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## THE DEVASTATING IMPACT OF PRIOR CRIMES EVIDENCE AND OTHER MYTHS OF THE CRIMINAL JUSTICE PROCESS

LARRY LAUDAN\* & RONALD J. ALLEN\*\*

We concur in the general opinion of courts, textwriters and the profession that much of this law [concerning exclusion of evidence of prior crimes] is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counterprivilege to the other. . . . [Nonetheless] [t]o pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice.

—Justice Robert H. Jackson for the United States Supreme Court<sup>1</sup>

*This Article argues that there is very good reason to believe that the misshapen stone should indeed be extracted and that the result would be a considerably less grotesque structure. There is abundant empirical evidence that prior criminal convictions weigh heavily in jurors' decisions about acquittal and conviction. That same empirical work suggests that jurors' learning directly through the evidence that defendant has been convicted of prior crimes makes very little difference to conviction rates. This seeming paradox is examined in considerable detail. Understanding how and why it arises suggests that the tendency in American law to suppress information about prior crimes (except under special circumstances) is a self-defeating strategy that not only lacks a convincing epistemic foundation but may also be responsible for the inadvertent conviction of innocent defendants. Arguably, it is often not the admission of prior crimes evidence that is unfairly prejudicial so much as its exclusion.*

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<sup>1</sup> *Michelson v. United States*, 335 U.S. 469, 486 (1948).

## I. INTRODUCTION

## A. ANALYSIS AND BACKGROUND

In the majority of legal systems in the developed world, triers-of-fact are routinely made aware of the prior convictions of the accused. In the United States, the admission of evidence of prior crimes is much more difficult, facing a multitude of hurdles. According to Federal Rules of Evidence (FRE) Rule 404, prior crimes categorically cannot be used to show character in order to prove “action in conformity therewith” or to show a propensity to illegal acts (unless defendant triggers a discussion of character), and they must also pass the Rule 403 balancing test, which rules out such evidence if the judge concludes that it is substantially more unfairly prejudicial than probatory. If a defendant takes the stand, prior convictions can be used as evidence that he is a liar under Rule 609—subject to the exceptions spelled out in Rule 404(b)—but generally not as evidence that he committed the crime with which he is charged.<sup>2</sup>

The exclusion of prior crimes is not an occasional quirk of the American legal system. It is the rule rather than the exception. In nine out of ten jury trials of defendants with prior convictions in which the defendant does not testify, the jury never learns about the prior convictions through evidence.<sup>3</sup> Even in trials where the defendant takes the stand, the jury learns of his priors only about half the time. Since more than half of defendants who go to trial have prior convictions, we are talking about massive exclusions of prima facie relevant evidence.

Certain aspects of American evidence law—and considerable American evidence scholarship—are founded on a widely-shared set of beliefs concerning the admission of prior crimes of the defendant. Most of these beliefs are predicated on hypotheses about the perverse inferential psychology of jurors when it comes to evaluating prior crimes information. Others are founded, not on presumed juror psychology, but on dubious epistemic hypotheses about the probatory strength of prior crimes evidence. Moreover, there is substantial handwringing about the difficult choice defendants face about taking the stand in their own defense: if a defendant takes the stand, he risks being destroyed by his prior convictions; if he does

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<sup>2</sup> Rules 413–415 also create more particular exceptions to the exclusion of prior crimes. FED. R. EVID. 413–415.

<sup>3</sup> See *infra* text accompanying note 47. It is important to stress that the focus in this Article is entirely on prior convictions. Accordingly, little will be said here about whether prior arrests and prior acquittals or alleged bad acts that never led to convictions should be admitted. Interesting as such questions are, the data utilized here do not illuminate them. For more on this issue, see *infra* notes 56 and 80.

not take the stand, he is destroyed by his silence in the face of plausible accusations.<sup>4</sup>

Consider a few of these hypotheses:

H<sub>1</sub>: Telling jurors about the prior crimes of a defendant dramatically increases their disposition to convict him and thereby puts at unnecessary risk many innocent defendants with criminal records.<sup>5</sup>

H<sub>2</sub>: Information about prior crimes is, in most cases, only marginally relevant to rational decisions about defendant's guilt in the instant case.<sup>6</sup>

H<sub>3</sub>: Hence, in the Rule 403 balancing test between probative value and unfair prejudice, prior crimes evidence should generally be excluded as being substantially more unfairly prejudicial than probative.

H<sub>4</sub>: Whenever prior crimes evidence is introduced for a specific purportedly non-propensity purpose allowed under Rule 404(b) (e.g., motive, opportunity, intent, and so on), and accompanied by a limiting

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<sup>4</sup> As it turns out, this is not a dilemma for the defendant with priors but it is for the defendant without priors, as the failure to testify is highly associated with guilty verdicts. This provides empirical support for the relative plausibility theory of juridical proof, as we discuss *infra* note 71. On the relative plausibility theory, see Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 NW. U. L. REV. 604, 609 (1994).

<sup>5</sup> The eminent legal scholar John Henry Wigmore once claimed: "The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge." JOHN HENRY WIGMORE, *EVIDENCE* § 194 (3d ed. 1940). Along the same lines, the U.S. Supreme Court in *Michelson v. United States*, 335 U.S. 469, 475–76 (1948), commented:

The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a logical perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.

Andrew Morris goes so far as to opine that the admission of propensity evidence under Rule 404(b) "produces grave consequences for thousands of criminal and civil defendants." Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181, 184 (1998). The issue surely is not whether the consequences are grave but whether they are inferentially appropriate.

<sup>6</sup> Calvin Sharpe claims, on the strength of no cited empirical data whatever, that "the probative value of all character evidence, including evidence of other crimes, is often not very great, while it usually will have substantial prejudicial effects." Calvin W. Sharpe, *Two-Step Balancing and the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof*, 59 NOTRE DAME L. REV. 556, 560 (1984). He continues: "Whatever the true probability that commission of a crime will be followed by other criminal acts, it is highly unlikely that the aggregate intuitions of a jury will produce an accurate assessment of the worth of such evidence. Furthermore, even if statistics indicating the probability of a second theft, given a first, were available, a jury's ability to ascribe to such evidence only its properly proportioned weight is highly questionable." *Id.* at 562 n.27.

instruction, juries generally ignore the instruction and construe the prior convictions as evidence of a criminal propensity.<sup>7</sup>

H<sub>5</sub>: The defendant with prior crimes faces a Hobson's choice in selecting his trial tactics: either (a) he testifies, in which case his prior crimes are more likely to be revealed and thus, by H<sub>1</sub>, his prospects of a conviction will be greatly enhanced or (b) he does not testify, in which case he faces a negative inference from his silence, despite judge's instruction to the contrary. Defendants—especially those with prior convictions—will often elect silence, believing that the potential adverse inference from silence would be less incriminating than the revelation of their prior crimes would be.<sup>8</sup>

One way or another, all of these hypotheses undergirding the conventional wisdom about prior crimes evidence are empirically testable. More than that, they have already been tested and most stand refuted or, at least, rendered highly implausible. That notwithstanding, many judges and legal scholars have been largely indifferent to, or unaware of, the empirical evidence, apparently persuaded that their own intuitions, grounded in decades of judicial experience, provide ample basis for the status quo, however clumsily cobbled together it may be.

If these familiar hypotheses were true, they would constitute a triple whammy directed against the admissibility of prior crimes evidence. H<sub>2</sub> would have it that in most criminal cases the evidence of prior crimes

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<sup>7</sup> Supreme Court Justice Robert Jackson insisted that “all practicing lawyers know to be unmitigated fiction” that “prejudicial effects can be overcome by instructions to the jury.” *Krulewitch v. United States*, 336 U.S. 440, 453 (1948). Justice Stewart concurred, insisting that certain kinds of evidence “are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, *whatever* instructions the trial judge might give.” *Bruton v. United States* 391 U.S. 123, 138 (1967). Judge Learned Hand held that asking jurors to lay aside such information as prior crimes requires an effort that “is beyond, not only their powers, but anybody's else.” *Nash v. United States*, 54 F.2d 1006, 1007 (1932). Michael Saks confidently notes that “[w]hen informed about a defendant witness's prior crimes for the permissible purpose of evaluating credibility, jurors use the information for the impermissible purpose of inferring the likelihood that the defendant committed the currently charged crime.” Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 3, 26 (1997).

<sup>8</sup> This conventional analysis is neatly summed up in the observation by Theodore Eisenberg and Valerie Hans that “testifying is risky for defendants with prior records because the records may be revealed on cross-examination.” Theodore Eisenberg & Valerie Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1373 (2009). As our subsequent analysis will make clear, this claim is half right: testifying does indeed make it more likely that defendant's prior crimes will be revealed but their revelation, should it occur, does little to increase significantly the (already high) risk that the testifying defendant with prior crimes will be convicted.

scarcely qualifies as relevant. That notwithstanding, insists  $H_1$ , jurors are prone to inflate their genuine probative value. Finally,  $H_4$  undercuts any hope that jurors' inferential mischievousness with prior crimes evidence can be kept in check by a sternly worded instruction. If all this were true, it would make sense to admit prior crimes evidence only under compelling circumstances. But if, as we believe can be plausibly inferred from existing empirical studies, none of these hypotheses (save  $H_4$ ) is true, then a serious reconsideration of current exclusionary practices concerning prior crimes evidence should be in order.

This Article will show that the extant empirical evidence about how real juries respond to evidence of prior crimes raises grave doubts about the soundness of two of these five claims (specifically,  $H_1$  and  $H_3$ ). As for  $H_2$ —the alleged marginal probative value of prior crimes information—we are not persuaded that the *relevance* or its probative value of a prior crime is chiefly what should be at stake. Finally, the tactical dilemma,  $H_5$ , founded as it is on the soundness of  $H_1$  to  $H_4$ , is likewise badly flawed.

#### B. THE INITIAL CONUNDRUM

Let us begin with a mildly surprising and seriously troubling pair of statistics. Both come from a relatively recent large-scale study sponsored by the National Council of State Courts (NCSC) of 358 criminal trials by jury in four different urban jurisdictions of the country. The first set of statistics is this:

(1A) The acquittal rate for those defendants with prior crimes, whose prior crimes were not admitted as evidence to the jury was 23.9%<sup>9</sup>, while

(1B) The acquittal rate for those defendants with prior crimes, whose prior crimes were admitted as evidence to jurors, was 20.3%.<sup>10</sup>

The first point worthy of note, although it is by no means the most surprising one, is that juries, fully aware of a defendant's prior crimes, are prepared to acquit in about two cases out of ten.<sup>11</sup> This statistic would appear to give the lie to the idea, entertained in some circles, that admitting evidence of prior crimes is the kiss of death for a defendant. The more

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<sup>9</sup> Daniel Givelber, *Lost Innocence: Speculation and Data About the Acquitted*, 42 AM. CRIM. L. REV. 1167, 1190 (2005). It should be noted here (and below where the NCSC data are referenced) that the NCSC database divided trial results into "acquittals," "convictions," or "hung juries." Analysts of this data set generally adopt the convention that "hung" results are counted as half acquittals and half convictions. Others exclude the hung trials altogether. These differing conventions explain why there are small discrepancies in the results reported by various authors. For descriptions of the data set, see note 71, *infra*.

<sup>10</sup> *Id.*

<sup>11</sup> That compares with the mean acquittal rate in all the trials in the NCSC study (including those of defendants without priors) of about three-in-ten. See *infra* note 71.

intriguing point about this pair of statistics is that, among those defendants who do have prior crimes, the conviction rate among those whose prior crimes never emerge explicitly is only modestly lower than the conviction rate among defendants whose prior crimes become known. Specifically, juries convicted defendants whose prior crimes were unknown to them about 76% of the time and they convicted defendants with prior crimes known to them slightly less than 80% of the time. This appears to reinforce the point that a jury's learning of prior crimes directly through the evidence is not the inflammatory, unfairly prejudicial, conviction-ensuring information it is often depicted as being. While the conviction rates in the two sets are not identical, there appears to have been only a modest increase in the conviction rate when jurors learned directly through evidence of the defendant's prior crimes.<sup>12</sup>

If that is so, the strenuous efforts of legal experts and defense attorneys to restrict the admissibility of prior crimes evidence seem misplaced. Admitting evidence of prior crimes apparently leads to few additional convictions. Under such circumstances, railing against the admissibility of prior crimes on the grounds that they unfairly disadvantage defendants with criminal records is unnecessary hyperbole.

Now consider a second and rather more salient statistic, again from the NCSC study:

(2) The acquittal rate for defendants with no prior convictions was almost twice as great as<sup>13</sup> the acquittal rate for defendants with prior convictions.<sup>14</sup>

Not only is a defendant with no prior crimes about twice as likely to be acquitted as a defendant with priors, but in addition, as we shall see below, having prior crimes turns out to be one of the strongest predictors of a guilty verdict that we have available, stronger even than the testimony of an

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<sup>12</sup> Obviously, the magnitude of change in the acquittal numbers is larger than in convictions because the absolute numbers of acquittals are smaller. Still, the acquittal rate for those with unknown priors is only about 17.5% higher than for those with known priors. In absolute numbers, in 15 out of 74 cases there were acquittals when the priors were known. Givelber, *supra* note 9, at 1190. Had there been only three more acquittals in this subset, the rates would have been almost identical. Thus, even the larger disparity does not suggest that knowledge of priors has a dramatic affect on juries.

<sup>13</sup> Specifically, it is 184% higher. Very similar data are reported by Givelber, *supra* note 9, at 1190 tbl.1 (reporting an acquittal rate 216% higher).

<sup>14</sup> Givelber, *supra* note 9, at 1190. So far as we are aware, Professor Givelber was the first analyst to draw attention to the fact that conviction rates for defendants with prior crimes in the NCSC study were significantly higher than conviction rates for defendants without them, regardless of whether the jury was informed of those priors. "It is whether or not the defendant has a criminal record—not whether the jury learns about it—that has the greatest influence on the acquittal/conviction decision." *Id.*

eyewitness to the crime who fingers the defendant.<sup>15</sup> And it remains a powerful predictor of the jurors' verdict even when the jurors have not been informed of its existence. To put it mildly, this result is puzzling, especially given that (1A) and (1B) entail that a jury, upon learning of the prior convictions of a defendant, is not much more likely to convict him than if the priors had not appeared. In short: jurors are much more likely to convict defendants with priors than those without, even while the jury's being informed of the priors does relatively little to increase the conviction rate.

The message to the hapless defendant with a record of previous crimes seems clear but perplexing: "Given your priors, it's very likely you'll be convicted, but don't worry too much about whether the jury learns about those priors since that makes little difference to the outcome!"

That advice is particularly pertinent if the defendant decides not to testify. In cases where the defendant did not testify and his prior convictions nonetheless became known at trial, the conviction rate was 72.7%.<sup>16</sup> For non-testifying defendants whose priors did not become public, the conviction rate was 71.4%.<sup>17</sup> The moral here seems to be that if a defendant chooses not to testify, it scarcely matters whether his priors become known. How often has defense counsel, having already decided that the defendant will not testify, fought valiantly to have prior crimes excluded under Rules 404 or 403? If these data from the NCSC study are representative, such efforts are largely futile, not because they will fail at excluding the evidence of prior crimes (usually they succeed) but because such exclusion will make little difference to the outcome of the trial. Nor do prior crimes seem to matter much if a defendant does testify. In cases where defendants testify and priors become known, defendants are convicted about 77.8% of the time; when they testify and their prior crimes do not become known, they are convicted about 76.6% of the time.<sup>18</sup> Again, not much depends on the admissions of the priors.

Lest these results seem to strain credibility, we hasten to add that two other studies of long runs of trials, including the classic University of Chicago Jury Project, lead to the same conclusion;<sup>19</sup> to wit, that jurors are much more likely to convict those with prior crimes than those without, even though they do not convict those whose priors have been admitted

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<sup>15</sup> See the discussion of Myers's results below, *infra* notes 49–51.

<sup>16</sup> Eisenberg & Hans, *supra* note 8, at 1381.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> For a discussion of these studies, see *infra* Part II.B.

with a significantly higher frequency than they convict those with priors unknown to the jury.

It will take us a while to get to the bottom of this set of puzzles. When we eventually do, we will discover that existing policies on the admissibility of prior crimes evidence are deeply flawed, because either they are built upon a set of erroneous a priori assumptions about juror inferences or they ignore critical aspects of police and prosecutorial behavior.

## II. EVIDENCE FOR THE MYTHIC CHARACTER OF COMMON ASSUMPTIONS ABOUT PRIOR CRIMES EVIDENCE

### A. WHERE NOT TO LOOK: THIRTY YEARS OF MOCK JURY STUDIES

There have been numerous studies of how mock jurors handle prior crimes information. Most adopt variants of the following design: mock jurors are split into two groups; group (a) is given details of a criminal case—real or imaginary—and asked for a verdict (sometimes involving inter-juror deliberation and sometimes not); group (b) is given the same information but also told that the defendant has a record of prior crimes and asked for its verdict; group (b) is instructed to ignore the information about prior crimes; and finally, conviction and acquittal rates for the two groups are compared.

The results, as they say, are all over the map. Doob and Kirshenbaum reported that group (b) was more likely to convict than group (a).<sup>20</sup> Sealy and Cornish reported that evidence of prior crimes played a role in cases involving minor crimes (especially theft and vandalism) but not in more serious cases (rape and homicide). The latter also found that the introduction of evidence of convictions for dissimilar crimes modestly *reduced* the conviction rate!<sup>21</sup> Hans and Doob claimed that 40% of jurors in group (b) voted to convict while none of the jurors in group (a) voted to convict.<sup>22</sup>

Thompson *et al.* reported that inadmissible priors evidence was utilized by mock jurors only when it was *favorable to defendants*.<sup>23</sup> Caretta and Moreland found that, after deliberation, there was no difference in

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<sup>20</sup> Anthony N. Doob & Hershi M. Kirshenbaum, *Some Empirical Evidence of the Effect of s. 12 of the Canada Evidence Act upon an Accused*, 15 CRIM. L.Q. 88, 90–91 (1973).

<sup>21</sup> W. R. Cornish & A. P. Sealy &, *Juries and the Rules of Evidence*, 1973 CRIM. L. REV. 208, 218.

<sup>22</sup> Valerie Hans & Anthony Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 CRIM. L. Q. 235, 243 (1976).

<sup>23</sup> William Thompson et al., *Inadmissible Evidence and Juror Verdicts*, 40 J. PERSONALITY & SOC. PSYCHOL. 453, 455 (1981).

conviction rates between groups (a) and (b).<sup>24</sup> Wissler and Sachs found that jurors given prior crimes information convicted 75% of the time when the prior crime convictions were similar to the current case, 52.5% of the time when the priors were dissimilar, and that mock jurors with no knowledge of the priors convicted only 42.5% of the time.<sup>25</sup>

Rind *et al.* found that prior crimes information plays a role in conviction decisions about minor crimes but not serious ones.<sup>26</sup> Greene and Dodge reported that group (b) convicted 40% of the time while group (a), ignorant of prior crimes, convicted only 17% of the time.<sup>27</sup> Lloyd-Bostock observed that jurors, given recent and similar priors, had a 66% rate of conviction while group (a) voted to convict 51.47% of the time.<sup>28</sup>

A conscientious judge, faced with having to make a Rule 403 decision about prior crimes evidence, and eager to inform herself by doing a quick and dirty meta-analysis of mock jury studies on the subject, would have to come away empty handed from this congeries of conflicting results. If of a mind to believe that prior crimes evidence has only a very limited effect on jury decisions, there are plenty of studies to back up that prior disposition. If inclined to think that prior crimes evidence scandalizes jury sentiment, there are ample studies to support that conclusion as well.

Apart from the contradictory character of the results emerging from these studies, there is a second powerful reason for doubting some of the generalizations derived from them. The logic driving the design behind most of these mock jury studies deliberately involves giving to mock jurors details of cases, real or fabricated, where the evidence is quite ambiguous and non-decisive.<sup>29</sup> In such cases, adding information about prior crimes can often prove dispositive, nudging jurors over the hump represented by the standard of proof.

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<sup>24</sup> Thomas R. Caretta & Richard L. Moreland, *The Direct and Indirect Effects of Inadmissible Evidence*, 13 J. APPLIED SOC. PSYCHOL. 291, 297 (1983).

<sup>25</sup> Roselle Wissler & Michael Saks, *On the Inefficacy of Limiting Instructions: When Jurors use Prior Conviction Evidence to Decide Guilt*, 9 LAW & HUM. BEHAV. 37, 43 (1985).

<sup>26</sup> Bruce Rind *et al.*, *The Effect of Crime Seriousness on Simulated Jurors' Use of Inadmissible Evidence*, 135 J. SOC. PSYCHOL. 417, 418 (1995).

<sup>27</sup> Edith Greene & Mary Dodge, *The Influence of Prior-Record Evidence on Juror Decision Making*, 19 LAW & HUM. BEHAV. 67, 72 (1995).

<sup>28</sup> Sally Lloyd-Bostock, *The Effects on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study*, CRIM. L. REV. 734, 743 (2000). Lloyd-Bostock claims her results are a "clear" confirmation of a "prejudicial effect," when all the evidence apparently shows is an increase in the probability assigned to guilt by mock jurors when they learn of prior crimes. *Id.* at 753. That increase that may or may not be justified by the probative weight of the prior crimes evidence. *Id.*

<sup>29</sup> Most of the mock jury results summarized above depend on the analysis of "close" cases.

Does this fact exhibit that jurors attribute unwarrantedly potent probatory significance to prior crimes evidence? Pretty clearly, it does not. If one selects or designs cases that are on, or close to, the margin between guilt proved and guilt not proved, then almost any sort of additional inculpatory evidence could be sufficient to change many jurors' votes from acquit to convict. For instance, an additional incriminating eyewitness or an additional piece of inculpatory physical evidence could easily tip opinion in a close case from one outcome to the other. No one would argue that evidence of such tipping shows that jurors give disproportionate weight to the evidence that caused the shift. By definition, if the case—absent additional evidence—is already close to the standard of proof, then any additional relevant evidence may be sufficient to shift opinion, even if jurors do not give excessive weight to it. Given that most real criminal cases are not borderline cases,<sup>30</sup> and that genuinely borderline cases are likely to be tipped by almost any additional inculpatory evidence, we ought not infer from any mock juror study that focuses principally on the role of prior crimes in close cases that jurors generally give disproportionate weight to such evidence.

Of course the fact that we should not infer from these studies that jurors give disproportionate weight to defendants' priors does not mean that they do not do so. It only tells us that, when cases—whether mock or real—without priors are close to the borderline and priors are then added to the mix, thereby shifting the mock verdict from acquittal to conviction, that shift warrants no inference about whether the learning of those priors created a situation that unfairly prejudiced the defendant. What such shifts do show vividly is that, at least among mock jurors, the instruction to draw

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<sup>30</sup> Another myth about criminal justice that is called into question by data is the micro-economic explanation that most cases that go to trial tend to be close. If they are not close cases, the argument runs, a plea bargain or dismissal will often be entered, leaving factually close cases to predominate at trial. This is disconfirmed by at least three sources. First, if cases were close, the requirement of unanimity should produce substantial hung juries, yet the rate for hung juries on all counts hovers around 7.5%. PAULA L. HANNOFORD-AGOR ET AL., NAT'L CTR. FOR STATE COURTS, ARE HUNG JURIES A PROBLEM? 43 (2002), available at [http://www.ncsconline.org/WC/Publications/Res\\_Juries\\_HungJuriesProblemPub.pdf](http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesProblemPub.pdf). Second, close cases should be difficult to decide, yet the average length of jury deliberations in noncapital felonies is three hours, two for misdemeanors, and a rather brief six for capital cases. GREGORY E. MIZE, ET AL., NAT'L CTR. FOR STATE COURTS, STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 38 (2007), available at [http://www.ncsconline.org/d\\_research/cjs/pdf/SOSCompendiumFinal.pdf](http://www.ncsconline.org/d_research/cjs/pdf/SOSCompendiumFinal.pdf). Third, if cases were close, there should be substantial judge-jury disagreement, but there is not; and with regard to what does exist, "[w]e find little evidence that evidentiary complexity or legal complexity help explain rates of judge-jury disagreement. The judges' lower conviction threshold seems to be driving most of the difference." Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven & Zeisel's The American Jury*, 2 J. EMPIRICAL LEGAL STUD. 171, 173 (2005).

no conclusions from known priors about a defendant's propensity to crime is flagrantly ignored. As we will see shortly, such instructions may be likewise ignored in real trials.

#### B. FORTY YEARS OF STUDIES OF REAL TRIALS

More promising and less ambiguous as a data source is a smaller class of empirical studies involving lengthy runs of real trials. In the three that we shall be discussing, questionnaires were given to judges and jurors and records were kept about which cases involved prior crimes evidence and which did not. The first of these is reported in Kalven and Zeisel's classic, *The American Jury*.<sup>31</sup> The second such study, already mentioned, grows out of an ambitious project initiated by the National Center of State Courts and published as *Are Hung Juries a Problem?*<sup>32</sup> It included some 358 felony trials held in four American cities in 2000 and 2001, utilizing detailed trial and post-trial questionnaire data from jurors and judges. Taking a cue from Eisenberg and Hans, we will focus principally on those trials in this study involving defendants with prior criminal records.<sup>33</sup> There were 251 such trials in all.<sup>34</sup> While ostensibly targeted at the problem of hung juries, its data have proven a fertile source for various scholars interested in exploring questions of the impact of prior criminal records on jury outcomes. A third medium-scale study of 201 jury trials in Indianapolis between 1974 and 1976, done by Martha Myers, although less widely cited, will also be discussed.<sup>35</sup>

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<sup>31</sup> HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966).

<sup>32</sup> HANNOFORD-AGOR ET AL., *supra* note 30.

<sup>33</sup> *See* Eisenberg & Hans, *supra*, note 8.

<sup>34</sup> *Id.* at 1371 tbl.1.

<sup>35</sup> Martha Myers, *Rule Departures and Making Law: Juries and Their Verdicts*, 13 *LAW & SOC'Y REV.* 781 (1979).

First a brief summary of the three studies is in order:

**Table 1**

	<i>Chicago</i> <sup>36</sup>	<i>NCSC</i> <sup>37</sup>	<i>Myers</i> <sup>38</sup>
Number of Trials	3,576	358	201
<i>Prior Convictions</i>	<i>Chicago</i> <sup>39</sup>	<i>NCSC</i> <sup>40</sup>	
Defendants with priors	47%	79%	
Defendants without priors	53%	21%	

The rise over thirty years in the proportion of criminal defendants with prior convictions is interesting in its own right but that is not our focus here. By contrast, the following figures are highly pertinent:

**Table 2**

<i>Conviction Rates</i>	<i>Chicago</i> <sup>41</sup>	<i>NCSC</i> <sup>42</sup>
Defendants with priors	75%	76.1%
Defendants without priors	58%	56.1%

Judging by this data, defendants with prior crimes are roughly one-third more likely to be convicted than defendants without such a record—29%

<sup>36</sup> KALVEN & ZEISEL, *supra* note 31, at 47.

<sup>37</sup> HANNAFORD-AGOR ET AL., *supra* note 30, at 32.

<sup>38</sup> Myers, *supra* note 35, at 785.

<sup>39</sup> KALVEN & ZEISEL, *supra* note 31, at 145.

<sup>40</sup> Givelber, *supra* note 9, at 1190 tbl.2.

<sup>41</sup> KALVEN & ZEISEL, *supra* note 31, at 160–61. This pair of statistics is not quite what it purports to be. For a set of arcane reasons, Kalven and Zeisel defined, for purposes of this table, a “defendant without priors” as one who (a) had no priors or (b) took the stand or (c) managed to hide his priors from the jury. Any defendant who failed to satisfy at least one of those conditions was counted as a “defendant with priors.” *See id.* at 159 n.17. Although their questionnaire solicited information directly about which defendants did and did not have prior convictions (in the usual sense of that term), they did not include that data in this computation.

<sup>42</sup> Givelber, *supra* note 9, at 1190. Our own analysis of the NCSC data suggests that these figures are closer to 73.5% and 52% respectively. Still, the gap in conviction rates between defendants with and those without priors is similarly striking on either method of tallying the results.

more likely in the Chicago study and 36% more likely in the NCSC study. Put differently, a defendant without priors was almost twice as likely to be acquitted as a defendant with priors was, even if the jury was not informed of those priors.<sup>43</sup> This discrepancy in acquittal rates shows up, even though in the NCSC study most defendants with priors did not testify, and even though the prior crimes of non-testifying defendants became known to jurors through evidence in only about one case in ten.

**Table 3**

<i>Giving Testimony</i>	<i>Chicago</i> <sup>44</sup>	<i>NCSC</i> <sup>45</sup>
Defendant with no record	91%	60%
Defendant with record	74%	45%
<i>Testimony &amp; Priors</i>	<i>Chicago</i> <sup>46</sup>	<i>NCSC</i> <sup>47</sup>
Jury learns of priors if defendant testifies	72%	52%
Jury learns of priors if defendant does not testify	13%	9%

<sup>43</sup> The Chicago Jury Project showed a 25% acquittal rate for defendants with priors versus 42% for those without, and the NCSC study's rates were 23.9% versus 43.9%.

<sup>44</sup> KALVEN & ZEISEL, *supra* note 31, at 146.

<sup>45</sup> Eisenberg & Hans, *supra* note 8, at 1357. These figures come from their summary of the NCSC results. The actual figures that appear in their Table I suggest that defendants with no priors testify 62% of the time. *Id.* at 1371.

A strong word of caution is in order with respect to the typicality of some of the data we will be citing from the NCSC project. While the sample size of the entire set of trials (358 trials) is impressive enough, as we focus on issues that segment that sample down to smaller and smaller subsets, e.g., "defendants with priors who do not testify and are convicted," the risk increases that these results might not be indicative of general patterns. That is one reason why, where possible, we have sought to include data from the much larger Chicago Jury Project as a way of lending statistical heft to our surmises. Where the Chicago data are unavailable, we utilize the NCSC data standing alone on the assumption that some data are preferable to purely a priori intuitions about (say) whether testifying defendants are more likely to be acquitted than silent ones are.

<sup>46</sup> KALVEN & ZEISEL, *supra* note 31, at 147.

<sup>47</sup> Eisenberg & Hans, *supra* note 8, at 1373–75. Both these figures are almost certainly mildly inflated above the usual norm because of the vicissitudes of Rules 413 and 414. Those rules permit the routine admission of similar prior crimes evidence in cases of rape and sexual assault. Since about 5% of all cases in the NCSC sample fell in this category (we can infer that) in cases not involving sex crimes, these figures would have been even lower than they appear. HANNAFORD-AGOR ET AL., *supra* note 30, at 36 tbl.3.3. Routine admission

One might be inclined to attribute the marked difference between the proportion of defendants with priors who are convicted (76%) and the proportion of defendants without priors who are convicted (56%) to the fact that 29% of the former group have their priors revealed to the jury. The idea might be that jurors—upon learning about the priors of this subset—are much more likely to convict them. Natural as that inference might seem, it is not sustainable, as the next table vividly shows:

**Table 4**

<i>Conviction Rates of:</i>		<i>NCSC</i> <sup>48</sup>
Non-testifying defendants whose priors were unknown to jury		71.4%
Non-testifying defendants whose priors were known to jury		72.7%

Here, the conviction rates for non-testifying defendants with unknown priors and for those with known priors are virtually indistinguishable. Givelber and Farrell, analyzing a slightly larger portion of the NCSC data base than the one just reported, arrived at a similar bottom line: among 177 defendants with priors unknown to the jury, the conviction rate was 78.8%; among 72 defendants with known priors, it was 81.4%.<sup>49</sup>

Virtually the same pattern repeats itself if we look to conviction rates among defendants with priors who do testify:

**Table 5**

<i>Conviction Rates</i>		<i>NCSC</i> <sup>50</sup>
Testifying defendants whose priors were unknown to jury		76.6%
Testifying defendants whose priors were known to jury		77.8%

Whatever else is going on here, we apparently cannot put the large difference in conviction rates between those with priors and those without them down to the revelation of priors. If that explanation were true, then

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of prior crimes in cases where the criminal record itself is one element of the crime (e.g., a felon possessing or purchasing a firearm) likewise distorts the record.

<sup>48</sup> Eisenberg & Hans, *supra* note 8, at 1381 tbl.8.

<sup>49</sup> Daniel Givelber & Amy Farrell, *Judges and Juries: The Defense Case and Differences in Acquittal Rates*, 33 LAW & SOC. INQUIRY 31, 38 tbl.1 (2008).

<sup>50</sup> Eisenberg & Hans, *supra* note 8, at 1381 tbl.8.

we should expect to see a striking difference in conviction rates between those whose priors were admitted and those whose priors were excluded. The data plainly refute that hypothesis.

Consider one last pertinent statistic: in Martha Myers's study of 201 trials, she found that among those going to trial, the average defendant had 2.7 prior convictions. "Juries," she claims, "were more likely to convict if the defendant had numerous prior convictions . . .,"<sup>51</sup> even though in most cases jurors never learned about the priors directly through the evidence. More concretely, she reports a regression coefficient of .182 (significant at  $p < 0.1$  on the verdict) for defendants with prior crimes.<sup>52</sup> In Myers's study, the existence of prior crimes, largely unknown to jurors, was a more successful predictor of conviction than were (a) eyewitness identifications of the defendant, (b) expert testimony against the defendant, (c) the recovery of stolen property, or (d) the recovery of the weapon used in the crime.<sup>53</sup>

How, then, are we to explain the fact that defendants with priors have high conviction rates, whether the jury has been informed of them or not? That is the puzzle for the next Part of this Article.

### III. SOLVING THE MYSTERY OF UNKNOWN PRIOR CONVICTIONS

We can abduct only two plausible explanations for the data that we have discussed. The first focuses on the jury's inferential process and the second on prosecutorial behavior. As to the inferential process, perhaps jurors convict those with unknown priors and with known priors at more or less the same rate because they have already concluded that those defendants whose priors they did not hear about nonetheless have priors that were suppressed. As to prosecutorial behavior, perhaps jurors attach no probatory significance to prior crimes but priors are associated with the strength of the government's evidence, because of prosecutorial or police decisions and resource investments. As we shall see, the end result in each case is the same—the criminal justice system's fetish about excluding prior crimes is ill-conceived.

We have seen that somewhere between half and three-quarters of defendants who go to trial have prior convictions. Jurors are explicitly informed of those priors through evidence about 10% of the time, unless the defendant takes the stand, in which case the revelation rate of priors jumps to about half or even (in the Chicago study) three-quarters. Since taking the stand was unusual among defendants with priors, it is fair to surmise that

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<sup>51</sup> Myers, *supra* note 35, at 792.

<sup>52</sup> *Id.* at 793 tbl.2.

<sup>53</sup> *Id.*

jurors learned of the defendants' prior convictions from the evidence in only about a third of the cases in which defendants have them. Despite that lack of information, jurors convicted defendants with priors significantly more often than they convicted defendants without a record and they convicted defendants with unknown priors about as often as they convicted defendants with known priors.

One possible solution to the conundrum is that jurors, even if never informed of the existence of prior convictions, can fairly readily deduce that information for themselves. Consider the typical behavior of a defendant with a clean record. He is free to announce that he has no prior convictions,<sup>54</sup> he can take the stand himself, and he can introduce character witnesses, without fear of such acts unleashing the prosecutor to present evidence of prior crimes.<sup>55</sup> By contrast, the defendant with priors provisionally excluded by the judge will do none of these things. He cannot point to a clean record, since he does not have one; he cannot call character witnesses without fear of the prosecutor then introducing his priors as pertinent to whatever opinion or reputation evidence the witness offers; and, if he takes the stand, he runs the risk of triggering the introduction of his prior convictions.

In short, if the defendant has no prior convictions, the jury is apt to be told that in no uncertain terms. If the defendant has prior convictions and the judge has authorized their admission, once again the jury will know the situation. But even when the judge has excluded a defendant's priors, the latter must adopt a very different profile during trial than a defendant without priors would, a profile that should leave few jurors in doubt that he has prior convictions, even if the latter go unmentioned explicitly in the trial.<sup>56</sup> In short, jurors will generally know when the defendant has no prior

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<sup>54</sup> As Givelber and Farrell note: "[W]hen the defendant has no [criminal] record, the jury is likely to hear this fact." *See supra* note 49, at 47 n.10.

<sup>55</sup> In the Kalven-Zeisel study, 25% of all defendants presented character witnesses. KALVEN & ZEISEL, *supra* note 31, at 137.

<sup>56</sup> We say "explicitly" because other rules of evidence facilitate such inferences by allowing in evidence of, or relevant to, prior crimes evidence. Rules 413-15 admit prior bad acts which could be prior crimes, as does Rule 404(b). It should be noted that many of the grounds for admission of prior bad act evidence under Rule 404(b) actually involve a propensity inference even though they are supposedly admissible on some other ground than propensity. For a discussion, see RONALD J. ALLEN ET AL., EVIDENCE: TEXT, PROBLEMS, AND CASES 244-57 (4th ed. 2006) and Thomas J. Reed, *Admitting the Accused's Criminal History*, 78 TEMP. L. REV. 201 (2005). As Reed puts the point: "Someone . . . might jump to the conclusion that courts admit uncharged misconduct in a backhanded, under-the-table way that conceals the real agenda of the criminal justice system. That view might lead . . . [them] to conclude that a judicial conspiracy exists to convict the accused on the basis of bad character while seeming to prohibit conviction on account of bad character." *Id.* at 248.

record and can usually infer when he is a serial felon. Short of curtailing a defendant's right to present evidence of his clean record (which would be wholly unacceptable), there seems to be no way to protect the defendant with prior convictions from jurors' inferences that he has them.<sup>57</sup>

Jurors, we submit, could plausibly make such inferences as these. The key question, however, is whether they do so. We have two kinds of evidence that seems to bear out the hypothesis in question. This hypothesis finds support in Sally Lloyd-Bostock's study of more than 200 mock trials, in which the acquittal rates for those defendants with known "similar" and "recent" priors—attributes to which jurors are thought to give special

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There are other rules of evidence that have similar effects, such as the common law *res gestae* rule. See, e.g., Edward J. Imwinkelreid, *The Second Coming of Res Gestae: A Procedural Approach to Untangling the "Inextricably Intertwined" Theory for Admitting Evidence of an Accused's Uncharged Misconduct*, 59 CATH. U. L. REV. 719 (2010). It may be the case that these other rules largely overwhelm the exclusionary rule of Rule 404.

<sup>57</sup> Alex Stein has offered a quite different analysis of the situation of the innocent defendant with prior convictions. Knowing that his priors may be revealed if he testifies (and aware that such a revelation may make his conviction more likely), he will nonetheless be disposed to "tell his story." According to Stein, "the defendant's readiness to risk impeachment by prior convictions might signal credibility." ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 165 (2005). He adds: "By testifying about his or her innocence, the defendant conveys to fact-finders that his or her exculpatory testimony is true and that there are no specific reasons for disbelieving it . . . . Because the defendant's signaling is costly, it indicates the defendant's credibility as a witness . . . ." Moreover, adds Stein, "many guilty defendants prefer to separate from the pool by not testifying in their defense," because the true stories told on the stand by the innocent defendant are more likely to stand up to prosecutorial cross-examination than the fictitious stories concocted by the guilty: "Reasons discrediting the defendant's self-exonerating testimony predominately appear in cases featuring guilty defendants." *Id.* Stein's argument amounts to the claim that innocent defendants with prior convictions have a strong incentive to testify since their willingness to run the risk of revelation of their priors betokens to the jurors the truth and sincerity of their testimony, whereas those who are guilty will not take the stand because their false stories would likely be shattered by cross-examination.

This analysis is directly disconfirmed by the data. According to the NCSC data, (a) 45% of defendants with priors testified; (b) most defendants with priors who chose to testify were convicted (77%) and thus were presumably guilty; and, most tellingly, (c) a testifying defendant with priors was more likely to be convicted than was a non-testifying defendant with priors (77% versus 72%). The inconsistency of this data with Stein's argument is obvious. First, if testifying signals innocence, the signal is not being received by the jury that convicts 77% of those with priors who testify. Second, according to the anti-pooling argument, those who do not testify are predominantly guilty and those who testify predominantly innocent, yet in the NCSC study, juries convicted more of those who testified than those who did not. In other words, it does not follow from any of this data therefore that the guilty avoid taking the stand and the innocent signal their innocence by testifying unless defendants make irrational choices and jury verdicts are highly unreliable. Thus, his argument amounts to an explanation of massive irrationality and a prediction of enormous error rates, all within the confines of an analysis predicated upon rational choice.

probatory weight—were virtually indistinguishable from those whose priors were wholly unknown (77.1% and 77.8% respectively).<sup>58</sup> The second sign that jurors make such inferences is already before us in the form of data patterns from the NCSC study showing that conviction rates for defendants with priors known to the jury are almost indistinguishable from conviction rates of defendants with unknown priors. Supposing that priors are positively relevant to guilt, and assuming no other systematic differences between the cases,<sup>59</sup> we would expect defendants with known priors to be convicted at a much higher rate than defendants without known priors,

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<sup>58</sup> Lloyd-Bostock, *supra* note 28, at 745. In her study of more than 200 mock jurors, presented with an initially weak case, and then told (in most cases) of prior crimes with varying characteristics, the results that emerged are quite contrary to standard intuitions. Here are some of the more salient data:

**Footnote Table 1**

<i>Nature of Known Priors</i>	<i>% Convicted</i>
Priors unmentioned	22.2
Told “no priors”	16.7
Old similar priors	5.6
Recent dissimilar priors	2.9
Recent similar priors	22.9
Old dissimilar priors	2.8

Note that her study does not suffer from the methodological problems of the mock jury studies trying to determine if the use of priors, standing alone, is unfairly prejudicial. She is varying the type of priors. The most curious result on this study is the “Told ‘no priors’” data. One would think that conviction rates in that setting should be considerably lower. One possible—although also possibly ad hoc—response is that in the study the jurors were told only that the defendant “has no previous convictions,” and in the judge’s instructions that “you have heard that the defendant has no previous convictions.” *Id.* at 740. With no exploration of the defendant’s good character, jurors may very well have speculated about conduct that did not result in convictions, and indeed that inference might have been motivated in part by the unelaborated information and instruction. The instruction, “you have heard,” seems to us particularly likely to be viewed as ambiguous. In any event, the complex interaction of decision makers and instructions is well known. *See, e.g.,* Saul M. Kassin & Samuel M. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1046 (1997); Nancy Steblay et al., *The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis*, 30 LAW & HUM. BEHAV. 469 (2006).

<sup>59</sup> In subpart III.C, we explore one possible systematic difference below with regard to state behavior in the face of priors.

unless jurors infer the existence of priors even where they have not been informed of them.<sup>60</sup>

Let us suppose, then, that jurors generally have a good idea which defendants have prior convictions and which have a clean record. The next obvious question is: what do jurors do with such information?

#### A. THE CLEAN-RECORD, GUILT-DEFLATION HYPOTHESIS.

Begin with what may be the simplest hypothesis. Our focus thus far has been on those defendants with prior crimes and their conviction rate. But, of course, the mirror image of this is the set of defendants with clean records and their acquittal rate. If we focus on that question to start with, we might entertain the following hypothesis: we have already noted that defendants with clean records, whether guilty or innocent, have several procedural advantages. Most importantly, they can see to it that their lack of prior convictions is brought vigorously to the jurors' attention. Besides this and other procedural advantages, such defendants likewise stand to gain if jurors, knowing that these defendants have no prior convictions, are more inclined to give them the benefit of the doubt in cases that might go either way.<sup>61</sup> If jurors are likely to be swayed by such considerations, we would appear to have a partial explanation for why the conviction rate for defendants without prior convictions is substantially less than that for serial offenders. We say "partial" because the frequency of close cases, as that term is usually understood, culminating in an acquittal is too low to explain the magnitude of the difference in conviction rates between defendants with

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<sup>60</sup> One possible explanation for the data involving defendants with priors is that motions *in limine* will provide the defense attorney with information about the admissibility of priors, allowing him to make the calculation of the likelihood of a guilty verdict with full information prior to the defendant testifying, and that the predictions about odds of conviction are well calibrated. There are numerous difficulties with this explanation. First, the attorneys' predictions are not just "well-calibrated," they are astonishingly well-calibrated, and thus the story is implausible. Moreover, they lose this astonishing calibration ability when it comes to making decisions about whether defendants without prior records should testify. Second, this explanation requires not just amazing calibration ability but full knowledge. Unfortunately, the latter condition does not exist. It is common practice for judges not to give definitive resolutions to the motions *in limine* that are essential for the explanation. The third problem is that this assumes that the only knowledge of priors will come from their formal revelation at trial. That is false. There are various mechanisms for this information to get out. *See supra* note 56. Fourth, and perhaps most devastating to this speculation, is that it is hard to make sense of a claim that the lawyers are good at calibrating odds of guilty verdicts when most people who go to trial are convicted. In most of those cases, the defendant would have been better off with a plea bargain.

<sup>61</sup> Kalven and Zeisel conjecture that "[t]he jury's broad rule of thumb here, presumably, is that as a matter of human experience it is especially unlikely that a person with no prior record will commit a crime . . ." KALVEN & ZEISEL, *supra* note 31, at 179.

no priors and serial offenders.<sup>62</sup> We should also note, for it matters for the later argument, that if this hypothesis were correct, then there would be little or no justification for a blanket policy excluding prior convictions since, *ex hypothesi*, the de facto role of priors in a trial is not to castigate the serial offender per se but to give a boost to the defendant with a clean record.

#### B. THE SERIAL-OFFENDER, GUILT-INFLATION HYPOTHESIS

As a second hypothesis, consider the flip side of this story. Imagine, as before, that jurors are often able to separate reliably those with and those without prior convictions, even when none is mentioned. When a defendant presents no character evidence or witnesses and no proof that he has never been previously convicted, jurors would be irrational not to infer that he has prior convictions. Suppose, further, that unlike in our first story, jurors are not especially inclined to let even defendants with a clean record off the hook easily.

By contrast, we might suppose, the typical juror is apt to think the worst of a serial offender. He believes—legally or not—that someone with a record of prior crimes is more likely to have committed the instant crime than a person without a record. Accordingly, on this hypothesis, the juror judges the person without a record entirely on the merits of the case but judges the serial offender, in part, by what he imagines to be his criminal past and perhaps by what he projects to be his criminal future, were he acquitted. As in our first hypothesis, jurors do not usually have to be rocket scientists to tell whether the defendant before them is probably a serial offender with priors.

Such a scenario would explain what we have seen in the data, namely, a pattern of strikingly higher conviction rates for serial offenders than for those without any priors. In fact, it explains more than that. Let us return briefly to the puzzling fact from the NCSC study that the conviction rate for non-testifying defendants with priors unknown to the jury (71.4%) is virtually the same as that for defendants whose priors have been introduced into evidence (72.7%). One's first instinct on reading this statistic is to construe this as evidence that jurors pay little mind to priors in reaching their verdict. But if the serial-offender, guilt-inflation hypothesis is right, the proper explanation is quite different. The conviction rates are so close in the two cases not because priors do not matter to juries but because jurors are quite willing to infer the existence of priors from various features of the trial.

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<sup>62</sup> See *supra* subpart II.B.

There is an alternative way of describing what may be going on here. It is conceivable that jurors, having decided that the defendant has already been convicted of a crime (or several of them), conclude not so much that the existence of prior convictions makes it more likely that a defendant committed this particular crime but rather that the existence of those priors implies that a defendant should be adjudged by a less demanding standard of proof than would be used for a person facing his first felony conviction.<sup>63</sup> It is common knowledge that felons with multiple priors are much more likely to offend again (and again) than are those with a clean record.<sup>64</sup> If the standard of proof is understood as a mechanism for balancing the costs of mistakes, here a false acquittal or a false conviction, it would not be unreasonable for jurors to decide that the costs of falsely acquitting a potentially serial felon were greater than the costs of falsely acquitting a person without a record. If they make such a back-of-the-envelope calculation, they will surely arrive at the conclusion that the level of proof necessary to justify convicting a serial felon should be lower than that necessary to convict a person with a clean record.<sup>65</sup> We already know that the prevailing standard of proof of beyond a reasonable doubt is so ambiguous and ill-defined that plenty of latitude is left to jurors to calibrate their construal of its meaning to the peculiarities of specific cases.<sup>66</sup> If this is what is happening, jurors are not necessarily assuming that the existence of prior crimes is relevant in the technical sense that they increase the likelihood of guilt in the instant case but are concluding rather that less proof is necessary to convict someone who has already shown an indifference to the law and his fellow citizens than is appropriate for someone with a previously clean slate.

Under such circumstances, the logic driving Rule 403 is simply inapplicable to the question of prior crimes. That rule is written as if the balancing act required of a judge is one of comparing the probative value of

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<sup>63</sup> See Eisenberg & Hans, *supra* note 8, at 1386. Eisenberg and Hans similarly observe that the NCSC data suggest that “[t]he conviction threshold appears to differ for defendants with and without criminal records.” *Id.*

<sup>64</sup> And in this case the common knowledge happens to actually qualify as knowledge by virtue of being true. See, e.g., Larry Laudan & Ronald J. Allen, *Deadly Dilemmas II: Bail and Crime*, 85 CHI.-KENT L. REV. 23 (2010).

<sup>65</sup> This argument is explored at length in Larry Laudan, *The Rules of Trial, Political Morality and the Costs of Error: Or, Is Proof Beyond a Reasonable Doubt Doing More Harm Than Good?*, LAW & PHIL. (forthcoming July 2011).

<sup>66</sup> The case for the interpretative flexibility of “beyond a reasonable doubt” has been made most cogently by Erik Lillquist in his *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85 (2002); see also LARRY LAUDAN, TRUTH, ERROR AND CRIMINAL LAW ch. 2 (Gerald Postema ed., 2006).

the prior crimes against their prejudicial impact.<sup>67</sup> But if jurors use prior crimes—whether revealed or inferred—not to enhance the likelihood of guilt but to trigger the lowering of the standard of proof, then talk of the relevance, probative value, or non-relevance of priors is beside the point. On this way of looking at things, priors do not, or at least need not, raise the likelihood that defendant committed the instant crime; instead, they lower the bar needed for a conviction. If that sounds vaguely like a case of Tweedledum and Tweedledee, it should not. There is a world of difference between believing that “priors make guilt more probable” and believing that “priors lower the bar for conviction.” The first assertion is essentially a matter of inductive logic (in which questions of evidential relevance are crucial); the second is a matter of fixing an appropriate standard of proof, which—being a question of political morality—has nothing whatever to do with relevance and probative value. Jurors could reasonably believe that the standard of proof should be lower for a serial offender than for a person without any priors, even if they did not believe that the existence of priors significantly altered the probability that defendant committed the crime with which he is charged.<sup>68</sup>

Of course, our two general scenarios are not mutually exclusive. It may be that both are going on routinely in the legal system at the same time: jurors, having enough cues to distinguish serial offenders from those with a clean record, may be disposed both to go harder on a defendant who comes in the former class and to go easier on one in the latter.

There is another statistic worth throwing into our stew. Several mock jury studies report that jurors, when learning of the existence of prior convictions for crimes similar to those in the instant case, are more likely to convict than when they learned nothing about the priors. This is intuitive. More surprising is the fact that some studies report that when mock juries learn of prior convictions for a dissimilar crime, they are less likely to

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<sup>67</sup> FED. R. EVID. 403.

<sup>68</sup> We share this view, although we should note that it is not universally embraced; one concept of “prejudice” includes the effect of evidence on juror utility functions. See ALLEN ET AL., *supra* note 56, at 164–66 (4th ed. 2006). Those who do not share this view might try to change outcomes by instructing the jury as to the utility functions to use—such as do not take into account the possibly deadly consequences of your decisions. The Supreme Court, in *In re Winship*, held that due process requires proof beyond a reasonable doubt in criminal trials. 397 U.S. 358 (1970). This appears doubtful to us if it means a unitary standard no matter what the case is about. The more plausible due process argument is to the effect that the standard of proof in all trials must reflect, as the Court likewise noticed in *In re Winship*, the respective costs of the mistakes that can be made. Since it is plausible to believe that falsely acquitting a serial felon is more costly than falsely acquitting a first-time offender, it follows that a less exacting standard of proof is plausible in the former case, depending upon the relationship between the changed costs of a false acquittal and a false conviction.

convict than when they are told nothing about priors.<sup>69</sup> The current hypothesis would explain this otherwise improbable result. If we suppose that jurors, given no priors at all, nonetheless infer them and accordingly are more willing to convict, we can see why they might convict less often upon learning that the priors are all quite different since their initial inferential extrapolation might well have been to the effect that “defendant has probably committed this sort of crime before.” Learning that hypothesis to be unwarranted, jurors may well be more disposed to acquit than they were before.

The key step in both hypotheses comes with the recognition that the current structure of a criminal trial—its explicit rules as well as its built-in incentives—creates a situation in which jurors can and arguably do distinguish fairly reliably between defendants with priors and those without. Having separated the sheep from the goats, it is foreseeable that they then either reward the one, penalize the other, or both.

For purposes of this Article, it does not matter very much which hypothesis is right or whether it is a mixture of the two. What is common to both is a recognition that the structure of a trial enables modestly savvy jurors to fairly reliably identify the serial offenders. Given that various rules of evidence—especially Rules 403 and 404—were written precisely to protect defendants from jurors making negative character or propensity inferences from prior convictions, such data as we have surveyed make it clear that jurors may routinely make such inferences, despite rules that ostensibly exclude both negative character evidence and unfairly prejudicial evidence. Whether we opt for the clean-record, guilt-deflation theory or the serial-offender, guilt-inflation explanation—or some combination of the two—(1) it is possible that jurors do figure out how to distinguish serial felons from non-serial ones and (2) it is clear that they are coming down significantly harder on the former than on the latter. This is not obviously a bad thing. But good or bad, its occurrence makes nonsense of the elaborate rules that have been put in place to prevent, or at least discourage, the drawing of such a distinction in the context of making a judgment about guilt or innocence. Refusing to admit prior crimes evidence for fear that jurors will over-interpret its significance or derive some propensity inferences from it is, in the current system, self-defeating. Judges may, and often do, exclude evidence of priors in wholesale fashion pursuant to Rules 403 and 404. Still, that will not block jurors from often figuring out who does and who does not have priors nor will it stop them from using that conclusion to shape their verdict.

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<sup>69</sup> Lloyd-Bostock, *supra* note 28, at 746–47.

One key empirical conjecture entailed by our analysis is that if a defendant without prior convictions elects not to testify, then jurors—receiving no signal that he has a clean record—are apt to infer mistakenly that he has priors and will thus be more disposed to convict him. The NCSC data strikingly support this conjecture. As the following table shows, among prior-free defendants, the conviction rate for those who are silent is a whopping 71% higher than the conviction rate for those who do testify. Clearly, the conviction rate for non-testifying, prior-free defendants is virtually indistinguishable from that of defendants with prior convictions. If, as we propose below, prior convictions were presented as a matter of routine, the prior-free defendants who elected silence would no longer be subject to this stiff penalty.<sup>70</sup>

**Table 6**

<i>Conviction Rates for Prior-Free Defendants Who:</i>	<i>NCSC</i> <sup>71</sup>
Testify	41%
Do not testify	70%

<sup>70</sup> Given the analysis in this paper, the mystery is why a defendant with no prior convictions—and his counsel—would deliberately forego the opportunity to make that fact known to jurors. One explanation offered by one of our helpful critics during the presentation of this paper at the Northwestern workshop, goes like this: “Assuming no perjury, there is often very little a guilty defendant could say on the witness stand that will help him. A positive correlation between testifying and acquittals among prior-free defendants reflects that the guilty testify less frequently and thus does not imply causation.” The problem is that in the real world, the assumption should be that a defendant is quite willing to commit perjury. After all, most who testify, with and without priors, are found guilty; and if they are not committing perjury, there is an amazing error rate at trial. Second, a guilty defendant for whom the Government has made a plausible case of guilt really has no choice but to take the stand and commit perjury; therefore the prediction should be that they would readily. By taking the stand, not only do they get to lie, but they increase the probability of demonstrating to the jury their clean record, which looks like it has probative value to fact-finders. Another difficulty with this explanation is that it is entirely unclear why it would only apply to prior-free defendants. It should also apply to those with priors, and the results there are quite different.

<sup>71</sup> These results emerge from our own analysis of the five data sets that constitute the NCSC data. (Our thanks to Jorge Luis Silva for invaluable help integrating the sets.) See HANNAFORD-AGOR ET AL., *supra* note 30.

The data also provide empirical support for the relative plausibility theory of juridical proof. The empirical hypothesis concerning proof beyond reasonable doubt of the relative plausibility theory is that guilt is determined by whether there is a plausible story of guilt and a plausible story of innocence. If there is a plausible story of guilt and no plausible story of innocence, convictions will ensue. It seems likely that cases where defendants do not testify involve cases of essentially no presentation of a defense, thus leaving the prosecution’s case

C. ROUND UP AND CONVICT THE USUAL—AND USUALLY GUILTY—  
SUSPECTS.<sup>72</sup>

There is a third hypothesis that must be explored, however. Although it is quite different from the juror inferential hypotheses, it has similar although not identical implications. It may also operate in conjunction with the prior hypotheses we have considered, thus being a partial explanation. Perhaps higher conviction rates for serial offenders can be explained by the fact that police and prosecutors are keener on locking up serial felons. They thus invest more effort in securing evidence and produce more solid cases. Jurors may not just infer the existence of priors but also judge the case on its own merits regardless of second-guessing about defendants' priors. The data we have been reporting thus may show a correlation between priors and convictions, but not a strong causal relationship. Rather, the prior record is a good predictor of a strong evidentiary case at trial.

Latent in this hypothesis are enormously complicated empirical questions in addition to those concerning police and prosecutorial motivations. For example, one implication of this hypothesis might be that the state (to combine police and prosecutors into one term) applies a differential standard in determining what cases to bring to trial, and that the case against defendants without a record is often less strong than against serial felons. However, one might think that, if the state is especially keen on locking away serial offenders, it would bring to trial any serial offender for which there was a reasonable chance of convicting. With defendants lacking priors, by contrast, the state might give them a pass unless the case was especially strong.

But the strength of a case may look quite different to the state than it does to a jury; there may very well be substantial differences in the surrounding circumstances that the state ignores in looking at the probability of conviction that juries do not. For a whole host of reasons, those without prior records may appear less threatening, less anti-social,

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largely un rebutted. As most cases would not go to trial without a plausible story of guilt, in most of the cases with no defense offered there should be convictions, as the data show. On the relative plausibility theory, see Allen, *supra* note 4, at 609. Another potentially confounding variable is that defendants without priors have more to lose with a conviction than those with priors. Standing alone, this suggests that the chance of conviction should be higher than for those with priors, as those without priors may take riskier cases to trial rather than plea. That is not what the data show, however. Perhaps this is because those without priors, having more to lose, may also invest more in the effort to avoid conviction. This point seems to cut in both directions, thus suggesting the better explanation is the one we give in the text.

<sup>72</sup> With apologies to *Casablanca*.

and so on. Those factors in turn may be associated with other variables—such as race, class, or wealth—that the state may not wish to emphasize in its investigative and charging decisions. The state may pay less attention to such matters and more to the more discrete evidence of the particular act than a jury might.

Similarly, cases are dynamic and not static. A prior record may be positively correlated with the ease with which a case may be built in the immediate preparation for trial. Those variables that perhaps were downplayed at the point of the investigating and charging decisions may very well be good predictors of how rich an evidentiary base can be constructed. The result could easily be that the set of defendants without priors looks, and in fact is, significantly different from that of serial felons.

If this hypothesis is true, then jurors again are simply reacting to the strength of the case, and would not regard prior crimes that they are informed about as particularly relevant as compared to the rest of the evidentiary base—and thus neither is their absence missed. Moreover, as with the previous hypotheses we have explored, fighting to keep priors out of trial is still silly. Priors could be admitted and it wouldn't significantly change conviction rates. Hence this hypothesis, too, speaks to the self-defeating character of Rule 404 and the use of Rule 403 to exclude prior convictions.

Obviously this behavioral hypothesis is compatible with the hypotheses about the jury inferential process. All could be true and partial explanations for what we observe regarding jury behavior. Moreover, this speculation, while quite compatible with the evidence concerning defendants with priors, does not as obviously explain the differential conviction rate of defendants without priors who do or do not take the stand. Another factor might. Given the dramatic impact of not taking the stand, perhaps it is those without priors who would be hurt by taking the stand who tend not to testify, and they in turn will tend to be those who cannot provide a plausible story of innocence. In any event, as we have noted above, the implications for evidence law are the same regardless of which of these or what combination of them actually explains the data.<sup>73</sup>

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<sup>73</sup> Donald Dripps, in comments on a previous draft of this Article, pointed out that another possible confounding variable is the ethical dilemma of defense counsel if they urge clients to tell them the truth, are told a story of guilt, but the client still wants to testify. Theoretically, a lawyer cannot sponsor perjured testimony. This may be operating to some extent, but its scope is somewhat questionable given the rate at which those both with and without priors who testify are convicted.

## IV. THE RELEVANCE QUESTION

Our suggestion to this point has been that a part, perhaps the major part, of the explanation of why jurors so frequently convict defendants with priors ostensibly unknown to them is that (a) they are generally able to infer who has priors and (b) they regard such presumed priors as relevant evidence of guilt, (c) as a license for lowering the bar for proof of guilt, or (d) as an accurate predictor of strong evidentiary cases at trial. We mildly incline to a combination of (a), (c), and (d) as the explanation for what is going on. But we think it important to address (b) as well, not least because the legal system frequently acts as if prior crimes have only marginal relevance to current guilt. In this section, we explore whether (b) is, as the law would have it, a confusion about relevance or probative value, or whether jurors might well be right in holding that evidence of prior crimes increases the probability of guilt in the case at hand.

There are at least two main arguments to consider, discussed below.

## A. THE GOOD CHARACTER/BAD CHARACTER CONTRAST.

The law expressly allows a defendant to introduce evidence of his good character.<sup>74</sup> This can include information that he has no prior convictions, testimony from character witnesses, and testimony from the defendant himself as to his sterling character. Indeed, the common law traditionally insisted that proof of good character created a presumption that defendant was not guilty of the crime.<sup>75</sup> Even now, it is common to find jury instructions indicating that evidence of good character may be sufficient by itself to justify an acquittal.<sup>76</sup> In short, evidence of good character is not only considered relevant by the courts but sufficiently relevant standing alone to justify an acquittal. That is one reason why Rule

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<sup>74</sup> FED. R. EVID. 404(a)(1).

<sup>75</sup> Cf. Josephine Ross, "*He Looks Guilty*": *Reforming Good Character Evidence to Undercut the Presumption of Guilt*, 65 U. PITT. L. REV. 227, 231 (2004).

<sup>76</sup> For instance, here is the jury instruction for the U.S. District Court for the Western District of Oklahoma, promulgated in 2006:

The defendant has offered evidence of his reputation for good character or testimony in the form of opinion as to his good character . . . Evidence of good character may be sufficient to raise a reasonable doubt whether the defendant is guilty, because you may think it improbable that a person of good character would commit such a crime. Evidence of a defendant's character, inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt.

Jury Instruction, *United States v. Good*, 2006 Jury Instr. Lexis 1938 (W.D. Okla. 2006) (No. CR-06-0070-F).

404(a) admits “evidence of a pertinent trait of character offered by an accused.”<sup>77</sup>

Let us be clear about the logic of the situation: in acknowledging that good character evidence is (exculpatorily) relevant, the courts are committed to saying that:

prob (guilt/good character) < prob (guilt/bad character).

This inequality inescapably entails the (inculpatory) relevance of evidence of bad character.

That notwithstanding, we have Rule 404(a) insisting that “[e]vidence of a person’s [bad] character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion,” and 404(b) holding that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”<sup>78</sup> In short, evidence of good character, including the absence of prior convictions, is freely admitted as pertinent while evidence of defendant’s bad character is excluded, except to refute evidence of good character. There is no room here for the sort of Rule 403 balancing act that weighs unfair prejudice against probative value. Prior crimes evidence proffered to show the shady character<sup>79</sup> or criminal propensity of the defendant is supposedly excluded from the prosecution’s case-in-chief.<sup>80</sup> Whatever the justification for this blanket exclusion, it cannot be that such evidence lacks relevance.

Nor is the law consistent in holding that evidence of bad character is generally irrelevant. Consider, for instance, that Rule 404(a) permits the defendant to present prior convictions evidence against a prosecution witness showing that the latter has a propensity for violent conduct. The defendant in a homicide case, alleging self-defense or provocation, can present evidence of prior convictions of the victim, aimed at showing that the defendant was not the first aggressor. Such policies make sense only if propensity evidence is relevant as a predictor of other bad acts. In numerous other parts of the justice system, the relevance of prior crimes is

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<sup>77</sup> Another is concern that excluding such evidence by defendants would violate their right to present a defense.

<sup>78</sup> FED. R. EVID. 404.

<sup>79</sup> Except for his character for lack of truthfulness. FED. R. EVID. 609.

<sup>80</sup> This raises another possible explanation for the data we have been exploring: that the promise of excluding propensity evidence highly associated with prior crimes is not redeemed because of rules such as Rule 404(b). *See supra* note 56. We do not explore this in the text for two reasons. First, the studies we have do not control for the subversion of Rule 404(a) by the other rules. Second, if the other rules essentially let evidence in equivalent to prior crimes, again it is obviously silly to be worried about excluding that very evidence that other rules admit.

both unchallenged and uncontroversial. For example, in bail hearings, in trials for the civil commitment of the insane, or in sentencing hearings, it is granted that a defendant's prior seriality, when it exists, is a powerful predictor of his future criminal behavior.<sup>81</sup> Denying the relevance of priors in showing the criminal propensity of the defendant in particular is highly implausible, and probably perceived as such by the general public, not least by those who serve as jurors.

We should not let it go wholly unnoticed that current evidence law—specifically, Rules 413 and 414—routinely admits, in trials for rape and sexual abuse, prior similar acts whether they led to convictions or not, despite the fact that recidivism rates for this class of crimes are no higher than for many others, where priors are by default excluded.<sup>82</sup> Since we have to suppose that sexual priors are admitted because they are relevant, it would be an obvious fallacy to suppose that similar priors lacked relevance in the adjudication of other crimes.

#### B. THE EMPIRICAL CASE FOR RELIABILITY OF INFERENCES FROM PRIOR CRIMES.

The data reprised in this paper plausibly suggest that jurors generally figure out which defendants have prior convictions and are more likely to convict those with priors than those without. We also can be fairly confident, from the numerous exoneration projects that have been in place over the last couple of decades, that the vast majority of those currently convicted at trial are truly guilty.<sup>83</sup> These facts do not themselves establish the relevance of priors, for it is conceivable that even if jurors convicted defendants without records with the same frequency with which they convict serial offenders, the vast majority of convictions would likewise be convictions of the truly guilty. But what they do speak to—which is vastly

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<sup>81</sup> See generally Laudan & Allen, *supra* note 64.

<sup>82</sup> According to Bureau of Justice Statistics figures, of the 3,265 convicted rapists released from prison in 1994, some 46% were re-arrested for a felony within three years. PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 9 tbl.10 (2002). However, only 2.5% of them were arrested within three years for a sexual assault. *Id.* By contrast, 13% of those who served time for robbery were re-arrested for robbery; 22% of assaulters were re-arrested for assault; and 23% of burglars were re-arrested for burglary. *Id.* Perhaps some defender of current practices can explain why an assaulter's similar priors are routinely excluded from trial and a rapist's are routinely admitted, despite the fact that the latter's priors are both less relevant and more prejudicial than the former's (for instance, in the NCSC study, jurors learned of an accused rapist's prior convictions 71.4% of the time while, in cases of aggravated assault, they learned of priors 27% of the time). See Eisenberg & Hans, *supra* note 8, at 1374 tbl.5.

<sup>83</sup> See generally Laudan & Allen, *supra* note 64. Of the dozen or so studies of exoneration familiar in the literature, there are none that suggest a false-positive rate of more than 5% and many make it much smaller than that.

more important than relevance—is the trustworthiness of giving significant probative weight to prior convictions. If jurors did what the courts wanted them to do—that is, to give little or no probative significance to presumed priors—and if they do puzzle out who does and does not have a record in making their choices, then the false acquittal rate could increase substantially. Conceivably, a fair number of true convictions (and a tiny proportion of false convictions) could be lost to the system. If, as appellate courts are constantly claiming, the aim of a trial is to get at the truth, then a system in which jurors factor prior convictions—either known or presumed—into their calculations of guilt and innocence is probably more truth-conducive than a system in which priors were ignored or treated as irrelevant.

#### V. THE CASE FOR CHANGING HOW PRIOR CRIMES EVIDENCE IS HANDLED

Current law allows a judge to exclude prior crimes if their introduction speaks to character or propensity (Rule 404) or if she determines that they are much more prejudicial than probative (Rule 403), and Rule 609 puts other constraints on the admissibility of prior crimes even for purposes of credibility. This policy is motivated by a commendable desire to block jurors from convicting a defendant simply because he has committed prior bad acts.<sup>84</sup> But if jurors can readily infer that a defendant is a serial felon even when no priors are admitted, and we are persuaded that they can, then what control has the legal system over the prejudicial character of the prior bad-acts scenarios that will play out in the minds of jurors who have already inferred the existence of prior crimes but have nothing save their imagination to constrain their guesses about their frequency or depravity? What does that imply about existing policies mandating the exclusion of prior crimes evidence?

The answer to that question seems to be unambiguous: prior crimes evidence should be admitted. Only in that way can jurors arrive at an informed assessment of the bearing, frequency, and magnitude of the prior crimes that they have reasonably inferred the defendant to have committed. The balancing act mandated by Rule 403 makes sense, if at all, only if the exclusion of evidence of prior crimes would block jurors from over-interpreting the probative weight of the priors. But such an exclusion can do nothing whatever to block jurors from prejudicially over-interpreting the relevance of the priors that they suppose the defendant to have. On the contrary, Rule 403 exclusions give free rein to the imagination of jurors who have already rationally surmised that the defendant has prior convictions.

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<sup>84</sup> ALLEN, ET AL., *supra* note 56, at 233.

The current system does not prevent jurors from figuring out most of the time which defendants have prior convictions and which do not. While such inferences may have no constitutional mandate, judges are powerless to prevent them. As dissenting Justices Stewart and White pointed out in *Griffin v. California*: “No constitution can prevent the operation of the human mind.”<sup>85</sup> Most of the time, it simply prevents jurors from having the slightest idea specifically what those priors were. It is as if the judge were routinely to announce, after the defense rests its case: “We now inform you that the defendant has engaged in one or more bad acts and has been convicted of them. But we won’t tell you either what they were, nor how often they occurred, because that might unfairly prejudice you against the defendant.”

Clearly, lesser fixes than abandoning the exclusion of priors offer little or no remedy for the plethora of problems we have identified. It is already widely agreed that limiting instructions to juries not to draw propensity inferences from information given them by the prosecutor about prior crimes are failures.<sup>86</sup> An instruction urging jurors to give no significance to their own inferences about the seriality of the defendant would be an even more desperate instance of whistling in the wind. We have to face this question: given that jurors can already usually figure out whether a defendant has prior crimes or not, which course is preferable: informing them precisely about which and how many priors the defendant has, or leaving them to draw their own unfettered conclusions about how egregious or mild the serial defendant’s priors happen to be? The former policy disadvantages the defendant whose priors are relatively mild or unlike the crime with which he is currently charged. At the other extreme, it shields the defendant with a lengthy rap sheet from jurors grasping the true measure of his seriality. How many serial felons are falsely convicted because jurors—uninformed about the nature of the priors but quite sure of their existence—make them out to be much worse than they actually are? And how many are falsely acquitted when the actual seriality of their criminal record is underestimated by juries who are confident about nothing more than that defendant has a record but do not know what it is? Obviously, nothing guarantees that jurors will give the “correct probative weight” to the priors that they learn about. Still, knowing specifically what the priors are is preferable to the current situation in which jurors conjecture, not only about their relevance, but likewise about their frequency and character. Given, too, that we have several studies that strongly suggest that mock

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<sup>85</sup> 380 U.S. 609, 623 (1965) (Stewart, J., dissenting).

<sup>86</sup> For an empirical study of the matter, see VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 124–27 (1986).

jurors attach much less weight to dissimilar priors than to similar ones, and less to remote priors rather than to recent ones, it seems that concerns of damage control alone would argue for making the priors known.

There is another issue worthy of attention: under current rules, when priors do not overtly appear, a defendant's attorney is in no position to argue before jurors about their salience. If priors were routinely admitted, defense attorneys could attempt to argue their minimal relevance, with prosecutors arguing the other side. This would surely be a good debate for the jury to hear, prior to resolving the question for themselves. But, under current practices, it occurs explicitly only when priors pass the tests of Rules 403, 404, and 609. And in the latter case, the arid debate in court is usually limited to the bearing of the priors on the question of whether the defendant's testimony is truthful. By contrast, under current rules, jurors are free to assign to them whatever probative value they fancy. They can suppose them to be many or few; that the crimes in question were minor misdemeanors or grievous felonies; that they were similar to the charged crime or vastly different; and that they were of recent or remote vintage. Which system would be fairer to the defendant and more likely to produce true verdicts: one in which jurors' imaginations were free to conjure up whatever set of priors took their fancy, or a system in which the specific priors were cited and the only question left to jurors' imagination was the degree of their bearing on the decision they are called on to make?

It also seems highly likely that, if prior crimes evidence were routinely admitted, more defendants would testify and more evidence of good character would emerge.<sup>87</sup> Substantial amounts of time and other valuable resources currently invested in debates about the admissibility of prior crimes evidence would be freed up for other purposes.<sup>88</sup> Indeed, Professor Imwinkelreid, an expert on such matters, tells us that "Rule 404(b) is the most litigated provision in the Federal Rules of Evidence," adding that "[i]t generates more published opinions than any other provision of the Rules."<sup>89</sup>

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<sup>87</sup> Arguably, admitting prior convictions as a matter of course would also have the desirable effect of undermining the principal rationale for the *Griffin* rule, *Griffin v. California*, 380 U.S. 609 (1965), thereby re-enabling jurors to draw adverse inferences from defendant's silence, which would remove one further obstacle to the defendant participating in the trial itself.

<sup>88</sup> Plea bargaining would be facilitated by eliminating an important ambiguity concerning the admissibility of what some will continue to think is important evidence; for the same reason, more defendants may decline jury trials, again lowering costs. Of course, some may not think these are advantages, but we do.

<sup>89</sup> Edward J. Imwinkelreid, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, the Doctrine of Chances*, 40 U. RICH. L. REV. 419, 433 (2006).

Most such litigation would vanish if prior crimes evidence were routinely admitted.<sup>90</sup>

What if our behavioral hypothesis about the state partially explains the data? This would complicate matters to be sure, but not the final conclusion that the misshapen stone should be removed. The argument for maintaining the present rule is that the more liberal admission of prior records would change the incentive structure of the state.<sup>91</sup> This is implausible as a significant factor with respect to the police investigations that are motivated by more immediate concerns. It may change the balance somewhat for prosecutors but there is not much room to change if in fact a prior record already predicts a strong evidentiary case. A few different cases may be taken to trial than would otherwise be the case, but many of them are likely to be cases of guilt just because of the predictive effects of prior records on the hypothesis we are examining. Against the low probability of cases of innocence being brought would have to be weighed all the effects discussed regarding the inferential hypotheses we have examined, and of course the enormous cost of litigation surrounding the misshapen stone of exclusion. Although to some extent it is an empirical question in need of more data, so far as we can tell now, the balance already seems clear.<sup>92</sup>

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<sup>90</sup> As we are about to discuss in the text, one needs to worry about unintended consequences. For all the reasons we have discussed, it does not seem likely to us that changing admission rules would have a dramatic effect on the mix of litigated cases, but we wish to acknowledge the possibility.

<sup>91</sup> We are aware that the point we make in the text generalizes and that any change in the rules may change the incentive structure in myriad unpredictable ways some of which may be irrational—perhaps defense lawyers will not believe the data presented here, for example, and thus perhaps will feel the need to engage in more compromises during plea bargaining if prior records are more readily admitted. One can make one's own judgments about the significance of such concerns.

<sup>92</sup> The manner in which information about prior convictions would be related to juries, the amount of detail about them, and so on, would need to be worked out. There would be much to argue about here, but these hardly present insurmountable problems. Judges are aware of prior records at bench trials, and no one seems to object to that. The data we have presented here suggest that there is no good reason to fear how juries handle this type of data, thus suggesting that the details of admission should be reasonably resolvable. A more difficult issue would be what instructions should be given about the use of the evidence. We would favor an instruction to the effect that the jury may consider the evidence on whatever issues to which the jurors think it is pertinent, but with a strong admonition about, first, its inferential limits, and second, that the issue is not whether the defendant is a serial offender but instead whether he committed the act of which he is accused.

There is at least one other variable to worry about.<sup>93</sup> Eliminating the current rule, so the argument might go, may lead to more perjured testimony, because the risk of being impeached by priors only if one testifies has been removed (priors are coming in anyway). The increased perjured testimony may lead in turn to an increase in false acquittals. Essentially, we would need to know whether the current regime or one in which priors are readily admitted and more guilty defendants take the stand and lie would produce better outcomes. We think this is an interesting speculation, although note how far it is from the current justifications for the rule. Although again this shows how further empirical work needs to be done, a few points are obvious. Even if changing the rule changed behavior resulting in more false acquittals, as we have shown it may also result in more true acquittals and more true convictions, and thus this increased cost would still need to be weighed against the increased benefits. Second, the data we have to date indicate that the ready admission of priors may actually increase the rate of guilty verdicts rather than decrease it. Remember, those with priors who testify are convicted at a higher rate than those with priors who do not. One possible explanation for this is precisely that the guilty who lie can often be shown to be liars. Many may still take that chance because they have no viable alternatives, and they may be encouraged to if not testifying no longer shields their criminal record. Nonetheless, if cross-examination and the presentation of contradicting evidence have such effects, as the data suggest they do, admitting priors routinely may lead to increased rates of conviction and increased accuracy of verdicts generally, rather than promote false acquittals alone.

#### VI. CONCLUSION

Perhaps the Justices on the Supreme Court realize all this and find it impossible to block jurors from inferring unmentioned priors, but still think that officially excluding priors is preferable to admitting them since the former policy keeps the judges' hands clean. This, after all, was precisely the position the Justices took in the famous *Griffin* case, dealing with a defendant's silence: "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another."<sup>94</sup>

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<sup>93</sup> We are indebted to Michael Pardo for encouraging us to think about this.

<sup>94</sup> *Griffin v. California*, 380 U.S. 609, 614 (1965).

This holier-than-thou, see-no-evil attitude, if it exists, would be a puerile reaction to a serious situation. Far more candid is the conclusion reached in 2001 by England's Lord Justice Auld in his well-known *Review of the Criminal Courts of England and Wales*. He wrote:

[T]he reality of the present law [concerning the admissibility of previous crimes] is that it mostly does not conceal from the tribunal of fact that a defendant has some—though not precisely what—criminal record. In the resultant scope for speculation, it is thus capable of engendering as much or more prejudice against him [as the admission of priors would]. And it is not an honest system in that it does not do what it is claimed to do.<sup>95</sup>

Although he was appraising the system in England and Wales, the general features of his diagnosis apply to U.S. practices. The principal difference between then and a decade later is that we now have solid empirical evidence—instead of intuitions—that the current system is both intellectually dishonest and that it does little or nothing to aid those defendants whom it was specifically invented to protect. The only defendants who obviously profit from the current system are those with rap sheets even longer and more grisly than jurors imagine them to be, and perhaps lawyers in need of business.

We realize, of course, that data always underdetermine theory and perhaps other explanations for the data can be offered; we have tried to respond to some alternatives by showing their lack of plausibility. In addition, our explanation generates various testable empirical hypotheses that would tend to confirm it. For example, we predict that jurors start with an assumption that defendants have prior records and that the assumption affects their deliberations virtually no matter what judges may tell them. We also predict that the biggest discrepancy between judges' and jurors' views of the evidence will be located in the set of cases in which jurors are not directly informed of defendant's priors, and thus must engage in surmise. We also predict that a fair amount of surmising is going on as a result of the other mechanisms we have mentioned for indirectly indicating the nature of a defendant's priors. Last, we predict that one product of that surmising is likely to be to disadvantage the innocent defendant. Whether any good test of that proposition can be structured is problematic, because of the lack of a good measure of factual guilt independent of the trial itself. That is the central difficulty of empirical studies of criminal trials.

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<sup>95</sup> ROBIN AULD, A REVIEW OF THE CRIMINAL COURTS OF ENGLAND AND WALES 564 (2001).

