be restricted in some respects, but, if any change is to be made we think it must be done by the General Assembly.").

42. State v. Busby, 844 P.2d 897, 898 (Or. 1993).

43. State v. Knight, No. COA15–917, 2016 WL 2648704, at *7–8 (N.C. Ct. App. May 10, 2016).

44. *See, e.g.*, Davis v. State, 654 N.E.2d 859 (Ind. Ct. App. 1995).

45. *See* State v. Dick, 754 P.2d 628, 628–29 (Or. Ct. App. 1988).

46. State v. Spruill, No. COA02-702, 2003 WL 1873622, at *4 (N.C. Ct. App. April 15, 2003).

47. People v. McKenna, 585 P.2d 275, 280 (Colo. 1978) (two first-degree murder convictions).

48. State v. Jones, 128 S.W.3d 110, 113 (Mo. Ct. App. 2003).

49. *Id.*

50. State v. Holden, 278 S.W.3d 674, 681 (Mo. 2009).

51. People v. Medina, 583 P.2d 293, 295–96 (Colo. App. 1978).

52. State v. Miller, 821 S.W.2d 553, 556 (Mo. Ct. App. 1991) (conviction dating from 1964).

53. State v. Wilson, 580 S.E.2d 386, 391–92 (N.C. Ct. App. 2003).

54. Bailey v. Myrick, 467 F. Supp. 3d 950, 953 (D. Or. 2020).

II. CRITIQUES FROM JUDICIAL OPINIONS

The judicial opinions interpreting these mandatory provisions reveal a variety of critiques of them, both explicit and implicit. This Part will examine the critiques under three headings: concerns about whether these convictions have any legitimate probative value, about the unfair prejudice that they cause, and about the discretionary power taken from the judge and handed to the prosecutor.

A. Probative Value

These provisions rely on the notion that the probative value of qualifying convictions relates to a lack of "credibility" on the part of the witness: indeed, so much probative value that judges must be prohibited from excluding them. Yet these judicial opinions reveal profound uncertainty about both what "credibility" means and whether these convictions do indeed diminish it.

For some judges, "credibility" in these statutes refers to what the Federal Rules of Evidence call a "character for truthfulness."[55] When these judges lay out the chain of inferences that is said to make the convictions relevant, they assert that a prior instance of lawbreaking makes it more likely than it otherwise would be that the witness is willing to violate laws (or social norms). This willingness makes it more likely than it otherwise would be that the witness is willing to lie—and more specifically, to lie on the witness stand.[56]

For other judges, "credibility" is best understood as connoting "worthiness of belief"—with an emphasis on the worthiness.[57] In this strand of the law, the witness's

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55. *See* FED. R. EVID. 609(a); Chrisman v. Commonwealth, 348 S.E.2d 399, 403 (Va. Ct. App. 1986) ("[I]t is well settled in this state that the character of a witness for veracity cannot be impeached by proof of a prior conviction of crime, unless the crime be one which involved the character of the witness for veracity."); Jones v. United States, 263 A.3d 445, 456 (D.C. 2021) (noting that this form of impeachment "calls the witness's character into question generally, supporting an inference, bluntly stated, that the witness is a 'lying liar'"); People v. Harding, 104 P.3d 881, 892 (Colo. 2005) (Kourlis, J., dissenting) (describing "character for truthfulness" as interchangeable with "credibility").

56. *See Harding*, 104 P.3d at 887 (stating that a felony conviction is admissible despite the prejudice "so the jury may use it for the limited purpose of making the inference that a witness who disobeyed a social norm in the past may be violating another norm [by] lying now") (alteration in original) (citation omitted); State v. Phillips, 482 P.3d 52, 58–59 (Or. 2021) (mentioning legislative policy judgment that "[a] person who [is] willing to break the law would also be willing to lie on the witness stand").

57. *See Harding*, 104 P.3d at 886–87 (contrasting "credibility" with "character" and noting that credibility "refers to a 'quality that makes something (as a witness or some evidence) worthy of belief'") (quoting *Credibility*, BLACK'S LAW DICTIONARY (8th ed. 2004)); State v. Guernsey, 577 S.W.2d 432, 435–36 (Mo. Ct. App. 1979) ("[T]he conviction may be proved to affect his credibility, that is, as affecting his worthiness of belief."); State v. Smith, 691 P.2d 89, 93 (Or. 1984) ("The value judgment by the legislature was that one who has committed certain forbidden acts may not be as worthy of belief as one who abides by the laws. Where the forbidden acts were deemed so serious as to be punishable as a felony, a 'conviction' thereof was deemed to be evidence pertinent to a witness' [sic] credibility even if the crime did not involve a 'false statement.'"); Simon-Kerr, *Credibility in an Age of*

conviction is understood as having tainted their honor and deprived them of the credit that might otherwise be their due.[58] The witness's conviction need not be probative of their character for truthfulness to be admissible.[59] This concept that someone might be "unworthy of belief" descends from incompetency rules, which kept people with certain criminal records off the witness stand altogether.[60] Indeed, several of the provisions under discussion bear the traces of those rules, stating that people with certain convictions are no longer incompetent but can be impeached.[61]

In addition to disagreements about what "credibility" means, judges voice deep concerns about rule makers' judgment that these convictions diminish it. For example, a chorus of Missouri judges have criticized that state's rule for mandating

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Algorithms, *supra* note 8, at 113 ("[L]egal credibility has two main meanings: it can refer either to a witness's propensity for truthfulness or her *worthiness* of belief.") (emphasis in original); *id.* at 122 ("[T]hese concepts coexist quietly but illogically in evidence law. Today's credibility doctrine simply points the fact-finder's attention to markers of a witness's worthiness of belief while claiming at the same time that the markers are predictive of truthfulness.").

58. *See* Simon-Kerr, *Credibility by Proxy*, *supra* note 8, at 159–60; Simon-Kerr, *Credibility in an Age of Algorithms*, *supra* note 8, at 152 ("[T]he courtroom still emphasizes a witness's worthiness of belief as performed in ways that have remained static over the past two hundred years.").

59. *See* State v. McEachin, 142 541 S.E.2d 792, 798 n.3 (N.C. Ct. App. 2001) ("Although evidence a witness has committed a burglary is not probative of his character for truthfulness and, thus, is not admissible under Rule 608(b), evidence the witness has been *convicted* of burglary may be admissible under Rule 609 provided the conviction falls within the time period set out in Rule 609 . . . . The North Carolina Legislature, therefore, has not imposed a requirement under Rule 609 that a *conviction* used to impeach a witness be probative of the witness's propensity for truthfulness.") (emphasis in original); Julia Simon-Kerr, *Law's Credibility Problem*, 98 WASH. L. REV. 179, 206–07 (2023).

60. See *Chrisman*, 348 S.E.2d at 400; Aranda Resp. Br., *supra* note 1, at 46 ("[O]ne reason that the internal logic of [Oregon Evidence Code] 609(1)(a) lacks a rational connection to its purported modern-day purpose of truth discovery is because the rules from which it is descended were never intended to serve that purpose.").

61. *See* COLO. REV. STAT. ANN. § 13-90-101 (2024); D.C. CODE § 14-305(a) (2024); MO. REV. STAT. § 491.050 (2024); VA. CODE ANN. § 19.2-269 (2024) ("A person convicted of a felony or perjury shall not be incompetent to testify, but the fact of conviction may be shown in evidence to affect his credit.").

admission of all convictions,[62] describing it as unwise,[63] unreasonable,[64] and arbitrary.[65] Judges also question the assumption, embodied in these rules, that felony convictions shed light on credibility. The Kentucky Supreme Court stated that the assumption that "all felons are inherently dishonest . . . may not be true at all."[66] The court noted that one can imagine someone who "commits a murder yet always tells the truth."[67] "In such a case, the assumption underlying the rule would actually undermine the search for truth . . . ."[68]

As part of this critique, courts raise the question of whether the distinction drawn by many of these rules between felony convictions—deemed probative on credibility and mandatorily admissible—and misdemeanor convictions is an arbitrary one.[69]

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62. *See* Lewis v. Wahl, 842 S.W.2d 82, 89–90 (Mo. 1992) (Thomas, J., concurring) ("In denying the offer of proof [relating to a speeding conviction] the trial court said, 'A speeding conviction is in no way impeaching the integrity or the character of a witness.' I agree wholeheartedly. When considered as a question of what is reasonable in light of human experience, the trial court's conclusion is obviously true. . . . I would adopt an evidentiary rule for the Missouri courts which would no longer allow impeachment using a misdemeanor that is not relevant to the witness's credibility."); Jackson v. City of Malden, 72 S.W.2d 850, 855 (Mo. Ct. App. 1934) ("It was shown that the witness was 43 years old and that he was in the reform school when he was 8 or 9 years old. Defendant contends that this was too remote to constitute substantial evidence tending to affect credibility. The chances are that it was so remote that it did not affect his credibility; yet under the provisions of section 1752, it was not error to admit such testimony.") (citation omitted), *abrogated on other grounds by* Carpenter v. Kan. City Pub. Serv. Co., 330 S.W.2d 797 (Mo. 1959).

63. State v. Blitz, 71 S.W. 1027, 1030–31 (Mo. 1903) ("While we doubt very seriously the wisdom of this sudden and apparently unnecessary change of the long-established rules of evidence, which have been uniformly followed for so many years, doubtless on account of their being based upon that most appropriate foundation of reason and justice, yet, if this change is unwise and was ill-considered, the more strictly it is enforced the sooner its defects will appear, and the sooner will the power that created it bring about its destruction.").

64. *See Lewis*, 842 S.W.2d at 89–90 (Thomas, J., concurring).

65. *See* Fisher v. Gunn, 270 S.W.2d 869, 876–77 (Mo. 1954) ("It appears to us that the statute, Section 491.050, has arbitrarily accorded to a litigant the right to show a prior conviction for felony or misdemeanor to affect the credibility of the witness. . . . There may be doubt as to the wisdom of arbitrarily permitting convictions for violations of traffic rules to be shown, irrespective of whether a particular conviction would probably affect the credibility of the witness.").

66. Allen v. Commonwealth, 395 S.W.3d 451, 465 n.13 (Ky. 2013) ("KRE 609 . . . is concerned with the fact of *any* felony conviction, which only indirectly illustrates character for dishonesty if at all. While we have said 'the fact of a felony conviction is, in and of itself, powerful evidence that reflects on truthfulness,' that claim depends on an assumption—that all felons are inherently dishonest. We have respected this view, though it may not be true at all.") (citation omitted) (emphasis in original).

67. *Id.*

68. *Id.*

69. *See* Bell v. Commonwealth, 189 S.E. 441, 444 (Va. 1937) ("By statute in Virginia, Code, section 4440, one who steals goods to the value of fifty dollars or more is guilty of grand larceny and if it be from the person five dollars or more. Of course these standards are wholly arbitrary. The Legislature might change them and it might entirely abolish such distinctions.").

And indeed, these opinions are full of reminders that the felony/misdemeanor line is fluid[70]: some alleged offenses can be charged as either felonies or misdemeanors,[71] some offenses called a felony in one state might be a misdemeanor in another,[72] some offenses that used to be felonies are now misdemeanors,[73] and all these classifications could be changed by the legislature at any point.[74]

The opinions convey not just explicit concerns about these convictions' probative value, but also implicit ones. One can see this by noting, for example, that these provisions rely on an assumption that a conviction represents a reliable adjudication of the alleged criminal violation.[75] In the federal system, one judge was willing to challenge that assumption.[76] Judges in state courts do not explicitly object, but one can find the seeds of that kind of objection in their opinions. For example, one opinion points out that, strictly speaking, a conviction is not the act of the witness but of the government,[77] thus creating at least a little daylight between the concepts of crime conviction and crime commission. Other judges concede that, absent sufficiently reliable procedures, a conviction is inadequate impeachment material: One refuses to admit the result of a court martial proceeding, noting trustworthiness concerns tied to a lack of formality and adversarial process.[78] Another judge states that a "high probability" of guilt is an insufficient basis for impeachment with an

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70. *See* United States v. Lipscomb, 702 F.2d 1049, 1062 (D.C. Cir. 1983) ("[T]he line between felonies and misdemeanors . . . will not always be sharp. A felony conviction could conceivably be based on conduct which would be a misdemeanor in another jurisdiction."); Cynthia Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of* Lafler *and* Frye, 41 HASTINGS CONST. L.Q. 561, 587 (2014) (noting prosecutors' total discretion when deciding "whether to charge the same act as a misdemeanor or a felony").

71. Tiner v. Premo, 391 P.3d 816, 828 (Or. Ct. App. 2017) (discussing an offense that in California is a "wobbler" that can be charged as either a felony or a misdemeanor).

72. *See* Lacey v. People, 442 P.2d 402, 406 (Colo. 1968) (finding no error in permitting impeachment with a New Jersey "high misdemeanor," despite the Colorado restriction to felonies).

73. Chrisman v. Commonwealth, 348 S.E.2d 399, 402 (Va. Ct. App. 1986) ("At common law simple larceny of whatever degree has been held to be a felony . . . ."); *Bell*, 189 S.E. at 443 ("[M]any offenses which were felonies at common law have been made misdemeanors by statute."); People v. Anders, 559 P.2d 239, 242 (Colo. App. 1976) (Sternberg, J., concurring) (disagreeing with the majority's conclusion "that conviction of a prior felony may be used for impeachment purposes where the legislature has reclassified the crime so that at the time of trial the former felony is a misdemeanor").

74. *See Bell*, 189 S.E. at 444.

75. *See* Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563, 580 (2014).

76. United States v. Walker, 315 F.R.D. 154, 156 (E.D.N.Y. 2016) (Weinstein, J.) (prohibiting defense from impeaching government witness with his convictions and noting that "[d]efense counsel is undoubtedly aware . . . that in light of the significant risks and emotional toll of going to trial, many defendants plead guilty to crimes they did not commit").

77. Allen v. Commonwealth, 395 S.W.3d 451, 465 (Ky. 2013) ("[A] conviction is not conduct, at least not by the witness who engaged in the conduct.").

78. *See* Zellers v. United States, 682 A.2d 1118, 1125 (D.C. 1996) ("[B]ecause a 'conviction' stemming from a summary court-martial proceeding lacks the trustworthiness of a conviction resulting from more formal and adversarial criminal proceedings, it cannot be used for impeachment purposes . . . .").

alleged prior crime.[79] A reader familiar with the informal nature of many criminal proceedings[80] and the questionable nature of "proof" in the guilty plea and trial context[81] might detect an implicit question mark hanging over the use of convictions as markers of guilt.

One can take the implicit critique idea further by considering another assumption underlying these provisions: that convictions reliably convey not just guilt but guilt in comparison to a law-abiding norm.[82] Both the assumption of guilt and the assumption of relative guilt would be unsettled by a legal regime in which factors such as resources profoundly affect one's chances of acquiring a felony conviction or, indeed, a conviction of any sort. These judges refrain from pointing out that we live in that kind of legal regime. But the signs are everywhere in their opinions. Those opinions contain repeated references to ways in which defense lawyers hampered their clients' chances: the errors they made,[83] the objections they missed,[84] the arguments they failed to preserve,[85] the rights they waived,[86] and the profound

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79. *See* Roberson v. State, No. 48A02-1103-CR-334, 2011 WL 6141461, at *10 (Ind. Ct. App. Dec. 9, 2011) ("The Indiana Supreme Court has held that Evidence Rule 609 'draws a bright line at conviction before a prior crime may be used to impeach a witness.' 'A high probability of guilt is not enough.' Accordingly, '[a] witness may not be impeached by specific acts of misconduct that have not resulted in criminal convictions.'") (alteration in original) (citations omitted).

80. *See* Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. SCH. L. REV. 911, 912 (2011).

81. *See* David L. Shapiro, *Should a Guilty Plea Have Preclusive Effect?*, 70 IOWA L. REV. 27, 43–44 (1984) (identifying probable cause as the operative standard with guilty pleas); Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1656–57 n.117 (2020) ("[E]ven in the rare case that goes to a jury trial, prosecutors do not have to 'prove' guilt in the scientific or mathematical sense of the word proof; they merely have to convince a jury to vote for guilt.").

82. Armstrong v. Commonwealth, No. 2016-CA-000709-MR, 2017 WL 4570569, at *3 (Ky. Oct. 13, 2017) ("Introducing a prior criminal conviction permits the jury to infer that, based on the witness's character, he is less likely than the average citizen to provide truthful testimony.").

83. Lacey v. People, 442 P.2d 402, 404–05 (Colo. 1968) (stating that the defense objection as phrased at trial was without merit); Bailey v. Myrick, 467 F. Supp. 3d 950, 957 (D. Or. 2020) ("Counsel's performance was lacking where she failed to understand that eliciting hearsay statements of her client's innocence potentially had the effect of opening the door to his [extensive] criminal history.").

84. *See* State v. Knight, No. COA15–917, 2016 WL 2648704, at *5 (N.C. Ct. App. May 10, 2016) (no objection to prosecutorial behavior was made "so we review under the 'grossly improper' standard," and find it not grossly improper); State v. Gentry, No. COA03-855, 2004 WL 1325796, at *2 (N.C. Ct. App. June 15, 2004) ("Because defendant failed to object to the State's cross-examination of Boyd on these grounds at trial, defendant asserts plain error.").

85. Barksdale v. Commonwealth, No. 0887-92-2, 1993 WL 346125, at *3 (Va. Ct. App. Sept. 14, 1993) ("'[E]rrors assigned because of a prosecutor's improper comments or conduct during argument will not be considered on appeal unless the accused timely moves for a cautionary instruction or for a mistrial.' Neither action was taken in this case.") (citation omitted).

86. State v. Payne, 600 S.W.2d 94, 96 (Mo. Ct. App. 1980) (constitutional claim waived by failure to object); Forbis v. Associated Wholesale Grocers, Inc., 513 S.W.2d 760, 767 (Mo.

consequences of these failings.[87] That cataloging of missteps—that landscape of moments at which the adequacy or inadequacy of counsel shaped their client's legal path—might make one wonder about the assumption that a conviction reliably marks someone as guilty and meaningfully distinguished from the innocent person without a conviction. One judge is willing to resist, at least a little, the notion that the defense's chances should depend on the vigorousness of their counsel.[88] Generally, however, when looking back at the conviction previously imposed and the question of whether it should be admissible, judges assume that a conviction is a reliable indicator that a witness was guilty, and that the witness can be usefully contrasted with the innocents around them.

Whatever critiques may be explicit or implicit in these opinions, these courts ultimately fall into line, asserting that the rules drafters have resolved the probative value issue,[89] and that questions that the judges might want to ask are not available to them.[90] As the Colorado Supreme Court put it:

> [W]e are not here concerned with the wisdom of a statute which permits showing the conviction of a person for any felony for the limited purpose of affecting the credibility of that person when he testifies as a witness in a criminal proceeding. The General Assembly has resolved the matter. Hence, whether a prior conviction for any felony does in logic and fact detract from the credibility of such a convicted person when he

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Ct. App. 1974) ("To preserve for appellate review a constitutional question, the question must be raised at the first opportunity.").

87. *See* Dorman v. United States, 491 A.2d 455, 462 (D.C. 1984) ("Failure to raise the issue will leave a defendant in the position of having to establish plain error in order to prevail on appeal."); State v. Davenport, 5 S.W.3d 547, 550 (Mo. Ct. App. 1999) ("Since Defendant did not object to cross-examination, he preserved nothing for review."); State v. Idlebird, 896 S.W.2d 656, 662–63 (Mo. Ct. App. 1995) (mentioning "serious concern that, if Defendant's description of her Netherlands trial is accurate, her conviction therefrom was lacking in basic due process protections," but concluding that "by failing to object to the evidence at trial, she waived any error"); State v. Goldsby, 845 S.W.2d 636, 641 (Mo. Ct. App. 1992) (concluding that despite alarming allegations about the interrogation practices that led to a Malaysian conviction, and even though the defense had bulked up its claims about the Malaysian system in the appellate brief, by then it was too late because "a point on appeal can be considered only to the extent that it was raised before the motion court"); State v. Cantrell, 775 S.W.2d 319, 321 (Mo. Ct. App. 1989) (no objection at trial, so plain error standard applied).

88. State v. Gore, 322 N.W.2d 438, 442 (Neb. 1982) (McCown, J., dissenting) ("The majority opinion tacitly approves the blatant violation of a defendant's rights to a fair trial upon the ground that the defendant's counsel did not object at every possible opportunity, and that the violations properly objected to were only a few and therefore not actually prejudicial. A prosecutor's deliberate and repeated disregard of long-established statutory and decisional requirements which attempt to protect a defendant's right to a fair trial ought not to be excused because defendant's counsel did not object often enough.").

89. Sherrer v. Bos. Sci. Corp., WD 80010, 2018 WL 3977539, at *10 (Mo. Ct. App. Aug. 21, 2018) ("[E]vidence of a witness's criminal convictions is deemed admissible by section 491.050, and is thus logically relevant to impeach the credibility of a witness.").

90. *See Dorman*, 491 A.2d at 458 ("Congress has prescribed that certain convictions are relevant to a fact-finder's credibility determinations. We are bound by Congress' policy decision.").

> subsequently (perhaps years later) takes the witness stand and whether a jury does in fact limit its use of such testimony to the witness's credibility and whether, if not, its use is an injustice, are, as stated by Judge Learned Hand, "not open questions for us."[91]

B. Unfair Prejudice

Judges speak repeatedly and forcefully about the risk of unfair prejudice that this type of evidence brings.[92] They note the risk that it will lead jurors to engage in forbidden propensity reasoning,[93] particularly when the prior conviction is similar to the charge at trial.[94] They note the risk that the evidence may prompt the jurors to punish the person on trial for things they may have done in the past,[95] and that this kind of forbidden usage undermines, rather than aids, the search for truth.[96]

Some judges put faith in measures said to mitigate the risk of unfair prejudice. One measure involves "sanitizing," which is the exclusion of details of the conviction, such as the name of the offense of conviction.[97] Other measures include voir dire,[98] challenges for cause,[99] peremptory challenges,[100] jury instructions,[101] and

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91. Lacey v. People, 442 P.2d 402, 405 (Colo. 1968) (emphasis in original).

92. *See, e.g.*, Chrisman v. Commonwealth, 348 S.E.2d 399, 403 (Va. Ct. App. 1986) (quoting Virginia precedent that "if the jury were aware of the previous conviction it was (to use a common expression) like trying a man with a rope about his neck" and adding that "care should be exercised in admitting evidence of any conviction of crimes because the jury might give too much weight to such evidence in determining the guilt or innocence of the accused").

93. *See* People v. Harding, 104 P.3d 881, 887 (Colo. 2005) ("[T]he jury might misuse the evidence and give more heed to the past convictions as evidence that the accused is the kind of man who would commit the crime charged, or even that he ought to be imprisoned without too much concern for present guilt or innocence."); Dorman v. United States, 460 A.2d 986, 992 (D.C. 1983) (Ferren, J., dissenting) ("Whenever a criminal defendant is impeached by prior convictions, there is a risk that the jury, despite a cautionary instruction, will be unable to limit their use to the purpose the law allows. Rather than draw the only permissible inference—that a one-time thief is likely to lie—the jury may draw the impermissible inference that a one-time thief is likely to steal again, and therefore did.").

94. *See* Ford v. United States, 487 A.2d 580, 591 (D.C. 1984) ("The risk of jury misuse of previous conviction impeachment is at its greatest when . . . the crime charged and the crime used to impeach the defendant are similar.").

95. *See, e.g.*, People v. Ziglar, 45 P.3d 1266, 1270 (Colo. 2002) ("When prior conviction evidence enters a trial, there is a risk the jury will 'punish the accused for his prior anti-social behavior rather than weigh the evidence relevant to the specific occurrence in question.'") (citation omitted).

96. Allen v. Commonwealth, 395 S.W.3d 451, 465 n.13 (Ky. 2013).

97. *See, e.g.*, Aranda Resp. Br., *supra* note 1, at 13 (noting that Mr. Aranda "offered [in vain] to make a judicial admission that he had committed prior felonies if the court would preclude the state from naming them").

98. People v. McKeel, 246 P.3d 638, 641 (Colo. 2010) (mentioning that safeguards against unfair prejudice in this context include voir dire, challenges for cause, peremptory challenges, and jury instructions, which "[w]e presume that [the] jurors follow").

99. *Id.*

100. *Id.*

101. *Id.*; Forbis v. Associated Wholesale Grocers, Inc., 513 S.W.2d 760, 768 (Mo. Ct. App.

rules that regulate the sequencing of prosecutorial questioning with the aim of minimizing the risk of propensity reasoning.[102] When discussing the jury instruction on prior conviction impeachment, one judge was willing to call it "precise and comprehensible,"[103] a claim that, as will be discussed below, is hard to credit.[104]

Other judges are blunt in stating that these measures are unable to remove the irreducible nub of unfair prejudice—the inevitability of propensity usage and of inflammatory thinking. As one Colorado judge put it, absent the mandatory provision, these convictions would be excluded because "the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it."[105]

Judges make a variety of points about the inadequacy of the most common salve, a jury instruction that states that these convictions may only be used on witness credibility. First, they express their own skepticism about whether jurors are able to comply with such an instruction.[106] It is "asking too much" of jurors, one judge says, to instruct them to reject the very inference that the evidence suggests should be adopted.[107] Another uses the example of someone with a rape conviction on trial for rape: to instruct the jurors to use that prior conviction only to assess credibility requires a "mental gymnastic" that is beyond them.[108] Another judge comments that, given the uncurable prejudice in that context, it becomes a "legal fiction" even to talk about such a person testifying: The risk of unfair prejudice is so intense that it

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1974) ("[A]n instruction limiting the effect of the conviction is available, thus mitigating against the possibility of prejudice."); Lincoln v. Commonwealth, 2021-SC-0033-MR, 2022 WL 3640914, at *5 (Ky. Aug. 18, 2022) ("[T]he trial court gave a proper limiting instruction admonishing the jury that the fact that Lincoln was a convicted felon was not to be considered as evidence of guilt but only insofar as it may have bearing on Lincoln's truthfulness as a witness and the weight to be given to his testimony. As such, any prejudice to Lincoln because of the Commonwealth's cross-examination was cured by the trial court's limiting instruction.").

102. *See* Dorman v. United States, 491 A.2d 455, 460 (D.C. 1984) ("Our test focuses on the manner of impeachment because we acknowledge that to some degree the mere fact of previous conviction impeachment imparts 'well-nigh inescapable prejudice on the issue of guilt.'") (citation omitted).

103. Peltz v. People, 728 P.2d 1271, 1277 (Colo. 1986).

104. *See infra* Part III.B.2.

105. People v. Ziglar, 45 P.3d 1266, 1270 (Colo. 2002) (quoting JOHN W. STRONG, KENNETH S. BROWN, GEORGE E. DIX, EDWARD J. IMWINKELRIED, D.H. KAYE, ROBERT P. MOSTELLER, & E.F. ROBERTS, MCCORMICK ON EVIDENCE 650 n.3 (5th ed. 1999)).

106. Harrington v. Johnson, 997 P.2d 283, 288 (Or. Ct. App. 2000) ("[I]t would be very risky to trust a jury's ability to follow that instruction rigorously under these circumstances. It would have required a herculean effort for the jury to resist the inference that petitioner, a convicted sex offender, was likely guilty of the current charges as well.").

107. Dorman v. United States, 460 A.2d 986, 992–93 (D.C. 1983) ("It is asking too much of a jury to permit the government to juxtapose the defendant's denial of present criminal involvement with questions and proof concerning prior criminal involvement, and then to attempt to prevent, through a cautionary instruction, the very inference that the mixture of evidence suggests should be drawn.").

108. State v. McClure, 692 P.2d 579, 590 (Or. 1984) ("To inform the jury in a rape case that the defendant has a prior rape conviction, and then to instruct the jury to consider the conviction only in evaluating the defendant's credibility, is to recommend a 'mental gymnastic which is beyond, not only their power, but anybody else.'") (citation omitted).

has nullified that constitutional right.[109] Even one of the rare judges who is willing to claim that this kind of instruction is "readily understood" balks at finding that a juror would be willing to apply it[110]:

> One might well wonder what the man on the Clapham bus (Britain's proverbial reasonable person) or his American counterpart thinks of the proceedings when he is told to consider a defendant's five prior convictions for possession of heroin only in connection with the defendant's truthfulness or lack thereof, but not at all in connection with the defendant's guilt or innocence of the current charge of possession or [sic] heroin.[111]

Judges also claim that their skepticism on this issue is broadly felt. One states that all lawyers and judges know that this kind of evidence is "a most damning thing."[112] Others back up their skepticism with empirical data: research revealing that attorneys and judges overwhelmingly believe that jurors cannot follow this kind of instruction,[113] and that jurors are "almost universally unable or unwilling" to use the evidence for anything other than propensity purposes.[114]

Judges highlight the detachment from reality that faith in these instructions reveals. To proceed as if they work is a "questionable hope,"[115] one that could only

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109. People v. Harding, 104 P.3d 881, 892 (Colo. 2005) (Kourlis, J., dissenting) ("[T]he defendant had a prior sexual assault conviction, and was on trial for sexual assault. Rarely, if ever, would a defendant choose to testify under those circumstances. We engage in something of a legal fiction to surmise otherwise."); *see also* Langley v. United States, 515 A.2d 729, 735 (D.C. 1986) ("Impeachment with prior convictions can be devastating to the party who calls the witness, to a point that some defendants, like appellant, may elect not to testify because of the anticipated impact of such impeachment on the jury. Such 'other crimes' evidence inevitably implies legally irrelevant criminal propensity, whatever limiting instruction the court gives to confine the jury's consideration to impeachment.").

110. Thompson v. United States, 546 A.2d 414, 426 (D.C. 1988) ("A direction to the jury that a prior conviction shall be considered only in connection with the defendant's credibility, and not in relation to his guilt or innocence of the charged offense, is at least readily understood, if not easily followed.").

111. *Id.* at 426 n.22.

112. State v. Mobley, 369 S.W.2d 576, 581 (Mo. 1963) ("All lawyers and judges know that a jury's knowledge of prior convictions is, in itself, a most damning thing in the trial of a criminal case.").

113. *McClure*, 692 P.2d at 590 ("In one recent survey 98% of the attorneys, and 43% of the judges, indicated their belief that a jury is unable to follow an instruction to consider prior conviction evidence only for the purpose of evaluating credibility.").

114. *See Thompson*, 546 A.2d at 425 ("A scholar who conducted juror interviews in Chicago concluded that jurors were almost universally unable or unwilling to understand or follow the court's instruction to consider prior convictions only for impeachment purposes, and almost invariably used a defendant's record to conclude that he was a bad man and hence more probably guilty of the crime for which he was standing trial.").

115. *See* Harrington v. Johnson, 997 P.2d 283, 288–89 (Or. Ct. App. 2000) (referring to the "questionable hope that the jury could resist the temptation to misuse the information in its deliberations").

be adopted by those who are "rather naïve."[116] One judge has called this kind of instruction a mere "ritual" that serves only to disguise the propensity use to which this evidence is put,[117] and, indeed, in congressional debates surrounding the federal version, one senator said that we do not need to have been lifelong criminal litigators to know that "we are kidding ourselves if we think that the instruction removes the poison."[118] One Missouri judge proposed dropping the faux naïveté and instead being candid.[119]

Regardless of their views on whether it is an assumption that matches reality, some judges state that they are "constrained to assume" that instructions are effective,[120] with one adding that our theory of trial relies on this assumption.[121] And regardless of their beliefs about the effectiveness of instructions, judges once again fall into line and admit the evidence.[122] As mentioned earlier, these judges hold the view that "whether a jury does in fact limit its use of such testimony to the witness's credibility and whether, if not, its use is an injustice, are, as stated by Judge Learned Hand, 'not open questions for us.'"[123]

After jury instructions, the second most common protective measure is "sanitization."[124] Implicit in these opinions are two sets of concerns about this device.

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116. *See* State v. Guernsey, 577 S.W.2d 432, 436 (Mo. Ct. App. 1979) (finding that where prosecutor made a "[o]nce a thief, always a thief" argument, one "would have to be rather naïve to believe" that the prejudicial error was corrected by judicial instruction that prior convictions "were for consideration only on the question of defendant's credibility").

117. Carl McGowan, *Impeachment of Criminal Defendants by Prior Convictions*, 1970 L. & SOC. ORD. 1, 9 (1970) (referring to the disguise involved in "the ritual of instructing the jurors that they are to consider the criminal record as bearing only upon the defendant's truth-telling capacity and not as being probative of his guilt of the immediate charge against him").

118. *See* 120 CONG. REC. 37077–78 (1974). Senator Hruska stated that "to a substantial degree" the prejudice attendant to a felony conviction can be mitigated by a jury instruction, and Senator Hart responded: "[D]oes anyone really seriously think that a careful instruction to that jury will serve to remove from the minds of the jurors the existence of that prior conviction? I do not think one has to have spent a lifetime in criminal litigation to know that we are kidding ourselves if we think that the instruction removes the poison." *Id.*

119. *See* State v. Wilkins, 59 S.W.3d 591, 596 (Mo. Ct. App. 2001) ("We should candidly realize that jurors may have difficulty enough in properly limiting impeachment evidence to its intended purpose.").

120. Thompson v. United States, 546 A.2d 414, 426 (D.C. 1988) ("[L]imiting instructions can and in some cases must be provided, and we are constrained to assume that when they contain realistic rather than theoretical distinctions, and when they are clearly and understandably delivered, they will reduce, if not dissipate, the danger of unfairness and prejudice."); Peltz v. People, 728 P.2d 1271, 1277 (Colo. 1986) ("There is a strong presumption that the jury followed the trial court's instructions.").

121. *See Thompson*, 546 A.2d at 425. The court noted, after mentioning the empirical data indicating that jurors do not comply with instructions in this area, that "[t]his approach, can, however, only take us so far. The jury is presumed to follow the trial judge's instructions. Moreover, as the prosecutor forcefully argued on appeal in this case, this is a crucial assumption, for our theory of trial depends on the jury's ability to do so." *Id.* (citations omitted).

122. *See* Dorman v. United States, 460 A.2d 986, 992 (D.C. 1983).

123. Lacey v. People, 442 P.2d 402, 405 (Colo. 1968).

124. *See supra* text accompanying note 97.

First, states take dramatically different stances on its appropriateness. Some view it as absurd not to sanitize because of the risk of unfair prejudice that the name of the conviction brings,[125] while others view it as absurd *to* sanitize because the name of the conviction is said to provide the probative value.[126] Second, the notion that sanitizing protects the witness is challenged by those on trial who plead with the court that they be allowed to *desanitize*—that is, name their conviction.[127] Their reasoning is that if the jurors hear, for example, about a "felony conviction," they will assume a "crime[] of violence."[128] Those who were convicted of a "crime[] of dishonesty" would like to be able to tell the jury that,[129] precisely because they are aware that these convictions are used not to assess truthfulness, but rather to assess propensity, moral worth, or apparent fitness for punishment.[130]

C. Power to the Prosecution

The third area in which judicial opinions reveal concerns is the allocation to the prosecution of the power to decide whether this evidence is admitted. In analogous contexts, that power is typically shared. While the prosecutor is given broad discretion to decide what to proffer,[131] the judge is given broad discretion to decide its admissibility.[132]

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125. *See* Dickerson v. Commonwealth, 174 S.W.3d 451, 463 n.5 (Ky. 2005) ("When the witness is the defendant, identifying the nature of the underlying offense could have a prejudicial effect far greater than the mere impeachment value of the conviction—especially if the defendant is on trial for a similar or related offense."); Payne v. Carroll, 461 S.E.2d 837, 838 n.1 (Va. 1995) ("Disclosure of the number and nature of prior felony convictions of an accused-witness attenuates the presumption of innocence and creates a prejudicial impact upon the process of determining guilt, or penalty, or both.").

126. *See* Davis v. State, 654 N.E.2d 859, 860 (Ind. Ct. App. 1995). The court rejected Mr. Davis's bid to have the jury told not that he had a burglary conviction (in a burglary trial) but rather just that he had a "felony," on the basis that "only certain crimes are available for impeaching purposes . . . . [So] to notify a jury that a witness has been convicted of a 'felony' without naming the crime, allows speculation and implies that conviction of any crime *ipso facto* calls into question the veracity of the witness. Such inference is exactly that which is prohibited by the rule. . . . Further, stating only that the defendant had been previously convicted of a felony undermines the admonishment to the jury limiting such evidence to the question of credibility, not propensity to commit crimes." *Id.* (emphasis in original) (citation omitted).

127. State v. Stabler, 940 N.W.2d 572, 579 (Neb. 2020). Stabler had argued that without evidence on the nature of the felonies the jury was left to wonder whether they were for violence, for example, and so he wanted to tell them that they were "dishonesty" crimes. *Id.*; *see also* Erving v. State, 116 N.W.2d 7, 14 (Neb. 1962) (stating that the limitation is to protect witnesses); State v. Howell, 924 N.W.2d 349, 371 (Neb. Ct. App. 2019) (rejecting Mr. Howell's argument that he should have been permitted to name his conviction, even while acknowledging the potential conflict between the state's prior conviction impeachment rule and the rule prohibiting infringement of the right to testify in one's own defense).

128. *See Stabler*, 940 N.W.2d at 579.

129. *See id.*

130. *See id.*

131. *See id.*

132. *See* State v. Mobley, 369 S.W.2d 576, 580 (Mo. 1963) (mentioning "the cloak of

Courts note that these provisions, by contrast, give prosecutors full control over admissibility,[133] with Missouri decisions referring to the "absolute right" of the prosecution to get this evidence admitted.[134] Of course this power rests with all parties—civil and criminal, prosecution and defense—but it is a power that is mightiest for the prosecutor, given the unique stakes for people facing criminal charges, and their unique vulnerability to forbidden propensity reasoning by the factfinder.[135] In a way that mirrors the previously mentioned search for ameliorative measures, some courts note that this power brings corresponding prosecutorial duties to exercise it fairly.[136]

Numerous judges have criticized both the choice to give this power to the prosecution and the ways in which the power, and the corresponding duties, are abused. One court refers to this transfer of power as an arbitrary decision.[137] Courts in several states catalog repeated prosecutorial abuses.[138] One state supreme court

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discretion so broadly conferred upon trial courts").

133. *See* People v. Yeager, 513 P.2d 1057, 1059 (Colo. 1973) (mentioning the "practice of leaving to the attorney representing the adverse party the discretion of using prior felony convictions to impeach a witness"); *id.* at 1060 ("[T]he 'may' in the statute does not bespeak a grant of permission or discretion to the trial judge to receive or reject the proof. On the contrary, the parties are invested with the option and if it is exercised the examination must be allowed or the record of conviction received when offered."); United States v. Dorman, 491 A.2d 455, 466 n.6 (D.C. 1984) (Nebeker, J., concurring) ("Fairly read, Congress' rejection of [a balancing regime] signalled [sic] the desire to remove from the arena of conviction impeachment the discretionary hand of the trial court and to leave intact the prerogative of the cross-examiner.").

134. *See* State v. Boyd, 659 S.W.3d 914, 927 (Mo. 2023) ("When a defendant chooses to testify, the State has an absolute right to question the defendant's credibility through proof of prior convictions."); Sherrer v. Bos. Sci. Corp., 609 S.W.3d 697, 705 (Mo. 2020) ("Generally, a circuit court has discretion to control the bounds of cross-examination, but its control is limited by section 491.050, which gives an absolute right to show a prior conviction of a witness.").

135. *See* Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1, 13 (1999) (noting that the North Carolina rule "heavily favors prosecutors while giving criminal defendants little protection").

136. *See* People v. Velarde, 541 P.2d 107, 109 (Colo. App. 1975) ("[I]f a district attorney elects to cross-examine a witness on his past criminal record, he must do so with fairness."); Reed v. United States, 485 A.2d 613, 617 (D.C. 1984) ("[C]ross-examination of a defendant by impeachment of prior convictions must be undertaken in a manner to avoid suggesting guilt of pending charges as a result of prior convictions and to avoid suggesting bad character or worse about a defendant."); State v. Mosley, 766 S.W.2d 755, 758 (Mo. Ct. App. 1989) ("The only legitimate purpose of a prosecutor's argument concerning a defendant's prior conviction lies in its bearing on defendant's credibility, and the prosecutor's argument should be 'carefully confined to that purpose and subject.'") (citation omitted); State v. Olsan, 436 N.W.2d 128, 133 (Neb. 1989) ("[P]ublic prosecutors are charged with the duty of conducting criminal trials in such a manner that the accused may have a fair and impartial trial.") (citation omitted).

137. Fisher v. Gunn, 270 S.W.2d 869, 876 (Mo. 1954).

138. *See, e.g.*, State v. Mobley, 369 S.W.2d 576, 581 (Mo. 1963) (finding that in his closing argument the prosecutor "made no pretense of arguing the question of credibility" and, indeed,

noted that the prosecutor had "injected the innuendo that [the person on trial] is indelibly branded with an extensive background of criminal misbehavior indicative of a propensity to commit the crimes charged."[139] The court seemed to have reached a limit, indicating that it would not "continually search for ways to extricate the prosecution from the results of its own misconduct by labeling such action 'harmless error.'"[140] It added that "[w]hether attributable to ignorance or indifference of the Nebraska Evidence Rules, the conduct in [this] case participates in the persistent parade of prosecutory prejudice to a defendant's right to a fair trial, namely, improper impeachment inquiry into a defendant's convictions."[141] Other courts bluntly state that the prosecution used the evidence not for the permitted purpose of credibility assessment but for the prohibited purpose of trying to show guilt via propensity.[142]

Beyond these explicit judicial criticisms are the concerns implicit in these opinions. Listed earlier were a variety of cases in which it is hard to believe that the propensity inference could be avoided: burglary and robbery convictions admitted in a burglary and robbery trial, rape convictions in a rape trial, and so on. While the rules permit this, and the judges declare themselves powerless to exclude, we should not downplay the role of the prosecution in deciding to proffer those convictions, despite risks that include juror misuse and racially disparate impact.

III. ADDRESSING THE CRITIQUES

Part II highlighted three sets of concerns that emerge from the judicial opinions interpreting these provisions: probative value, unfair prejudice, and the prosecutor as sole repository of discretionary power.

Even while discussing such concerns, the judges often present themselves as helpless, and "forced" to admit this evidence despite their qualms.[143] Because the concerns are grave, and the helplessness not total, this Part will discuss a variety of responsive changes under each of these three headings. Some involve giving judges the discretion they seek, others involve measures that judges could implement even

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that the state's appellate argument "amounts to an admission that the Prosecutor was . . . using the fact of prior convictions as substantive evidence of guilt"); *Olsan*, 436 N.W.2d at 136 ("The prosecution knew that the commission of other crimes by the defendant was irrelevant, improper, and inadmissible in its case. While the evidence of defendant's guilt herein is conclusive, this is a transgression which cannot be condoned. The evidence against the defendant was more than adequate. Possibly in the past we have been too lenient in excusing these transgressions under the guise of harmless error, and the prosecution has concluded that anything goes. Defendants must be given fair trials, and it is the responsibility of the prosecution to see that each defendant receives one.").

139. *Olsan*, 436 N.W.2d at 135.

140. *Id.* at 136 (quoting State v. Johnson, 413 N.W.2d 897, 899 (Neb. 1987)).

141. *Id.* at 136 (adding that "[w]e hope that our emphatic and renewed disapproval expressed in this case will stem the steady stream of appeals to this court as the result of prosecutory misunderstanding or misapplication of [Rule 609]").

142. *See, e.g.*, *Mobley*, 369 S.W.2d at 581.

143. *See, e.g.*, Dorman v. United States, 491 A.2d 455, 458 (D.C. 1984) ("Congress has prescribed that certain convictions are relevant to a factfinder's credibility determinations. We are bound by Congress' policy decision.").

absent such a change, and some go bigger, involving the abandonment of prior conviction impeachment of those on trial.

A. Probative Value

1. Assessing Probative Value as Part of a Balancing Test

A first possibility is that through either constitutional rulings (as was tried by Mr. Aranda), or amendments or reinterpretations of the rules, the judges obtain the balancing power whose absence they lament. That they move, in other words, out of the backwater and into the mainstream.[144]

With the power to assess probative value, judges could draw on a wealth of research pointing out the lack of a documented connection between convictions and the likelihood of truthfulness.[145] They could thus insist that the law in this area should acknowledge social scientific realities instead of resting on myth and assumption, passed down through precedent, about what a conviction reveals.[146] The oral argument in Mr. Aranda's case offers one recent example of a judge showing interest in that kind of approach.[147] The defense brief and an amicus brief had walked through the assumptions on which this practice rests—that a conviction conveys culpability, relative culpability, and untruthfulness, for example—and pointed out the shakiness of each of them.[148] At oral argument, one of the Oregon Supreme Court justices picked up the thread, asking the government for its response to data suggesting that convictions offer no probative value on truthfulness.[149] Assigning responsibility for investigating probative value to trial judges, as opposed to waiting for appellate review, might save a lot of money and time, including time in prison.

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144. *See* State v. Cantrell, 775 S.W.2d 319, 321 (Mo. Ct. App. 1989) ("If Missouri is, as appellant claims, 'in the backwater of the law,' we will not join the main stream unless the legislature indicates this is the preferable course.") (citation omitted).

145. *See* Simon-Kerr, *Credibility by Proxy*, *supra* note 8, at 211 ("[C]urrent social science research explains neither the structural nor the substantive choices of modern impeachment jurisprudence."); Brief of *Amici Curiae* Coalition for Prior Conviction Impeachment Reform et al., at 22–25, State v. Aranda, 550 P.3d 363 (Or. 2024) (CC 19CR07375) (SC S069641) [hereinafter Aranda Amicus Br.].

146. *See* G. Alexander Nunn, *The Living Rules of Evidence*, 170 U. PA. L. REV. 937, 944–45 (2022) (advocating in favor of "living evidentiary theory," which "encourages a judge to couple her reliance on the text and purpose of the Federal Rules of Evidence with equally forceful appreciation for external realities discerned from modern cultural sentiments and the leading edge of the scientific and empirical literatures").

147. Oral Argument at 8:28–9:18, State v. Aranda, 550 P.3d 363 (Or. 2024) (CC 19CR07375) (SC S069641), https://oregoncourts.mediasite.com/mediasite/Channel/default/watch/94e222ad8fb44fd8bf624fb29d6430fd1d [https://perma.cc/FW54-CMD2] [hereinafter Aranda Oral Argument].

148. Aranda Resp. Br., *supra* note 1, at 55–61; Aranda Amicus Br., *supra* note 145, at 21–28.

149. Aranda Oral Argument, *supra* note 147, at 8:28–9:18.

2. Addressing Probative Value Even Without a Balancing Test

Even if these rules remain unchanged,[150] the judges implementing them are not powerless. There are measures that they can consider that are responsive to the probative value concerns.

One can usefully draw from an analogous context—namely, eyewitness identification testimony. Those who studied that field reached a consensus: If jurors were exposed to that evidence without guidance, they might accord it more probative value than it merited.[151] This consensus prompted a realization that there was a need to inform jurors (through expert testimony, for example) about the possible vulnerabilities of eyewitness identification testimony.[152]

In the prior conviction impeachment context, there is also a consensus among the leading scholars that there are grave probative value concerns.[153] As will be discussed below,[154] jury instructions are typically bare bones on this issue, giving jurors no guidance on the inferential steps that might lead from a conviction to a finding of lessened credibility, what should prompt them to take those steps, or how they should assess the amount of probative value that a particular conviction has.[155]

That careful unpacking of inferential steps is most likely to happen, if it happens at all, at the appellate stage, in briefs by defense counsel and amici. As mentioned above, Mr. Aranda's lawyer laid these assumptions out in his appellate brief, pointing out the vulnerabilities in each, and supporting his analysis with expert input.[156] The jurors were never able to benefit from the same information. They were simply told that they could use the convictions in assessing credibility.[157]

Judges could consider bringing that same information into the trial courtroom. For there are experts who could testify to vulnerabilities in each of the inferential steps laid out in Mr. Aranda's appellate brief.[158] And whereas the concept of credibility as "worthiness of belief" might be thought to be one that community members are equipped to assess, since it rests on norms and stereotypes accessible

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150. *See* Simon-Kerr, *Credibility by Proxy*, *supra* note 8, at 217–18 (mentioning some of the impediments to change).

151. *See* Nancy Gertner, *The Extraordinary Criminal Law Jurisprudence of Justice Ralph Gants*, 62 B.C. L. REV. 2697, 2701 (2021) (mentioning scientific consensus "that showed the flaws of memory and eyewitness identification").

152. *See* Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. REV. 737, 741 (2016) ("In some jurisdictions, courts . . . have been a force for change, providing enhanced pretrial judicial review and, when such evidence is admitted at trial, allowing expert testimony and jury instructions about the fallibility of these categories of evidence."); Thomas D. Albright & Brandon L. Garrett, *The Law and Science of Eyewitness Evidence*, 102 B.U. L. REV. 511, 519 (2022) ("The majority of state courts now permit expert evidence on eyewitness perception and memory.").

153. *See* Aranda Amicus Br., *supra* note 145, at 21–28.

154. *See supra* notes 106–23 and accompanying text.

155. *See* Simon-Kerr, *Credibility by Proxy*, *supra* note 8, at 192–203 (describing contradictory and complex nature of doctrine attributing differing probative value to convictions in impeachment).

156. Aranda Resp. Br., *supra* note 1, at 55–59.

157. State v. Aranda, 550 P.3d 363, 370 (Or. 2024).

158. *See* Aranda Amicus Br., *supra* note 145, at 1–2, 21–28.

to us all, evidentiary rules tend to proclaim a purpose of serving truth rather than honor.[159] The bearing that convictions have on truth may be seen as a social scientific question "beyond the ken" of the average juror.

It may well be that defense counsel are not moving for the admission of expert testimony on this issue. Expert evidence has often been the province of the moneyed,[160] and resources for publicly funded counsel to retain expert witnesses are often inadequate.[161] In many states, however, judges have the power to appoint their own experts.[162]

3. Getting Rid of the Practice

Careful consideration of the judges' concerns, and of the kinds of responses discussed thus far, might lead one to the conclusion that, where possible, the better option is to push for the abolition of prior conviction impeachment as a prosecutorial tool. One might do so via either a constitutional ruling or a rule amendment, and recent litigation and advocacy offers momentum.[163]

If one thinks about the constitutional arguments made by Mr. Aranda's attorney, for example, it is understandable that they were carefully tailored to the goal of getting his client a new trial.[164] But their logic easily extends beyond a ruling that judicial balancing is necessary to a ruling that the prosecution just cannot use prior conviction impeachment at all. Mr. Aranda deployed Supreme Court case law that finds a constitutional violation where evidence rules "infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve."[165] Since the arbitrariness and disproportionality in this context center around the lack of demonstrated link between convictions and witness truthfulness, that argument extends not just to the felony convictions in Mr. Aranda's case, but to any convictions, and could support a push not just for judicial balancing but for an abandonment of this practice. And indeed, any argument for balancing—whether constitutionally grounded or not—seems less on point than an argument for abandonment, if it relies on an argument that there simply is not any probative value here. A balancing test where there is nothing on one side would confound.

Thus, when a Due Process challenge to Hawai'i's practice of impeaching those facing criminal charges with their prior record reached that state's supreme court, the

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159. *See* Compilation of States' Versions of Federal Rule of Evidence 102 (on file with author).

160. *See* Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2287–88 (2017).

161. *See id.*

162. *See* Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 1986–87 (1999) ("Judges in the United States have the power under Federal Rule of Evidence 706 and many state equivalents to appoint their own expert witnesses, but one would hardly realize this by looking at actual practice.").

163. *See, e.g.*, Aranda Amicus Br., *supra* note 145, at 42–44 (arguing for abolition).

164. *See* Aranda Resp. Br., *supra* note 1, at 14 (arguing that trial courts are constitutionally required, on request, to "subject evidence of a defendant's prior felony convictions to traditional [Oregon Evidence Code] 403 balancing").

165. Aranda Resp. Br., *supra* note 1, at 61 (alteration in original) (quoting Holmes v. South Carolina, 547 U.S. 319, 324 (2006)).

result was not balancing, or a restriction of the type of conviction that could be used, but a prohibition of this method of impeaching those facing criminal charges.[166] The rationales included a concern that this evidence lacked probative value.[167] That case was decided in 1971, and since then the rationales have only strengthened.[168]

Similarly, when rules drafters in Kansas and Montana examined this question, the result was not balancing, or a restriction on the type of conviction that could be used, but a decision that this practice could not be used against those facing criminal charges.[169] Again, the rationales included a concern that there was a lack of probative value.[170]

There are two other reasons why a balancing test might fail to satisfy, and both were mentioned by the government in Mr. Aranda's case. The first is judges. The same discretion that gives judges the ability to strive toward justice, racial equity,[171] and social scientific understanding also creates the potential for disparate outcomes.[172] And while some judges might be committed to innovative, informed measures to protect against unfair prejudice that tracks racial and economic subordination, others might be the very opposite.[173] In addition, judges are largely limited to the arguments of counsel.[174] Thus, as will be discussed below, disparately resourced counsel might facilitate disparate judicial rulings.[175]

The second reason for concern about balancing is existing datasets. The government in Mr. Aranda's case highlighted the years preceding the Oregon ballot

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166. *See* State v. Santiago, 492 P.2d 657 (Haw. 1971) (violation of right to testify in one's own defense, and thus of state and federal Due Process); HAW. R. EVID. 609(a) (carving out situation where the person on trial has introduced evidence to establish their own credibility).

167. *See Santiago*, 492 P.2d at 661 (minimal relevance of convictions to credibility).

168. *See* Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 2031 (2016) (mentioning social scientific and doctrinal developments).

169. *See* KAN. STAT. ANN. § 60-421 (2024) (carving out situation where the person on trial has introduced evidence to establish their own credibility); MONT. R. EVID. 609 (applying to all witnesses).

170. MONT. R. EVID. 609 commission's comments (rejecting this form of impeachment "most importantly because of its low probative value in relation to credibility" and adding that the Commission "does not accept as valid the theory that a person's willingness to break the law can automatically be translated into willingness to give false testimony").

171. *See infra* Part III.B.1.

172. *See* Reply Brief of Petitioner on Review at 17, State v. Aranda, 550 P.3d 363 (Or. 2024) (No. SC S069641), 2023 WL 1966919, at *17 [hereinafter Pet'r Reply Br.] ("[T]o the extent defendant and *amici* are concerned about discriminatory impacts of [Oregon Evidence Code] 609, discretion rather than the current bright-line rule is likely to exacerbate those disparities because of unconscious bias among judges.") (alteration in original); State v. McClure, 692 P.2d 579, 587 n.7 (Or. 1984) (citing legislative history discussing likely variation among judges deciding whether to admit a murder conviction at a murder trial, or a rape conviction at a rape trial); *id.* at 589 (citing descriptions of discretion as a "wild stallion" and a "very slippery concept").

173. *See generally* Vida B. Johnson, *White Supremacy from the Bench*, 27 LEWIS & CLARK L. REV. 39 (2023).

174. *See* Washington v. Vaile, No. 37943-4-III, 2023 WL 3371574, at *2 (Wash. Ct. App. May 11, 2023) ("[O]ur justice system is based on the principle of party presentation, in which the courts, as neutral arbiters, generally decide only the issues raised by the parties.").

175. *See infra* notes 259–64 and accompanying text.

measure, during which judges were permitted to balance probative value against unfair prejudice. All too often, judges admitted proffered convictions as if doing so was mandatory.[176] Judges complained about the balancing test that they were supposed to administer, finding it flawed,[177] "complex,"[178] and "very difficult."[179] If we look beyond Oregon to balancing done in other state and federal courts, we find countless examples where it seems all but impossible that jurors would use the admitted convictions only on the question of truthfulness.[180] The application of the federal balancing test is widely decried as misunderstood, mangled, and muddled,[181] all in ways that tend to favor the prosecution.[182] And in Washington, D.C., where judicial discretion preceded the current regime, the discretionary arrangement is said to have been rejected as "absolutely unworkable"[183] and "chaotic."[184]

This Part will now turn to the other side of the scale and consider the range of options available to judges and others in response to unfair prejudice concerns.

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176. *See, e.g.*, State v. Kyles, 692 P.2d 706, 707 n.1 (Or. Ct. App. 1984) (describing trial court admitting burglary and robbery convictions in a burglary and robbery case after "balancing," with defense counsel's question "Could the Court think of any decision where there are more prejudicial crimes?" not getting an answer); *McClure*, 692 P.2d at 588 (admitting rape conviction in a rape case after balancing, with the judge noting that "the present case was not simply a prior rape conviction being offered in a subsequent rape trial" because it "also involved charges of kidnapping, sodomy and robbery").

177. *See Kyles*, 692 P.2d at 707 n.1 (quoting trial judge as stating with regard to the "importance of the defendant's testimony" criterion that he testified before the Oregon Legislative assembly that the factor should not be used in balancing because the factor was taken into account in setting forth the "formula").

178. *Id.* at 708 n.2.

179. State v. Simmonds, 692 P.2d 577, 579 (Or. 1984) ("The trial judge commented that the balancing test is a very difficult one . . . ."); *see also* State v. Carden, 650 P.2d 97, 100 (Or. Ct. App. 1982) ("The legislature chose to place that difficult balancing decision in the trial court's discretion.").

180. *See McClure*, 692 P.2d at 590 n.9 (giving examples); John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 490–91 (2008).

181. *See, e.g.*, 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, 845–56 (2016).

182. *See id.*; Simon-Kerr, *Credibility by Proxy*, *supra* note 8, at 218 (noting that "courts often strike the balance in favor of admissibility").

183. Molovinsky v. Fair Emp. Council of Greater Wash., Inc., 683 A.2d 142, 148 n.11 (D.C. 1996) ("Such discretion had been recognized a few years earlier in *Luck v. United States*, which had construed an earlier version of section 14-305. The legislative history makes clear that Congress specifically intended to overrule *Luck,* rejecting the *Luck* rule [which gave the trial judge discretion] as 'absolutely unworkable.' H.R. REP. NO. 91-907.") (citation omitted).

184. H.R. REP. NO. 91-907, at 62–63 (1970).

B. Unfair Prejudice

1. Assessing Unfair Prejudice as Part of a Balancing Test

If a constitutional ruling or rule amendment were to permit judicial balancing, judges could turn, as a starting point, to the factors developed by the federal judiciary to assess unfair prejudice. These include the importance of the testimony that might be chilled by the prospect of prior conviction impeachment, and the risk of propensity reasoning when, as in Mr. Aranda's case, the conviction is similar to the charge at trial.[185] Mr. Aranda's case highlights another risk that judges could assess–namely, the risk of unfairly inflaming jurors' emotions.[186]

Judges permitted to weigh unfair prejudice could also draw on empirical research that substantiates their concerns. For example, John Blume's study of exonerees shows the potency of the chilling effect inflicted by this form of evidence.[187] As Blume describes the data, "[i]n almost all instances in which a defendant with a prior record did not testify, counsel for the wrongfully convicted defendant indicated that avoiding impeachment was the principal reason the defendant did not take the stand."[188] Similarly, judges can cite social science research that suggests that jurors use this form of evidence not for its only permitted purpose, but for forbidden ones.[189]

Finally, interested judges could consider scholarly and doctrinal suggestions aimed at striving toward justice in analyses of unfair prejudice. For example, Jasmine Gonzales Rose has suggested that "unfair prejudice" be interpreted to incorporate "racial prejudice,"[190] and she invokes prior conviction impeachment as an example of an area of law where racialized impact is severe and a racial analysis badly needed.[191] In federal court, Judge Weinstein offers an example of a judge who cared about racial prejudice when thinking about unfair prejudice: He excluded the convictions of a bodega worker testifying for the government, in part because of the racially disparate allocation of convictions and a fear that allowing such impeachment could chill entire communities of color from testifying.[192] And, as

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185. *See, e.g.*, United States v. Mahone, 537 F.2d 922, 929 (7th Cir. 1976).

186. *See* United States v. Carneglia, 256 F.R.D. 366, 372–73 (E.D.N.Y. 2009) ("Evidence presents a danger of unfair prejudice when 'it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence,' such as 'prov[ing] some adverse fact not properly in issue or unfairly . . . excit[ing] emotions against the defendant.'") (alteration in original) (citation omitted).

187. Blume, *supra* note 180, at 491.

188. *Id.* at 490–91 ("The relevant state rules of evidence do appear to be the primary determining factor in whether the defendant takes the stand.").

189. *See* Eisenberg & Hans, *supra* note 9, at 1357–61; Thompson v. United States, 546 A.2d 414, 426 (D.C. 1988) ("In weighing probative value against prejudicial effect, courts should inquire as to whether the risk of prejudice has been or can be meaningfully reduced by the trial judge's instructions.").

190. Gonzales Rose, *supra* note 160, at 2271–73.

191. *Id.* at 2287.

192. United States v. Walker, 315 F.R.D. 154, 156 (E.D.N.Y. 2016) ("Were the court to allow cross-examination of the witness on these convictions, it would fail to afford protection to a large population of minorities in New York State who have had contact with the criminal justice system.").

regards the jurisdictions under consideration here, in all but one of them members of the state judiciary have made public commitments to racial justice in the wake of the death of George Floyd.[193] This is an area of the law in which such commitments might be translated into rulings.

James Macleod's work sketching out a broad vision of evidence law offers new dimensions of unfair prejudice that judges might consider.[194] He highlights cases in which judges were at least open to the possibility that prosecution evidence (such as expensive computer-generated imagery) might inflict unfair prejudice where the defense lacks the resources to counter it.[195] Prior conviction impeachment is hard to counter for a variety of reasons: Its impact may be instant and severe,[196] and any efforts by the defense to explain it, or to push back against it with their own witnesses, may open the door to more damaging attacks.[197] A judge concerned about the impact of this form of evidence on the prospect of a fair trial—and indeed, as Macleod suggests, on the rates and disparate impact of plea bargaining[198]—might exclude it because of unfair prejudice concerns.

2. Addressing Unfair Prejudice Even Without a Balancing Test

As with probative value, judges who lament their inability to conduct a balancing test are not powerless as regards unfair prejudice, even if the rules remain as they are. One can start by examining the predominant ameliorative measure invoked in this context: the jury instruction.

As mentioned above, some judges adopt a blithe attitude toward their jurisdictions' instructions, describing them as "precise,"[199] "comprehensible,"[200] and "effective."[201] It is hard to credit these assertions once one unearths the instructions. Mr. Aranda's jury was told, for example, "[i]f you find that a witness has been convicted of a crime, you may consider this conviction only for its bearing, if any, on the credibility of the witness."[202]

The complexity and variety of the meanings of "credibility" was mentioned earlier,[203] and scholars have devoted pages and pages to the topic.[204] Here, as in the model instructions in the rest of these jurisdictions, jurors receive no definitional

193. *See State Court Statements on Racial Justice*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/newsroom/state-court-statements-on-racial-justice [https://perma.cc/2LE7-KKPN].

194. James A. Macleod, *Evidence Law's Blind Spots*, 109 IOWA L. REV. 189, 229–37 (2023).

195. *See id.*

196. *See, e.g.*, Chrisman v. Commonwealth, 348 S.E.2d 399, 403 (Va. Ct. App. 1986).

197. *See* Roberts, *supra* note 75, at 573.

198. Macleod, *supra* note 194, at 193; *see also* Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187 (2018).

199. Peltz v. People, 728 P.2d 1271, 1277 (Colo. 1986).

200. *Id.*

201. *See, e.g.*, Lincoln v. Commonwealth, 2021-SC-0033-MR, 2022 WL 3640914, at *6–7 (Ky. Aug. 18, 2022).

202. Aranda Pet'r Br., *supra* note 39, at 6 (alteration in original).

203. *See supra* Part II.A.

204. *See, e.g.*, Julia Simon-Kerr, *Law's Credibility Problem*, 98 WASH. L. REV. 179 (2023).

help.[205] In addition, they are not told how, under what circumstances, or with what force a particular kind of conviction might shed light on credibility.

Judges interested in doing what they can to mitigate the unfair prejudice of the evidence that they are admitting might look closely at their jurisdiction's model instruction and consider attempting or urging change. This area illustrates a broader point made by former Judge Mark Bennett:

> Jury instructions have been markedly consistent for decades, if not longer, regarding how little jurors are told about determining witnesses' credibility. The standards for determining witness credibility have persisted as if frozen in time, based on myth, and completely unconnected with current knowledge of cognitive psychology. Thus, there are compelling reasons to update current pattern jury instructions on the credibility of witnesses, or, at a minimum, to increase attention given to them and to initiate a discussion about what updated instructions should look like.[206]

This is another way in which examination of the eyewitness identification testimony context might prove fruitful. Like prior conviction impeachment, this is a type of evidence where deep concern developed that the jurors would not be able to make proper use of what they had heard.[207] One responsive measure was the adoption of new jury instructions.[208] Some of the instructions gave relatively short summaries of the kinds of vulnerabilities of this evidence,[209] whereas others were considerably longer, walking the jurors through relevant areas of vulnerability and advising them on how to assess the evidence fairly.[210] A judge might consider jury instructions that go into analogous detail regarding prior conviction impeachment.[211] Even borrowing from what Oklahoma does on eyewitness identification evidence—instructing the jurors to approach it with "extreme care"[212]—might be worthwhile here.

Judges concerned about unfair prejudice have other options, even absent a rule change. As the Colorado Supreme Court indicated, safeguards against unfair prejudice in this context include voir dire, challenges for cause, and peremptory

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205. *See* Compilation of States' Model Jury Instructions on this Issue (on file with author).

206. Mark W. Bennett, *Unspringing the Witness Memory and Demeanor Trap: What Every Judge and Juror Needs to Know About Cognitive Psychology and Witness Credibility*, 64 AM. U. L. REV. 1331, 1371 (2015).

207. Albright & Garrett, *supra* note 152, at 516.

208. *See* Bennett, *supra* note 206, at 1332 (noting that in eyewitness identification "several state supreme courts have relied heavily on cognitive psychological research to craft better science-based specialized jury instructions"); Albright & Garrett, *supra* note 152, at 550 ("The New Jersey Supreme Court released highly detailed jury instructions regarding eyewitness evidence, tailored to particular factors that can arise in eyewitness identifications, together with a very brief overview of human memory processes."); *id.* at 552 ("Over the past decade, there has been a sea change in the jury instructions that courts adopt in states.").

209. *See* Albright & Garrett, *supra* note 152, at 556.

210. *See id.* at 554–56.

211. *See, e.g.*, Aranda Resp. Br., *supra* note 1, at 55–61 (laying out the inferential steps on which this form of impeachment relies).

212. *See* Albright & Garrett, *supra* note 152, at 622.

challenges.[213] After all, if the root of the concern about unfair prejudice is that jurors will make their decisions on an improper basis, perhaps one can guard against that with careful attention to who is selected, and how. These processes sometimes appear to be mere facades: Voir dire may be cursory,[214] challenges for cause may be met with diligent judicial efforts to rehabilitate,[215] and peremptory challenges may act as a tool that supports, rather than protects against, unfair prejudice.[216] But concerned judges could try to do more. They could, for example, familiarize themselves with the scholarship urging that judges resist justifications for peremptory challenges relating to contact with the criminal system,[217] and they could also engage with the scholarship combating prosecutorial assertions that those with convictions must be kept from juries because they just cannot be fair.[218]

3. Getting Rid of the Practice

As with probative value, considerations relating to unfair prejudice might lead to the conclusion that the practice of impeaching those on trial with criminal convictions needs to be abandoned. One type of reason was mentioned already: We may doubt the commitment or capacity of judges to bring about significant improvement via balancing or any other measure. Others will be added in what follows.

First, a balancing test simply may not make any sense in those regimes where credibility connotes "worthiness of belief."[219] In those regimes, the probative value of these convictions is tied to notions of lawlessness and immorality: One gets to the inference that the witness is more likely than they otherwise would be to lie on the stand via an inference that they are the kind of person who violates moral, social, or legal norms.[220] But that sounds virtually indistinguishable from the kind of inference that is deemed unfairly prejudicial, namely that the person has a propensity to violate laws or is a morally bad person.[221] A balancing test where the probative value and unfair prejudice are all but the same would confound.

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213. People v. McKeel, 246 P.3d 638, 641 (Colo. 2010).

214. *See* Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 254 (2005).

215. *See* Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1194 (2003).

216. *See* Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 840–41 (2012).

217. *See, e.g.*, Vida B. Johnson, *Arresting* Batson*: How Striking Jurors Based on Arrest Records Violates* Batson, 34 YALE L. & POL'Y REV. 387 (2016).

218. *See, e.g.*, JAMES M. BINNALL, TWENTY MILLION ANGRY MEN: THE CASE FOR INCLUDING CONVICTED FELONS IN OUR JURY SYSTEM 50–52 (2021).

219. *See supra* notes 57–59 and accompanying text.

220. *See* Aranda Resp. Br., *supra* note 1, at 52 ("The logic of [Oregon Evidence Code] 609(1)(a) requires the jury to draw an adverse inference about the veracity of the defendant's testimony based on his character as a bad person."); Forbis v. Associated Wholesale Grocers, Inc., 513 S.W.2d 760, 768 (Mo. Ct. App. 1974) (declining to find irrationality in the legislature's conclusion that a conviction "evidences some disregard for the legal system").

221. *See* Old Chief v. United States, 519 U.S. 172, 180–81 (1997); Payne v. Carroll, 461

Second, the efforts that a concerned judge might make to inoculate the jury against unfairly prejudicial uses of this evidence may be hopeless. The Supreme Court has identified one context where the inadequacy of jury instructions cannot be ignored: when a confession is admissible against only one of the two people on trial even though it implicates both.[222] This may be a second such context.[223] In addition, each of these nine jurisdictions, other than Colorado, excludes by statute some or all of those potential jurors who have criminal convictions.[224] So, to the extent that one views a fair jury pool in cases like this as including those who themselves have had firsthand experience of a prior conviction, there are obstacles to fairness that are hard to overcome.

Thus, arguments based on unfair prejudice—like those based on probative value—may tend toward protecting those on trial from this practice across the board. And while, as mentioned earlier,[225] probative value concerns motivated states that have banned this practice, all three of them—Montana, Hawai'i, and Kansas—were also moved by concerns about unfair prejudice.[226] These two categories of concerns led not to a tweaking of the rules or their implementation but rather an abandonment of the practice.[227]

S.E.2d 837, 839 (Va. 1995) (mentioning fear that the jury think a witness was "morally undeserving of an award of damages"); Powell v. Commonwealth, 409 S.E.2d 622, 627 (Va. Ct. App. 1991) (noting the risk that the jury might think that the witness is someone "of bad character"); Simon-Kerr, *Credibility by Proxy*, *supra* note 8, at 216 ("If a person is unworthy of belief because social norms deem her unworthy, should it surprise us that jurors have trouble separating worthiness in general (or guilt) from worthiness of belief?").

222. Bruton v. United States, 391 U.S. 123, 135 (1968) ("[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.").

223. *See generally* Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867 (2018).

224. *See* Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 595 (2013).

225. *See supra* notes 166–70 and accompanying text.

226. *See* State v. Santiago, 492 P.2d 657, 660–61 (Haw. 1971) (mentioning the "substantial danger that the jury will conclude from the prior convictions that the defendant is likely to have committed the crime charged" and that this danger "is scarcely mitigated" by a jury instruction, as well as the risk that this "may compel him to forego his privilege to testify"); State v. Stokes, 523 P.2d 364, 366 (Kan. 1974) (purpose of [Kansas Evidence Rule 60-447] was to "permit a defendant to testify in his own behalf without having his history of past misconduct paraded before the jury"); MONT. R. EVID. 609 commission's comments (mentioning risk of undue prejudice, including chilling effect).

227. *See* MONT. R. EVID. 609 (prohibiting this practice); HAW. R. EVID. 609(a) (prohibiting this as regards the person testifying in their defense, unless they open the door); KAN. STAT. ANN. § 60-421 (2024) (same).

C. Power to the Prosecutor

1. Restoring Judicial Power to Exclude

The third critique mentioned earlier is that all discretionary power to balance probative value and unfair prejudice rests with the prosecution, and that the prosecutorial urge to gain a conviction may make a nullity of that balancing power.[228] Whether through constitutional ruling or rule amendment, judicial balancing power could be added. Such a power might mirror that found in Federal Rule of Evidence 403, where a risk of unfair prejudice must substantially outweigh probative value in order to prompt exclusion.[229] Alternatively, it could take the more protective stance of Federal Rule of Evidence 609(a)(1)(B), which requires the prosecution to show that the probative value outweighs the risk of unfair prejudice.[230]

2. Judicial Power to Prevent the Admission of This Evidence Even Without a Balancing Test

Given that some or all of these jurisdictions may decline to make such a change, it is worth considering what power judges have to act as a check on prosecutorial proffers, even with the rules as they are. There are two types of rulings that judges could consider.

First, judges always have the power to rule on constitutional grounds that this kind of evidence cannot come in against a particular witness, even under a rule that appears mandatory.[231] The balancing mandated within a rule like Federal Rule of Evidence 403, for example, is said to embody due process concerns,[232] and those concerns do not disappear when the balancing test does. New scholarship by Colin Miller describes the reluctance of courts to extend the principles contained within *Chambers v. Mississippi* and its progeny[233]—requiring evidentiary rules of exclusion to yield to principles of fundamental fairness—to the context where evidentiary rules mandate *admission*, and urges an end to that reluctance.[234] Mr. Aranda's attorney also invoked that strand of case law, drawing from it the principle that the Due Process Clause prohibits evidentiary rules that "infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve."[235]

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228. *See supra* Part II.C.

229. FED. R. EVID. 403.

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

231. *See* Marshall v. Martinson, 518 P.2d 1312, 1314 (Or. 1974) (overruling trial court decision to prohibit impeachment because of the duty "to see that everybody gets a fair trial").

232. United States v. Carneglia, 256 F.R.D. 104, 113 (E.D.N.Y. 2009) ("Rule 403 is based upon due process objectives to promote fairness and efficiency in trials.").

233. Chambers v. Mississippi, 410 U.S. 284 (1973).

234. *See generally* Colin Miller, *The Constitutional Right to Exclude Evidence*, 12 TEX. A&M L. REV. 317 (2024).

235. Aranda Resp. Br., *supra* note 1, at 61 (alteration in original) (quoting Holmes v. South Carolina, 547 U.S. 319, 324 (2006)).

Second, judges in Oregon have a statutory power to dismiss prosecutions "in furtherance of justice."[236] If they perceive this form of impeachment as antithetical to justice, they could choose or threaten to dismiss the prosecution.

3. Abolishing the Practice

Once again, any step short of abolishing this method of impeaching those on trial may fail to satisfy. Appellate courts have rejected numerous constitutional challenges to each of these statutes. For example, a trial judge who ruled on constitutional grounds that the person facing charges was entitled to a bench trial given the risk that jurors would misuse the impeachment evidence was summarily reversed.[237]

As for the Oregon dismissal statute, its promise has been tightly constrained. On its face, it contains no limitations in scope: "The court may, either of its own motion or upon the application of the district attorney, and in furtherance of justice, order the proceedings to be dismissed."[238] However, appellate judges have interpreted this power in an extremely restrictive way. They have declared this a "drastic remedy,"[239] one that must be "limited to the most severe situations,"[240] one that may be appropriate only when less severe measures have been exhausted,[241] and one that requires "substantial" reasons,[242] because dismissal "frustrates the public interest in the prosecution of crimes, the protection of the public, and the rehabilitation of offenders."[243] There is not one published opinion upholding such a dismissal in Oregon, and, in several cases, the trial court is found to have abused its discretion in granting dismissal.[244] In one such instance, a dissenting appellate judge asserted that the standard of review being applied in cases where trial judges ordered dismissal is not (as it is supposed to be) abuse of discretion but something more like automatic reversal.[245]

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236. OR. REV. STAT. § 135.755 (2024).

237. People v. McKeel, 246 P.3d 638, 639 (Colo. 2010).

238. OR. REV. STAT. § 135.755 (2024). Note that the case law seems to indicate that a defense motion is also permissible. *See* State v. Hadsell, 878 P.2d 444, 446–47 (Or. Ct. App. 1994). *See generally* Anna Roberts, *Dismissals as Justice*, 69 ALA. L. REV. 327, 358 (2017) (discussing judicial constructions of the Oregon dismissal statute).

239. State v. Adams, 738 P.2d 988, 991 (Or. Ct. App. 1987).

240. *Id.*; *see also* State v. Sharp, 559 P.2d 930, 931 (Or. Ct. App. 1977) ("Dismissal is a severe action with the possibility of unforeseen consequences to the unseen public.").

241. *See* State v. Vasquez-Hernandez, 977 P.2d 400, 405–06 (Or. Ct. App. 1999) (reading that requirement in from a different statute, because "[o]therwise, the public's interest in having crimes prosecuted for the benefit of public safety and order is frustrated").

242. *See id.* at 406–07 (Warren, S.J., dissenting) ("A trial court that dismisses a case in the interests of justice must articulate substantial reasons for that decision that should generally involve consideration of the defendant's substantive and procedural rights and of the public's interest in having the law enforced.").

243. *Id.* at 406 (Warren, S.J., dissenting).

244. *See, e.g.*, *id.*

245. *Id.* (Warren, S.J., dissenting) ("As the state points out in its brief, our decisions under [the Oregon dismissal statute] are unusual because we nominally apply an abuse of discretion standard but in fact routinely reverse trial courts when they dismiss cases over the state's

IV. THE IMPLICATIONS OF CRITIQUE AND CHANGE

This Article has identified three types of concerns about these regimes and has suggested responsive changes. But to stop here would be incomplete. This final Part will describe two additional sets of considerations, suggest that they are necessary parts of thinking about any such changes, and explain ways in which they can refine and help us choose between the possible routes to change.

Part IV.A will examine ways in which discussions of change can be sharpened by abolitionist insights, including the concern that certain types of reform can sanitize and entrench harmful systems. Part IV.B will suggest that it is also crucial to think about the implication of academics in the provisions critiqued here. We are not lab scientists observing specimens. We are deeply implicated, in part because the concepts endorsed by these provisions are concepts that we reinforce in our teaching and writing, including through our key linguistic terms. Efforts to create change will be more effective if informed by both sets of considerations.

A. Caution About Abolitionist Concerns

Abolitionist work suggests that responding to the concerns laid out above with discrete reform proposals might be counterproductive.[246] By presenting this area of the law as a particularly problematic and fixable phenomenon, one might entrench and sanitize the broader systems of which this is a microcosm.[247]

Thus, one is left with the challenge of figuring out how to respond productively to the pressing calls for change within these judicial opinions in a way that avoids the risk of shoring up the broader system by isolating one area as ripe for reform.[248]

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objection. Our apparent presumption that a dismissal is reversible presents a stark contrast to the normally deferential nature of the abuse of discretion standard."); *id.* at 76 ("The majority thereby makes express the implication that the state draws from our cases: if a trial court dismisses a case over the state's objection, it will be reversed, no matter how carefully the court has followed our teachings. Because I cannot join in this final step in the process of negating a statute that has been part of this state's law since [the 1800s], I dissent.").

246. As described in one recent account, abolitionists "work toward eliminating prisons and police, and building an alternate and varied set of political, economic, and social arrangements or institutions to respond to many of the social ills to which prison and police now respond." Amna Akbar, *Teaching Penal Abolition*, LAW & POL. ECON. PROJECT (July 15, 2019), https://lpeblog.org/2019/07/15/teaching-abolition/ [https://perma.cc/52EC-6H2W].

247. *See* Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1643 (2019) ("[E]fforts to reform criminal legal processes in order to attempt to realize idealized visions of justice are doomed to simply further entrench existing injustices if they are not accompanied by more transformative demands."); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 42–43 (2019) ("Efforts to fix the criminal punishment system to make it fairer or more inclusive are inadequate or even harmful because the system's repressive outcomes don't result from any systemic malfunction. Rather, the prison industrial complex works effectively to contain and control black communities as a result of its structural design. Therefore, reforms that correct problems perceived as aberrational flaws in the system only help to legitimize and strengthen its operation.").

248. *See* Maneka Sinha, *Radically Reimagining Forensic Evidence*, 73 ALA. L. REV. 879, 946 (2022).

To address that problem, this Subpart suggests that in framing and selecting between proposals for change, two efforts be made to respond to abolitionist work. First, this issue should be presented as a case study, indicative of broader phenomena rather than an isolated area in need of taming.[249] By presenting this area as part of a web of related phenomena, one avoids obscuring the broader abolitionist point about the pervasiveness of injustice in our current systems. And second, one should pay careful attention to what sustains this practice—the assumptions and the myths. By exposing the pervasiveness of legal fictions and of mythology acting as the "mortar of the . . . system,"[250] one challenges the notion that it is abolitionists who are naïve dreamers.[251] If one clings to the premise that the existing system is necessary, one needs to rely on a variety of legal fictions and assumptions to paper over the cracks. If one releases the premise, one is free to look with more accuracy at the system as it actually works.

The rest of this Subpart will explore ways in which these considerations might help us shape and choose among critiques and efforts at change. If proposals heed these two inquiries, the potential for change goes far beyond these nine rules and into the heart of the criminal and evidentiary systems.

1. Probative Value

As was mentioned above,[252] in their mandatory admissibility as markers of deficient credibility, convictions are given a weight and a meaning that they lack. One can certainly make that point, as has been done by many judges. But one could take those same kinds of arguments—about their inadequacy as markers of guilt, and of comparative guilt—and use them to question whether convictions possess the weight and meaning attributed to them throughout the system: in charging, for example, or bail requests, sentencing, or other consequences of conviction. The implications are not small because without the conviction and its assumed meaning, the system could not continue.

Similarly, one could highlight, as was done above, the disconnect between assertions of probative value and the social science on truth telling.[253] But in doing so, one could highlight this kind of disconnect throughout the evidentiary and criminal systems. Jasmine Gonzales Rose and Alex Nunn, for example, have pointed out numerous areas of evidence law where the insights of social science are

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249. *See* Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis*, 120 MICH. L. REV. 1199, 1215 (2022) (describing the way in which "[c]ollective organizing around the plight of one individual can [serve as] a case study for the rationale for abolishing prisons altogether").

250. *See* Uviller, *supra* note 12, at 777 (suggesting that "myth is the mortar of the justice system").

251. *See* Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), https://jacobin.com/2017/08/prison-abolition-reform-mass-incarceration [https://perma.cc/5SF9-V8CD] (stating that, to some, abolition is "unworkably utopian and therefore not pragmatic").

252. *See supra* II.A.

253. *See supra* notes 145–49 and accompanying text.

disregarded.[254] As for the criminal system, one can think of the theories of punishment, for example, whose role is foundational not just to punishment but also to prosecution,[255] and one can point to challenges that the social sciences pose to their validity.[256] Again, showing the pervasiveness of disregard of research on issues that criminal and evidentiary law purport to care about may provoke useful questions about the validity of these areas of law.[257]

These ideas can help us with the selection and framing of proposals for change. Expert testimony was mentioned above as a way to give jurors something to work with other than stereotypes and assumptions in assessing whether a conviction sheds light on a witness's credibility.[258] It is easy and tempting to propose an expert or a jury instruction any time that a problem emerges, without engaging with the inaccessibility of either the perfect expert or the perfect instruction to those who may need them most, whether that inaccessibility lies in the cost of retaining an expert or the skill and resources needed to make successful use of an instruction or an expert.[259] A tool is only as good as the hands in which it lies. Ideally, one would use this kind of proposal to highlight how pervasively the provision and non-provision of experts, and of adequate counsel, has come to reinforce race- and class-based subordination.[260]

In terms of assumptions that sustain this practice, it is worth exposing and challenging the assumption that a conviction connotes an unworthy and immoral character. It is worth exposing the lack of support offered for that kind of assumption. And it is worth trying to understand that the system may need that kind of assumption in order to continue. If things were otherwise, the treatment of those with convictions might be widely understood as intolerable. Again, rather than being naïve dreamers, it is the abolitionists—freed from pressures to make the system palatable—who are able fully to acknowledge the humanity of those with convictions, and fully to acknowledge the harm done by those acting in the name of the criminal system.

Finally, one can explore the ways in which this area of the law rests on an assumption that the crucial variable dictating whether one has a conviction is guilt, as opposed to, for example, resources. Those overseeing the criminal system have every incentive to wish away the role of resources, because it may not be palatable

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254. *See generally* Gonzales Rose, *supra* note 160; Nunn, *supra* note 146.

255. *See, e.g.*, Roberts, *supra* note 238, at 375.

256. *See, e.g.*, William W. Berry III, *Capital Felony Merger*, 111 J. CRIM. L. & CRIMINOLOGY 605, 632 (2021) ("[O]ne may conclude that the death penalty does not deter future crime. Certainly, the social science evidence points in this direction—the most one can say in favor of deterrence is that the evidence is inconclusive about whether the death penalty actually deters future crime.").

257. *See* McLeod, *supra* note 247, at 1638 ("[T]he realities of the criminal legal process are starkly at odds with . . . theoretical justifications [such as retributivism, deterrence, and expressivism]."); *id.* at 1617 ("[A]bolitionists are committed to justice grounded in experience rather than proceeding primarily from idealized and abstract premises with little attention to how those ideals are translated into actual practices.").

258. *See supra* notes 152–62 and accompanying text.

259. *See* Elizabeth F. Loftus, *Eyewitness Science and the Legal System*, 14 ANN. REV. L. SOC. SCI. at 5 (2018) (describing the cost of expert witnesses).

260. *See* Gonzales Rose, *supra* note 160, at 2287–88.

or lawful to have a system whose protections depend on resources.[261] Yet the disparities are pervasive and profound, and the willingness of the system to proceed as if they were nothing unsettles the notion that it is abolitionists who are living in fantasyland.[262] If one is freed from the notion that the status quo has to continue, one can dispense with the fictions that prop it up.[263] One can look frankly at the disparities and assess whether a system of that sort is tolerable.[264]

2. Unfair Prejudice

This area of the law can also act as a case study of various pervasive phenomena relating to unfair prejudice. These include the seductive power of the ameliorative measure that, upon closer examination, is a fallacy and belied by social scientific or other data. That applies to jury instructions in this and other contexts,[265] but it also applies to other stages of the criminal and evidentiary processes. For example, a judge taking a guilty plea is tasked with making sure that the plea is voluntary, given the constitutional protections at stake.[266] Guilty pleas, however, are widely understood to be coercive.[267]

This area of the law can also serve as a case study of methods by which the voices of those involved in the criminal system are silenced,[268] and as a case study of the inescapability of bias.[269] As the government argued in Mr. Aranda's case, judicial

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261. *See* Griffin v. Illinois, 351 U.S. 12, 19 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.").

262. *See* McLeod, *supra* note 247, at 1637 (describing work by local organizers to build "a national movement that serves to denaturalize common assumptions about crime and punishment"); Berger et al., *supra* note 251, (describing concerns that abolition "is unworkably utopian").

263. *See, e.g.*, McLeod, *supra* note 247, at 1615 ("Justice in abolitionist terms involves at once exposing the violence, hypocrisy, and dissembling entrenched in existing legal practices, while attempting to achieve peace, make amends, and distribute resources more equitably."); *id.* at 1616 (mentioning that "conventional accounts of legal justice emphasize the administration of justice through individualized adjudication and corresponding punishment or remuneration (most often in idealized terms starkly at odds with actual legal processes)").

264. *See* Morgan, *supra* note 249, at 1219 ("Abolitionist thinking . . . surfaces what is so often taken for granted in traditional legal analysis of legal rules—that is, whether existing laws and legal standards function to uphold racial, gender, class, and disability-based hierarchies.").

265. *See supra* notes 199–206 and accompanying text.

266. *See* Brandon L. Garrett, *Why Plea Bargains Are Not Confessions*, 57 WM. & MARY L. REV. 1415, 1418 (2016).

267. *See* Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855, 895 (2019) ("Both courts and scholars alike have written about the coercive nature of plea bargaining as a practice . . . .").

268. *See* Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449 (2005); Bennett Capers, *Bringing up the Bodies*, 2022 U. CHI. LEGAL F. 83, 86–89 (2022).

269. *See* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1197 (2015) ("The deep, structural, and both conscious and unconscious entanglement of racial degradation and criminal law enforcement presents a strong case for aspiring to abandon criminal regulatory frameworks in favor of other social regulatory projects, rather than aiming for more modest criminal law reform.").

discretion does not offer an escape from the kinds of stereotyped thinking and disparity that the mandatory rules facilitate; it just offers another variation on that theme.[270]

So too, when one thinks of reforms, one can try to shape and frame them so that they illuminate the web of broader concerns of which this is just one instance. Jury instructions that would alert jurors to potential vulnerabilities in this evidence have the potential to inform the courtroom conversation and to offer to the community representatives knowledge and power that they would otherwise lack. But discussions of jury-related reforms need to emphasize key points: First, like many courtroom reforms, they hinge on the skill and resources of (unequally resourced) counsel; second, the vast majority of cases do not make it to trial;[271] and third, the inadequacy of instructions is just one dimension of the limitations affecting juries as decision-makers. Juries, for example, are a whittled down, nonrepresentative slice of the populace,[272] vulnerable to bias,[273] and apt to range far beyond the admitted evidence in their decision-making.[274]

That, in turn, brings us to the question of sustaining mythology. The system has to perpetuate the fiction that pleas are voluntary because the Constitution demands it, and our system relies on pleas.[275] Similarly, however deep the concerns about the jury, the system cannot jettison it because it is a constitutional entitlement.[276] Thus, there is every incentive to wave away concerns—to assume that jurors are fair and that they follow their instructions. We engage in the myth that instructions work because our theory of trial depends on it.[277] That makes sense if one cannot conceptualize an alternative to criminal law and criminal trials. Abolitionist thinking, and its invocation of different horizons,[278] allows us to drop the fictions and examine the system as it really is.[279] It allows us to examine a system reliant on coercive pleas

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270. *See* Pet'r Reply Br., *supra* note 172, at 17.

271. *See* Anna Roberts, *Criminal Terms*, 107 MINN. L. REV. 1495, 1513 (2023).

272. *See* Roberts, *supra* note 224, at 594–99.

273. *See, e.g.*, 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, 207 (2010) (discussing study designed by the authors that found, "[f]irst, . . . that participants held implicit associations between Black and Guilty [and] [s]econd, . . . that these implicit associations were meaningful—they predicted judgments of the probative value of evidence").

274. *See* Capers, *supra* note 268, at 97–98.

275. *See* Lafler v. Cooper, 566 U.S. 156, 169–70 (2012) ("[C]riminal justice today is for the most part a system of pleas, not a system of trials.").

276. *See* U.S. CONST. amend. VI.

277. *See* Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983) ("[T]he crucial assumption underlying the system of trial by jury is that juries will follow the instructions given them by the trial judge."); Thompson v. United States, 546 A.2d 414, 425 (D.C. 1988) ("The jury is presumed to follow the trial judge's instructions. Moreover, as the prosecutor forcefully argued on appeal in this case, this is a crucial assumption, for our theory of trial depends on the jury's ability to do so.").

278. *See* Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544, 1557 (2022).

279. *See* McLeod, *supra* note 247, at 1642–43 ("Criminal justice—the idea that criminal conviction and punishment render justice in the aftermath of harm—appears to be a delusion, grounded in ideology rather than attention to actual criminal prosecutions and their aftermath.

and consider whether that is tolerable. It allows us to examine a reality where jurors do not comply with their instructions and consider whether that is tolerable. It allows us to examine the profound nature of jury bias and consider whether a system that holds such decision-makers up as the gold standard is tolerable.[280] It allows us to reject the choice between racially subordinating legislation and racially subordinating judging and reach for something different.

3. Power to the Prosecution

Even while highlighting the vast power of the prosecution in these jurisdictions, and the multiple examples of that power being abused, one can seek opportunities to present this as a case study on both fronts. In an array of other contexts, prosecutors exercise great power with little accountability.[281] In an array of other contexts, one can observe a failure of prosecutors to do more than pursue convictions, despite their duty to do justice.[282] And in an array of other contexts, one can observe them using their power to silence voices and make guilty pleas seem unavoidable.[283]

If one urges, as a response, that judges should take more seriously their power—at least in some jurisdictions—to dismiss in the interests of justice, one can do so in a way that attempts to unsettle assumptions that help to sustain the system. One can force into the courtroom a discussion of justice and how one might conceive of it beyond the narrow confines of conviction and punishment.[284]

Finally, one can use this topic as a way to question whether we are (as some assert) in an era of "progressive prosecution"[285] and perhaps expose the dominance of this phenomenon, or even its existence, as a myth. Prior conviction impeachment, after all, is a tool that prosecutors are free to reject, and an array of justifications would support that decision: racially disparate impact, risk of wrongful conviction,[286] predictable misuse of evidence, lack of legitimate use of evidence, and so on. Yet there is no sign that this has ever happened.

To equate the criminal legal process with justice is to insist upon an idealist notion of what criminal punishment will deliver, without accounting at all for the experiences of those whose lives it touches.").

280. *See* Roberts, *supra* note 271, at 1513.

281. *See, e.g.*, Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503, 1514–17 (2015).

282. *See* Paul Butler, *Gideon's Muted Trumpet*, N.Y. TIMES (Mar. 17, 2013), http://www.nytimes.com/2013/03/18/opinion/gideons-muted-trumpet.html [https://perma.cc/WN9Z-GD8L] (opining that the duty to do justice is "just words on paper").

283. *See, e.g.*, NAT'L ASS'N OF CRIM. DEF. LAWS., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 5, 16 (2018) [hereinafter THE TRIAL PENALTY].

284. *See* JOCELYN SIMONSON, RADICAL ACTS OF JUSTICE: HOW ORDINARY PEOPLE ARE DISMANTLING MASS INCARCERATION 168–71 (2023) (describing ways in which alternative conceptions of justice can be pushed into courtrooms).

285. *See, e.g.*, Jenny Roberts, *Defense Lawyering in the Progressive Prosecution Era*, 109 CORNELL L. REV. 1067, 1067 (2024); Judith L. Ritter, *Making a Case for No Case: Judicial Oversight of Prosecutorial Choices – From In re Michael Flynn to Progressive Prosecutors*, 26 BERKELEY J. CRIM. L. 31, 40 (2021).

286. *See* Blume, *supra* note 180, at 493.

B. Caution About Our Implication

Part IV.A explored the need for caution in discussing reforms because of the risk that one ends up entrenching, sanitizing, or obscuring harmful systems or system components. This Part ends with an additional type of caution that is needed in proposing reforms, and it will be explored in the context of that most frequent source of reform proposals—namely, academics. If we examine some of the problematic assumptions that are relied upon and furthered by these provisions and, thus, that help inspire reforms—assumptions about permanent criminality, moral unworthiness, and the appropriateness of trusting the prosecutor's judgment—we find that they are not alien to academic discourse but rather are regularly reinforced by it through both our explicit and our unstated propositions. Thus, even as we consider reform possibilities, we should consider the extent to which they might be hampered by our own assertions and commitments.[287]

This Part returns to the three types of concerns investigated throughout this Article, illustrating ways in which mainstream academic discourse endorses problematic themes under each heading. Perhaps we should not be surprised since, as teachers, we shape the thinking of those who leave us and populate the system. Regardless, we should be aware of the risk that in our writing and teaching we fuel what we decry.

1. Probative Value

Part II discussed concerns related to the probative value that these provisions (and sometimes the judges who apply them) attribute to convictions.[288] These include assumptions that convictions correlate to something that we might call crime commission; that convictions (particularly felony convictions) are meaningful indicators of credibility, in part because they reveal morally bad character; and that conviction marks one as a bad or guilty person who can usefully be contrasted with the good or innocent person who lacks convictions. It is perhaps particularly problematic when these assumptions are endorsed by judges since those working in courtrooms are on notice of a variety of factors that complicate these assumptions.[289] Academics, too, are on notice of such factors, and yet their mainstream discourse frequently seems to endorse—whether explicitly or implicitly—these same sorts of ideas. This Subpart will explain this point with a discussion of the three components of probative value mentioned above.

a. Assumptions of Guilt

For a conviction to be used to impeach, a necessary assumption is that the conviction marks commission of a crime. Only with that assumption in place can one

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287. *See* MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 4 (2021) ("[W]hen we set about trying to transform society, we must remember that we ourselves will also need to transform. . . . We are deeply entangled in the very systems we are organizing to change.").

288. *See supra* Part II.A.

289. *See supra* notes 82–87 and accompanying text.

move on to the further assumption that this reveals a willingness to violate laws or norms. As discussed above, in a hint here and there in judges' words, we find the seed of an argument that might unsettle this assumption,[290] and littered throughout appellate judicial opinions are reminders of the impact of inadequate counsel on the likelihood of legal success.[291] Yet judges are mostly silent on this issue, even though they are on notice of the role of counsel, pre-trial detention, evidence such as prior conviction impeachment, and the trial penalty[292] in bringing about convictions without robust adversarial litigation or fact-finding.[293] They may worry about the impact of prior conviction impeachment when discussing a pending case, but once a conviction is finalized those reliability concerns seem to get erased.

Academics, too, are on notice of a variety of factors that threaten the reliability of convictions as markers of "crime commission" and often decry them.[294] But when we discuss convictions, all too often those concerns are erased.[295] Sometimes that takes the form of explicit assertions about the reliability of convictions and the notion that they "are necessarily the product of proof beyond a reasonable doubt."[296] And sometimes it takes more implicit forms. Note, for example, the way in which professors often begin their criminal law courses with the case *In re Winship*,[297] which emphasizes the unique and crucial nature of the proof beyond a reasonable doubt standard in criminal law, finding it to be a constitutional requirement.[298] Leading with that case can have the effect of suggesting that this highest protection is guaranteed and that important values are consequently served, despite the overwhelming predominance of the guilty plea as the source of convictions in the United States and the far lower standards of "proof" that exist in that context.[299]

Another way in which academics could be said implicitly to endorse the notion that a conviction implies crime commission is through their core vocabulary terms, which often erase the distinction. One of the most common terms in criminal legal academic discourse is "offender," which is frequently used in uncomplicated fashion despite its core ambiguity.[300] It could refer to someone who has been convicted of a crime or someone who has committed a crime, and yet criminal legal academics frequently use it without specifying which of these ideas they are invoking: These two notions get merged, as if when a conviction exists, one can assume commission.[301] That is a practice that Black's Law Dictionary endorses, since its definition envelops the group of those who have been convicted of crimes within those who have committed them.[302] There is no room for anyone who may have been

290. *See supra* notes 77–81 and accompanying text.
291. *See supra* notes 82–87 and accompanying text.
292. *See, e.g.*, THE TRIAL PENALTY, *supra* note 283, at 24.
293. *See* Blume, *supra* note 180, at 493.
294. *See* Anna Roberts, *Convictions as Guilt*, 88 FORDHAM L. REV. 2501, 2510–11 (2020).
295. *See id.* at 2531.
296. *See id.*
297. 397 U.S. 358 (1970).
298. *Id.* at 364.
299. *See supra* notes 80–82 and accompanying text.
300. *See* Roberts, *supra* note 271, at 1511–12.
301. *See id.*
302. *Offender*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Someone who has

convicted absent crime commission. As in the prior conviction impeachment context, we might harbor doubts about the conviction-production process. But once a conviction is in place, academics frequently talk in ways that assume crime commission, mentioning, for example, the need for rehabilitation of "offenders," "offenders" being better than the worst thing they have ever done, or noting that even "offenders" change.[303]

b. Assumptions of Bad Character

Another feature of these provisions, and of some judicial opinions applying them,[304] is that they treat convictions—and particularly felony convictions—as indicators of bad or immoral character. These provisions assume a lasting character for willful rules violation, with the power to predict a willful violation of the prohibition on perjury.[305] This stance posits that one does not need the kind of contextual information and judicial scrutiny that would be available in a balancing analysis[306]: Instead of context, all we need to know is the crime of conviction, and we will be able to see whether it is one of the crimes that correlates to a lasting character imbued with immorality and, thus, deceit. And, in some states, this character trait is assumed to last forever.[307]

Even though these kinds of assumptions might be in tension with ways in which academics explicitly discuss the meaning of convictions, they reveal themselves in unstated premises underlying our common academic terms. Thus, for example, in our common usage of the word "felon" (as opposed to, for example, "person with a felony conviction") we appear willing to adopt, or risk adopting, the notion that people with felony convictions can usefully be grouped together as people who share a character trait.[308] We talk about "offenders," "sex offenders," and "violent offenders" as if these are groups with a shared essence or lasting character revealed by their convictions.[309] Their character, we imply, is one that is inherently violative of laws and norms. Thus, just like the rules drafters in these nine jurisdictions, we

committed a crime; esp., one who has been convicted of a crime.").

303. Roberts, *supra* note 294, at 2537.

304. Some judges question this kind of chain of inferences. *See supra* notes 55–56 and accompanying text.

305. *See* State v. McClure, 692 P.2d 579, 584 (Or. 1984) (mentioning "a present disposition to adhere to any norm, including that of telling the truth").

306. *See* State v. Carden, 650 P.2d 97, 100 n.2 (Or. Ct. App. 1982) ("If the evidence has some probative value, but also presents difficulties . . . the judge must determine whether the value of the evidence outweighs, or is outweighed by, the offsetting considerations. We sometimes call the exercise of this kind of judgment 'discretion.' Its exercise requires the judge to weigh the value of the evidence in light of all the circumstances of the particular case, and his conclusion, if it is reasonable, will not be disturbed on appeal. Precedent is of little value in reviewing such cases, because even when cases involve similar issues and similar types of evidence, the other factors which may properly influence the trial court's ruling are highly variable.") (citation omitted).

307. *See supra* notes 3–4 and accompanying text.

308. *See* Roberts, *supra* note 271, at 1521–22.

309. *See id.* at 1514–21.

imply that we do not need contextual information or individual scrutiny regarding the convictions.

This kind of assumption surfaces even in language that is ostensibly benign and progressive. Take, for example, the word "redemption," which is gaining traction within progressive legal discussions.[310] A "right to redemption" is sometimes urged in the context of those who have been imprisoned,[311] but, of course, redemption occurs only if one has sinned.[312] Similarly, the uncritical use of the word "rehabilitation" as something to be urged for those with convictions conveys an embedded assumption that there is something wrong with you—something we can detect through the fact that you have a conviction—and something that we can try to fix.[313] Thus, within ostensibly benevolent discourse is the same embedded assumption that helps to fuel these provisions. It is possible that the more we use these terms that emphasize the sin and the faults of those with convictions the more we obscure, for example, the profound economic and racial disparity involved in who ends up with one.

c. Assumptions of Relative Culpability

Another troubling thing about these provisions and the judicial opinions applying them is an assumption—sometimes explicit and sometimes implicit—that a conviction is not only a marker of guilt but an indicator that your guilt (and bad character) separates you meaningfully from a person without a conviction, who is innocent and of good character.[314] The purported probative value rests, in other words, on *relative* culpability and would collapse if willful rule violations were the norm. We see few, if any, objections from these judges to the assumption of evenhanded application of the law.[315]

Of course, this is a problematic assumption, since as academics we are on notice of the disparate impact of the criminal law—that it falls on certain groups harder and more often than others. We arrest some, we prosecute some, and we convict some. These actions may be more closely related to race and class than to what one might call guilt.

And yet, like these legislatures and judges, we all too often perpetuate the notions conveyed in these nine jurisdictions: that there exist "the guilty" and "the innocent,"[316] and that the law lays bare the division between these groups in a way

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310. *See, e.g.*, Panel, Unshackled: Stories of Redemption and Hope in Post-Conviction Work in Parole and Clemency Cases, Ann. Meeting, Ass'n of Am. L. Schs. (Jan. 5, 2024).

311. *See, e.g.*, Terrell Carter, Rachel López & Kempis Songster, *Redeeming Justice*, 116 NW. U. L. REV. 315, 318 (2021).

312. *See* Michael Pinard, *Race Decriminalization and Criminal Legal System Reform*, 95 N.Y.U. L. REV. ONLINE 119, 132 (2020).

313. *See* Roberts, *supra* note 271, at 1523.

314. *See* Ashton v. Anderson, 279 N.E.2d 210, 213 (Ind. 1972) ("It is not to be supposed that the testimony of a witness who is morally depraved and an habitual law breaker will, as a rule, be given the same credit as a witness who is of known moral character.").

315. Judge Weinstein offers a counterexample in the federal system. *See* U.S. v. Walker, 315 F.R.D. 154, 156 (E.D.N.Y. 2016).

316. *See* Roberts, *supra* note 294, at 2533 (describing academia's often narrow view of

that is detached from economic and racial disparity in, for example, policing, prosecution, judging, and defense lawyering. We thus risk erasing those disparities and their contribution to patterns of conviction.

The simplest example is the use in academic discourse of "law-abiding" to refer to those who have no conviction.[317] We also sometimes exhibit a capacity to erase economic and racial disparity in a way analogous to legislatures and judges treating convictions as reliable markers of people as guilty, as contrasted with the innocent norm. When academics treat crime conviction as synonymous with crime commission—for example, when they glide back and forth between the two using the word "offender"—part of what is accomplished is an erasure of the economic and racial disparity that contributes to racially disparate patterns of conviction. We normalize or sanitize the disparity in those patterns by treating them as patterns of crime commission.

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Pulling these points together, one can view academics as doing the same kind of thing that the provisions do—namely, treating a conviction as sufficient information to enable a judgment about character. We resemble the legislatures and some of the judges, in that our words suggest that we know what a conviction—or a conviction of a certain sort—means.

One can imagine incentives to adopt these probative value assumptions in the courtroom. First, it might be uncomfortable for judges to think that they are enforcing arbitrary and unjust laws with potentially devastating effects. Second, for a judge squarely to confront whether a conviction can bear the weight that is placed on it, or whether those with convictions really do have bad characters, might make the day-to-day work in the courtroom—jailing, imprisoning, and carving up families, for example—hard to tolerate. So, too, in academia. Given that we train those who uphold the system, and frequently work in partnership with them to keep our law schools running, there may be incentives to adopt these assumptions.

2. Unfair Prejudice

The discussion above highlighted several dimensions of the unfair prejudice problem posed by these provisions: the ways in which they encourage rather than protect against propensity inferences and inflammatory reactions; the ways in which they erase the racial and economic unfairness that might have contributed to—and might be increased by the use of—these convictions; and the allure of ameliorative assumptions that might assuage the concerns of the court (or legislature). Common forms of academic discourse exhibit each of these same phenomena.

As mentioned in the probative value discussion above, core legal academic terms perpetuate the idea that a criminal record can mark someone as having the character or essence of someone who breaks laws (or at least certain laws): Those terms

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"the innocent").

317. *See id.* at 2507.

include "offender," "violent offender," and "sex offender." If we speak in terms that suggest a propensity to break laws, we pave the way for provisions that do the same.

Core academic terms and approaches also echo the kinds of inflammatory thinking that these provisions facilitate. Recall that these provisions are arguably most damaging to those—like Mr. Aranda, or like those with "violent" convictions—who have the most stigmatizing records, and, indeed, that Indiana's provision is limited to convictions of that sort.[318] These provisions could be read as throwing them to the wolves.[319] Of course, academic writing often appears to take the opposite approach, decrying, for example, the many restrictions and degradations imposed on "sex offenders."[320] But sometimes a different attitude emerges in our article titles,[321] and, indeed, the uncritical adoption of the term "sex offender" suggests a comfort with the idea that this is a group that is meaningfully distinct and that has accurately been designated by the state as distinctly bad.[322] Indeed, in some instances, academics are explicit about their desire to carve stigmatized groups of people out of their otherwise strongly felt commitments, as scholars such as Benjamin Levin and Kate Levine have described.[323] Perhaps relevant here, too, is the choice by criminal law professors to emphasize as substantive areas within their course not those charges that are most common, but those charges that are among the most stigmatizing: homicide and rape. This could be read—and has been read—as communicating a message that this is where the criminal law is really needed.[324]

Finally, faced with the tension between these mandatory provisions and their self-conception as administrators of justice, judges frequently succumb to ameliorative assumptions about their capacity to address the unfair prejudice. Hence the implausible claims that these instructions are precise, comprehensible, and effective.[325] As academics, we, too, dabble in ameliorative assumptions that could be said to paper over stark problems. It is not unusual, for example, to read academic work that briefly notes (often without support) some version of: "of course most prosecutors are striving for justice,"[326] "of course most defendants are guilty,"[327] or, as will be discussed below,[328] that we are in an era of "progressive prosecution."[329]

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318. *See supra* note 29 and accompanying text.

319. *See* Simon-Kerr, *Credibility by Proxy*, *supra* note 8, at 208 ("Our search for courtroom liars is guided by the loose assumptions that prior acts involving untruthfulness reveal credibility, and that the more serious, morally offensive, or historically reputation-destroying a prior criminal conviction is, the more probative it will be.").

320. *See* Roberts, *supra* note 271, at 1539.

321. *See id.* at 1519–20 (giving examples).

322. *See id.* at 1517–19.

323. *See* Benjamin Levin & Kate Levine, *Redistributing Justice*, 124 COLUM. L. REV. 1531, 1531 (2024) ("Many left-leaning academics and activists who may critique the criminal system writ large remain enthusiastic about criminal law in certain areas—often areas in which defendants are imagined as powerful and victims as particularly vulnerable.").

324. *See* Ristroph, *supra* note 81, at 1664–71.

325. *See supra* notes 199–201.

326. *See, e.g.*, DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 5 (2012).

327. *See* Roberts, *supra* note 294, at 2532 (giving examples).

328. *See infra* text accompanying notes 335–43.

329. *See supra* text accompanying note 285.

As mentioned above,[330] just like the judges, we operate under incentives to adopt such assumptions: We train the prosecutors and judges, and they lock up the defendants. Our institutions support the prosecutors and laud the judges.

3. Power of the Prosecutor

One of the effects of these provisions is to leave it entirely up to the prosecutor whether a conviction is admitted. The ability of the judge to oversee, and potentially override, that choice is stripped away, and, if there is to be any individualized weighing of any of the factors mentioned above, it must be done by the prosecutor. What might aid the project of making these provisions palatable is a sense that one can trust the prosecutor's conduct, accuracy, integrity, intentions, wisdom, and vision of justice. If those appear robust, one might conclude that judicial oversight is unnecessary.

Common academic assertions—both explicit and implicit—vouch for these qualities. First, we find examples of explicit support for prosecutors' behavior and judgment. As mentioned above, even while addressing certain undisputable concerns about law enforcement, it is not unusual for scholars to assert that most prosecutors are striving toward justice.[331] Second, we find implicit endorsements of prosecutorial judgment in widespread academic use of terms denoting crime commission in stages of a case that precede adjudication. Thus, it is common for academics to refer to someone merely facing charges as an "offender" and to discuss "crime commission" or "recidivism" in the context of a mere charge.[332] The prosecutor's labeling of the person is enough, and the necessity or even usefulness of a judicial process is erased, just as it is by these mandatory impeachment provisions. Similarly, it is common for academics to label as a "victim" the person alleged to have been harmed by crime—even though that term's legal definition involves the crime's actually having happened.[333] Again, the prosecutorial judgment denominating this person a "victim" appears sufficient and the adjudicative role unnecessary. As we endorse the prosecutor's judgment, we may pave the way for rule makers to do the same.[334]

As a final example, academics have embraced, rather eagerly, the concept of "progressive prosecution." While some adhere to the view that this is a contradiction in terms,[335] and that the quotation marks need to stay in place,[336] for many others the "quotation marks dropped," and the claim was adopted as entity.[337] Scholars declare that we are in an era of "progressive prosecution,"[338] and they focus not on whether

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330. *See supra* Part IV.B.1.c.

331. *See, e.g.*, MEDWED, *supra* note 326, at 5.

332. *See* Roberts, *supra* note 271, at 1510.

333. *See id.*

334. We also pave the way for "victims' rights" provisions such as the Oregon one that was central to Mr. Aranda's case. *See* Anna Roberts, *Victims, Right?*, 42 CARDOZO L. REV. 1449, 1456 (2021).

335. *See, e.g.*, Maybell Romero, *Rural Spaces, Communities of Color, and the Progressive Prosecutor*, 110 J. CRIM. L. & CRIMINOLOGY 803, 817 (2020).

336. *See* Roberts, *supra* note 271, at 1525–26.

337. *See id.* at 1527.

338. *See, e.g.*, Roberts, *supra* note 285, at 1067; Ritter, *supra* note 285, at 40.

the concept exists but how it is best carried out.[339] However, this area of the law (like many others) illustrates the contestable nature of this branding. Prior conviction impeachment represents a tool to coerce pleas, a practice with stark racially disparate consequences, a passport to abuse by both jurors and prosecutors, a tool that flies in the face of social science findings, and one that contributes to wrongful convictions. Perhaps one of the "progressive prosecutors" might have been expected to announce an abandonment of the practice, as has been done by one—in a way—with peremptory challenges.[340] Despite at least one scholar urging this,[341] it does not appear that any of them have done so. Indeed, prosecutors have vigorously opposed restrictions on prior conviction impeachment.[342]

Reflecting on the extent to which we buy into the notions that fuel and are fueled by these provisions may help to make change efforts more grounded and productive. And rather than just attempting to shed those notions, it is productive to think about where they may come from. For just as one can imagine that judges are drawn to assumptions about those who pass through their courts (that they are morally bad and are dishonest, for example), and about the ameliorative potential of fixes within the system, so, too, those incentives are likely to exist for us. Every day we send students out into the legal system, as prosecutors and judges, for example, and every day our scholarly institutions work with the system. If the system has been misjudging and harming people, and there is no obvious way to fix it, then we have been doing harm and are likely to continue to do so.[343] For those of us who train prosecutors, the notion that prosecution is progressing from the harms of the past to something more promising may be attractive.

CONCLUSION

The judges who speak out about these provisions are right that they are problematic. It is important to expose them and, in doing so, to expose some of the many ways in which change might be attempted.[344] As we choose between those many options, two considerations can help us make wise decisions. First, the importance of acknowledging abolitionist concerns that reform done without awareness of the broader context may be counterproductive. And second, that our own implication in the currents underlying these provisions may create obstacles to the very things we seek.

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339. *See* Roberts, *supra* note 271, at 1527.

340. *See* Anna Roberts, *Models and Limits of Federal Rule of Evidence 609 Reform*, 76 VAND. L. REV. 1879, 1888–89 (2023).

341. *See* Steven Zeidman, *Some Modest Proposals for a Progressive Prosecutor*, 5 UCLA CRIM. JUST. L. REV. 23, 43 (2021).

342. *See* Roberts, *supra* note 340, at 1889.

343. *See* Ristroph, *supra* note 81, at 1692.

344. *See* Morgan, *supra* note 249, at 1214 (describing ways in which abolitionists "do not ignore the urgent needs facing communities experiencing the brunt of state violence; rather, they see these needs as informing priorities").