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Two Criminal Justice Systems

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TWO CRIMINAL JUSTICE SYSTEMS

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I. INTRODUCTION

In theory, there is one criminal justice system. According to this view, everyone is subject to the same criminal justice system that is governed by the same rules. Only certain classes of defendants—such as young offenders and members of the Armed Forces—are subject to a distinct criminal justice system with different rules and procedures.[1]

In practice, it is as if there are two criminal justice systems: one for defendants with a criminal record, and one for first-time offenders. At each point of the criminal justice process—policing, bail, plea bargaining, trial, and punishment—the criminal justice system treats those with criminal records worse than those without.[2] A criminal record increases the likelihood of police contact, justifies harsher pre-trial coercion, pushes repeat offenders to accept worse plea deals, incentivizes judges and juries to convict defendants based on their bad character, discourages defendants with a criminal history from testifying, and invites harsher sentences.[3] These adverse effects are compounded for Indigenous persons, racialized individuals, those who face mental health challenges, and impecunious defendants against whom the criminal justice system is already skewed.[4] Prior convictions decrease employment prospects and access to housing, which increases the likelihood that individuals with a criminal history will become re-involved with the criminal justice system after they serve their sentences.[5] Defendants with and without criminal

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1 See *Youth Criminal Justice Act*, SC 2002, c 1, ss 3, 14; *National Defence Act* RSC 1985, c N-5, s 67, 70.

2 See James Jacobs, *The Eternal Criminal Record* (Cambridge: Harvard University Press, 2015) at 227–38.

3 See *ibid*.

4 See Terry Skolnik, "Criminal Justice Reform: A Transformative Agenda" (2022) 59 Alta L Rev 631 at 633–34.

5 See Devah Pager, "The Mark of a Criminal Record" (2003) 108:5 American J Sociology 937 at 960. See also Peter Leasure & Tara Martin, "Criminal Records and Housing: An Experimental Study" (2017) 13 J Experimental Criminology 527 at 527–28, 534.

records are subject to such qualitatively different treatment that it is as if they are subject to different criminal justice systems.[6]

Building on the interconnected insights of information economics and behavioral economics, this article highlights the reasons why it is as if there are two criminal justice systems. This article argues that the interplay between these two areas of economics account for why justice system actors use cognitive biases to mitigate information failures in the criminal justice process. Yet, the cumulative effects of information failures and cognitive biases ultimately subject defendants with criminal records to discriminatory treatment and worse criminal justice outcomes than first-time offenders.

For instance, police officers can interpret prior convictions as a signal that individuals are involved in criminal activity, which results in greater law enforcement scrutiny.[7] During the bail process, prosecutors screen defendants' criminal history to assess risks of pre-trial misconduct.[8] Yet three cognitive biases—loss aversion, the availability heuristic, and the representativeness heuristic—may lead prosecutors to overestimate these risks and err on the side of greater pre-trial coercion.[9] Then there is the use of criminal records at trial and during sentencing. Judges and juries are more likely to convict defendants who are cross-examined on their prior convictions, which contributes to confirmation bias that the defendant is guilty.[10] Criminal records can disincentivize defendants from testifying at trial, which can

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6 For a similar argument regarding the qualitative difference in how the law applies, see Jeremy Waldron, "Homelessness and Community" (2000) 50:4 UTLJ 371 at 397.

7 See Lisa Stolzenberg, Stewart J D'Alessio & Jamie L Flexon, "The Usual Suspects: Prior Criminal Record and the Probability of Arrest" (2021) 24:1 Police Q 31 at 45–46.

8 See Josh Bowers, "Punishing the Innocent" (2008) 156:5 U Pa L Rev 1117 at 1135.

9 See Section IV(b), *below*, for more on this topic.

10 See Theodore Eisenberg & Valerie P Hans, "Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes" (2009) 94:6 Cornell L Rev 1353 at 1358–64.

result in a wrongful conviction.[11] Finally, recidivists tend to receive harsher sentences than first-time offenders.[12] A criminal record is not only one of the most powerful signaling and screening tools in the criminal justice system; it also activates justice system actors' cognitive biases against repeat offenders.

The criminal justice system's disparate treatment of repeat offenders is objectionable for various reasons. It worsens racial and socioeconomic discrimination in the criminal justice process, compounds the disadvantages experienced by marginalized defendants, increases the prospect of wrongful convictions, and produces counterproductive consequences.

The structure of this article is as follows. Section II describes the consequences of a criminal record. Drawing on signaling and screening theory in information economics, sections III and IV explain why criminal records play a crucial role in policing and in the bail system. Section V sets out how the combined effects of information failures and cognitive biases may lead prosecutors to subject prior offenders to greater pre-trial coercion. Section VI explains why judges and juries are more likely to convict defendants with criminal records and punish them more severely. Section VII concludes this article and advances concrete proposals to address the widening gulf between Canada's two criminal justice systems. This article argues that the criminal justice system's choice architecture—meaning the way that the justice system presents and structures decision making—can help address some of the most egregious consequences of criminal records.[13]

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11 See John Blume, "The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted" (2008) 5:3 J Empirical Leg Stud 477 at 479, 481, 491.

12 See Rhys Hester et al, "Prior Record Enhancements at Sentencing: Unsettled Justifications and Unsettling Consequences" (2018) 47 Crime & Justice 209 at 210.

13 See e.g. Cass Sunstein, *The Ethics of Influence: Government in the Age of Behavioural Science* (New York: Cambridge University Press, 2016) (describing choice architecture as "the background conditions for people's choices" at 5).

II. THE CONSEQUENCES OF A CRIMINAL RECORD

A criminal record can result in serious consequences. First, prior convictions decrease employment prospects.[14] Studies indicate that employers may be less willing to hire individuals who have a criminal record.[15] Furthermore, these studies reveal that Black persons may be disproportionately impacted by discrimination based on prior convictions, which worsens existing structural inequalities.[16] Some experimental studies show that job applicants with prior convictions are less likely to receive callbacks from prospective employers compared to those with no criminal record.[17] A professional order may not license an individual who has a criminal record or may subject them to additional scrutiny.[18] Furthermore, the law may not protect individuals against discrimination based on a prior conviction. Some provinces' human rights codes do not categorize a criminal record as a prohibited ground of discrimination.[19]

Second, criminal records can decrease access to housing.[20] Landlords increasingly screen prospective tenants for their criminal history.[21] Part of this may stem from the expansion of landlords' legal liability for tenants' conduct in certain

14 See Pager, *supra* note 5 at 960–61.

15 See Sarah Esther Lageson, Mike Vuolo & Christopher Uggen, "Legal Ambiguity in Managerial Assessments of Criminal Records" (2015) 40:1 Law & Soc Inquiry 175 at 181, 196.

16 See Pager, *supra* note 5 at 957–58.

17 See Amanda Agan & Sonja Starr, "Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment" (2018) 133:1 Q J Economics 191 at 203–06; Amanda Agan & Sonja Starr, "The Effect of Criminal Records on Access to Employment" (2017) 107:5 American Economic Rev 560 at 563–64.

18 See Michael Pinard, "Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity" (2010) 85:2 NYU L Rev 457 at 492–93.

19 See The Canadian Bar Association, *Collateral Consequences of Criminal Convictions: Considerations for Lawyers* (Ottawa: CBA, 2017) at 34–35.

20 See Peter Leasure, "Securing Private Housing with a Criminal Record" (2019) 58:1 J Offender Rehabilitation 30 at 31.

21 See David Thacher, "The Rise of Criminal Background Screening in Rental Housing" (2008) 33:1 L & Soc Inq 5 at 12–13.

circumstances, or a general preference to mitigate risk.[22] Yet lack of access to housing can hinder ex-offenders' reintegration within the community.[23] Criminal record checks of prospective tenants may disproportionately impact racialized persons who are already over-represented in the criminal justice system, and may contribute to racial segregation within communities.[24]

Third, a criminal record can result in important immigration-related consequences.[25] Permanent residents who commit crimes and receive a criminal record may lose their permanent residency status.[26] They may be subject to a removal order and face deportation.[27] In contrast to appeals for criminal convictions, individuals may have greater difficulty appealing or staying removal orders based on their criminal record.[28] Notably, provisions of the *Immigration and Refugee Protection Act* limit foreign nationals' and permanent residents' right to appeal their inadmissibility based on security concerns or serious criminality.[29]

Lastly, prior convictions impose a range of other limitations. Criminal records may impede international travel and limit individuals' opportunities to work outside of Canada.[30] Prior

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22 See *ibid* at 13–15.

23 See *ibid* at 26. See also Peter Leasure et al, "Criminal History, Race, and Housing Type: An Experimental Audit of Housing Outcomes" (2022) 49:10 Crim Justice & Behavior 1536 at 1537.

24 See Deborah Archer, "The Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances" (2019) 118:2 Mich L Rev 173 at 176–77, 208–14.

25 See Jennifer Koshan, Janet Mosher & Wanda Wiegers, "The Costs of Justice in Domestic Violence Cases: Mapping Canadian Law and Policy" in Farrow & Jacobs eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver: UBC Press, 2020) at 154.

26 See *ibid*, citing *Immigration and Refugee Protection Act*, SC 2001, c 27, s 36.

27 See *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 46, 48 [*IRPA*].

28 See Souheil Benslimane & David Moffette, "The Double Punishment of Criminal Inadmissibility for Immigrants" (2019) 28:1 J Prisoners on Prisons 44 at 46, 48–51.

29 See *ibid; IRPA*, *supra* note 27, s 64.

30 See James Jacobs & Dimitra Blitsa, "Sharing Criminal Records: The United States, the European Union and Interpol Compared" (2008) 30:2 Loy LA Intl

convictions may also impact a person's custody over their child.[31] Individuals who have a criminal record may be disqualified from jury service.[32] A witness' credibility can be impeached based on their criminal record.[33] Many of the consequences associated with a criminal record can last for years. Individuals who are convicted of an indictable offence can apply for a record suspension ten years from the date that they completed their sentence.[34] The relevant period is five years for those convicted of a summary conviction offence.[35]

III. CRIMINAL RECORDS AND POLICING

A. POLICING, ASYMMETRIC INFORMATION, AND INFORMATION FAILURES

A defendant's criminal record impacts their criminal justice system involvement long before they are arrested, charged, and tried for a crime. This section demonstrates how patrol officers must investigate crimes and enforce the law despite imperfect information. It shows how they attempt to remedy this lack of information by screening individuals for a criminal record, which influences who officers choose to investigate.

Street-level policing is rife with information failures. The term information failure connotes an "asymmetry of information" between two parties that interact with one another.[36] This

& Comp L Rev 125 at 146, 151–52; Samantha McAleese & Catherine Latimer, *Reforming the Criminal Records Act* (Ottawa: John Howard Society of Canada, 2017) at 6.

31 See McAleese & Latimer, *supra* note 30 at 5.

32 See Keith Hogg, "Seeing Justice Done: Increasing Indigenous Representation on Canadian Juries" (2021) 26 Appeal 51 at 60. See e.g. *Juries Act*, RSO 1990, c J.3, s 4.

33 See *Canada Evidence Act*, RSC 1985, c C-5, s 12.

34 See *Criminal Records Act*, RSC 1985, c C-47, s 4(1) [*Criminal Records Act*].

35 See *ibid*.

36 Jonathan Barron Baskin, "The Development of Corporate Financial Markets in Britain and the United States, 1600-1914: Overcoming Asymmetric Information" (1988) 62:2 Bus History Rev 199 at 200. See also George

asymmetry advantages the more knowledgeable party and disadvantages the less knowledgeable one.[37] The former can exploit the latter's lack of information to their advantage.[38] Several examples highlight the ubiquity of information failures. Landlords know far more about the quality of their apartments than prospective renters. They may hide their property's defects from tenants, who only discover the problems once they sign the lease, move in, and are locked into a contract.[39] Similarly, salespersons are able to exploit consumers' ignorance and sell them lower quality products that yield a higher profit margin.[40] Doctors, lawyers, financial advisors, and other professionals are all in a position to exploit their clients' vulnerability for personal gain.[41]

The law addresses these information failures in various ways. Rental law imposes a duty on landlords to maintain their property in good condition and to pay the costs of repairs, which offers greater protection to renters.[42] Consumer protection law may mandate warranties for products and prohibits liability waivers.[43]

Akerlof, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism" (1970) 84:3 QJ Economics 488 at 490.

37 See also Baskin, *supra* note 36 at 200.

38 See Jeffrey Banks & Barry Weingast, "The Political Control of Bureaucracies Under Asymmetric Information" (1992) 36:2 American J Political Science 509 at 509–10.

39 See Thomas W Merrill & Henry Smith, *The Oxford Introductions to U.S. Law: Property* (Oxford: Oxford University Press, 2010) at 141.

40 See also Katalin Judit Cseres, *Competition Law and Consumer Protection* (The Hague: Kluwer, 2005) at 155.

41 See Evan Criddle, "Liberty in Loyalty: A Republican Theory of Fiduciary Law" (2017) 95:5 Tex L Rev 993 at 1039–40 (note that fiduciary obligations counteract this risk of exploitation).

42 See Edward H Rabin, "Revolution in Residential Landlord-Tenant Law: Causes and Consequences" (1983-1984) 69:3 Cornell L Rev 517 at 521–22; *Residential Tenancies Act*, SO 2006, c 17, s 20. See also Brent Ambrose & Moussa Diop, "Information Asymmetry, Regulations and Equilibrium Outcomes: Theory and Evidence from the Housing Rental Market" (2021) 49:1 Real Estate Economics 74 at 74.

43 See Michel Boucher, Jean-Luc Migue & Christine Viens, "Consumer Protection Legislation: An Exercise in Property Rights Economics" (1983) 13:2 RDUS 391 at 401-02; *Consumer Protection Act,* chap p-40.1 (Quebec), ss 159-60.

Doctors, lawyers, and financial advisors all owe fiduciary duties to their clients that mitigate the effects of information asymmetries and prevent abuse.[44]

Information failures also permeate law enforcement and the criminal justice system.[45] In many proactive police encounters, there is an information asymmetry between officers and individuals.[46] Traffic stops are a prime example. A driver knows whether they are hiding firearms or drugs in their trunk; officers do not.[47] Similarly, when officers interact with a pedestrian, they often have no clue whether the individual is armed, sought by warrant, or is in breach of their bail conditions—all of which the individual knows.[48] Officers want to know this information for various reasons: to prevent crimes, detect criminality, ensure their safety, protect others, and more. Information failures are ubiquitous in policing for two reasons.

First, since individuals attempt to conceal their criminality, they know more about their criminal activities than officers.[49] Those who commit crimes wish to avoid detection, arrest, and prosecution.[50] So, they make concerted efforts to hide their criminal wrongdoing from law enforcement.[51] Frequently, they use physical barriers that provide the necessary opacity. To avoid detection, individuals tend to manufacture drugs secretly in their

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44 See also Paul Miller, "Justifying Fiduciary Duties" (2013) 58:4 McGill LJ 969 at 971, 1014.

45 See Alex Kornya et al, "Crimsumerism: Combating Consumer Abuses in the Criminal Legal System" (2019) 54:1 Harv CR-CLL Rev 107 at 120–21.

46 See also John Hollway, Calvin Lee & Sean Smoot, "Root Cause Analysis: A Tool to Promote Officer Safety and Reduce Officer Involved Shootings Over Time" (2017) 62:5 Vill L Rev 883 at 887.

47 See also Terry Skolnik, "*R. v. Macdonald* and the Illogicality of the Reasonable Belief Requirement for Safety Searches" (2015) 62:1/2 Crim LQ 43 at 49.

48 See Terry Skolnik, "The Suspicious Distinction between Reasonable Suspicion and Reasonable Grounds to Believe" (2016) 47:1 Ottawa L Rev 223 at 243–44.

49 See Chris William Sanchirico, "Detection Avoidance" (2006) 81:4 NYU L Rev 1331 at 1332–33.

50 See *ibid*.

51 See *ibid*.

basements rather than openly in public parks.[52] When gun smugglers import firearms illegally, they do not declare the contraband to customs officials. Instead, many of them conceal the deconstructed weapons in a vehicle's door panels and hire unsuspecting mules to drive the goods across the border.[53] Criminals do not want to be caught. Physical barriers—homes, cars, clothing, and so on—are means to that end because they provide a degree of privacy.[54] Criminality's hidden nature contributes to information failures.

To be clear, privacy protections also skew against socio-economically disadvantaged individuals.[55] Individuals without access to housing may use controlled substances on public property because they lack access to a private place to engage in such conduct.[56] Whereas more affluent individuals can conceal illegal objects in their cars, others who cannot afford a car may

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52 See Jonathan Todd Laba, "If You Can't Stand the Heat, Get Out of the Drug Business: Thermal Imagers, Emerging Technologies, and the Fourth Amendment" (1996) 84:5 Cal L Rev 1437 (stating that "[m]arijuana cultivators increasingly are moving their operations indoors . . . to shield their activities from the public" at 1442).

53 See Jayme Poisson & David Bruser, "The Gun Pipeline: Mules who Bring Firearms across Border Pay High Price for Fast Money" (April 19, 2013) online: *Toronto Star* <thestar.com/news/investigations/2013/04/19/the_gun_pipeline_mules_who_bring_firearms_across_border_pay_high_price_for_fast_money.html>.

54 See Christopher Slobogin, "The Poverty Exception to the Fourth Amendment" (2003) 55:1 Fla L Rev 391 at 400–01.

55 See e.g. William Stuntz, "Distribution of Fourth Amendment Privacy" (1999) 67:5 Geo Wash L Rev 1265 at 1266–67 [Stuntz, "Distribution of Fourth Amendment Privacy"]; Christopher Slobogin, "The Poverty Exception to the Fourth Amendment" (2003) 55:1 Fla L Rev 391 at 400–05; Tery Skolnik, "How and Why Homeless People are Regulated Differently" (2018) 43:2 Queen's LJ 298 at 305–06.

56 See e.g. Kami Chavis Simmons, "Future of the Fourth Amendment: The Problem with Privacy, Poverty and Policing" (2014) 14:2 U Md LJ Race, Religion, Gender & Class 240 at 249–51; Terry Skolnik, "Homelessness and the Impossibility to Obey the Law" (2016) 43:3 Fordham Urb LJ 741 at 773, 775.

carry these objects onto public transportation, which attracts a lower expectation of privacy.[57]

Second, statutes, the common law, and the Constitution prevent officers from correcting information asymmetries to detect crimes.[58] Three interrelated examples illustrate this point. Consider first section 8 of the *Canadian Charter of Rights and Freedoms*, which confers the right to be free from unlawful searches and seizures.[59] The provision confers a reasonable expectation of privacy to individuals, which in turn limits officers' abilities to search and seize incriminating evidence that is not in plain view.[60] The upshot: police officers can lawfully search an individual or their property—such as homes, cars, or cellphones—only when the officer respects certain legal requirements. In some cases, officers must satisfy the reasonable and probable grounds threshold to conduct a warrantless search.[61] In others, they must obtain a search warrant (unless the exigent circumstances exception applies).[62] In these ways, section 8 of the *Canadian Charter* limits officers' capacities to reduce information asymmetries and detect crimes.

Section 9 of the *Canadian Charter*—which protects individuals against arbitrary detention and imprisonment—operates similarly.[63] Often, officers do not know whether an individual is

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57 See Stuntz, "Distribution of Fourth Amendment Privacy", *supra* note 55 at 1271.

58 See Aziz Huq, "Fourth Amendment Gloss" (2018) 113:4 Nw UL Rev 701 at 701 (explaining how constitutional norms set a floor for legitimate police action).

59 *Canadian Charter of Rights and Freedoms*, s 8, Part 1 of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Canadian Charter*].

60 See *Hunter et al v Southam Inc,* [1984] 2 SCR 145 at 159, ACS no 36; William Stuntz, "Privacy's Problem and the Law of Criminal Procedure" (1995) 93:5 Mich L Rev 1016 at 1029.

61 See Steven Penney, "Standards of Suspicion" (2017) 65 Crim LQ 23 at 27–28.

62 See Don Stuart, "The *Charter* and Criminal Justice" in Oliver, Macklem & Desrosiers (eds), *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) at 799–801.

63 *Canadian Charter*, *supra* note 59, s 9.

casing a house to commit a break and enter, breaching their bail conditions, or trafficking narcotics. So, they resort to certain investigative tactics that help them gather information.[64] They pull over drivers to seek incriminating material or circumstantial evidence.[65] They look for signs of intoxication or smell for drugs to see if the driver may have committed a crime.[66]

Yet officers can also seek out a more direct type of evidence to resolve information failures: confessions. During informal street level questioning, suspects may admit that they are breaching their bail conditions, hiding drugs or guns, or have committed some other crime.[67] Although confessions can be unreliable, they are crucial to police officers for various reasons. For one, they may provide the necessary reasonable grounds to arrest suspects, search them, find evidence, and charge them with crimes.[68] As such, confessions may also increase the likelihood that individuals will be charged with a crime, plea bargain, and be found guilty.[69] Furthermore, when confessions lead to the discovery of derivative evidence—for instance, when a defendant admits that they possess narcotics or prohibited weapons—the defendant's

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64 See Terry Skolnik, "Policing in the Shadow of Legality: Pretext, Leveraging, and Investigation Cascades" 60:3 Osgoode Hall LJ [forthcoming in 2023] [Skolnik, "Policing in the Shadow of Legality"].

65 See *ibid.*

66 See *ibid*.

67 See e.g. Yueran Yang et al, "Why Suspects Confess: The Power of Outcome Certainty" (2019) 43:5 L & Human Behavior 468 at 468–69 (stating that the confession rate for custodial interrogations is roughly 42-55% in the United States). For examples in Canadian case law, see *R v Grant*, 2009 SCC 32 at para 7 [*R v Grant*] (the accused confessed that they had a gun during an unlawful investigative detention). See also *R v Manninen,* [1987] 1 SCR 1233 at 1238, ACS no 41 [*R v Manninen*] (following an arrest, the accused confessed that they committed an armed robbery with a knife but denied that they used a gun).

68 See Skolnik, "Policing in the Shadow of Legality", *supra* note 64; Steven Penney, "Driving While Innocent: Curbing the Excesses the 'Traffic Stop' Power" (2019) 24:3 Can Crim L Rev 339 at 341.

69 See Laura Fallon, Weyam Fahmy & Brent Snook, "Assessing the Treatment of Confession Evidence in Court: The Confessions Rule and the Case of *R. v. Oickle*" (2018) 23:3 Can Crim L Rev 233 at 239.

substantive guilt tends to be established.[70] Much of the subsequent trial—if any—will turn on procedural claims: whether the police violated the defendant's constitutional rights and whether the evidence should be excluded.[71]

Section 9 of the *Canadian Charter* prevents officers from engaging in many investigative tactics that produce confessions and fix information failures. Officers must have reasonable grounds to suspect that a person is involved in a recent or ongoing crime to detain and question them.[72] To be clear, the Supreme Court of Canada has held that officers may ask individuals certain preliminary questions—such as their name, date of birth, or address—without triggering an investigative detention.[73] But if officers wish to ask more intrusive questions or interrogate individuals, they must meet the reasonable suspicion requirement and inform individuals of their constitutional right to counsel.[74] Similar constraints apply to traffic stops. During a random traffic stop, officers can only ask traffic-related questions unless they satisfy the reasonable suspicion requirement.[75] Officers who wish to conduct a more thorough criminal investigation must inform the individual of their relevant constitutional rights.[76]

The common law confessions rule confers additional protection to individuals. A confession is admissible only when the prosecution proves beyond a reasonable doubt that it was free and

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70 See Janice Nadler, "No Need to Shout: Bus Sweeps and the Psychology of Coercion" [2002] 2002:1 Sup Ct Rev 153 at 210.

71 See William Stuntz, "The Uneasy Relationship between Criminal Procedure and Criminal Justice" (1997) 107:1 Yale LJ 1 at 45 [Stuntz, "The Uneasy Relationship"].

72 See *R v Mann* 2004 SCC 52 at para 45, [*R v Mann*].

73 See *R v Suberu*, 2009 SCC 33 at para 28 [*R v Suberu*]; Terry Skolnik, "Rééquilibrer le rôle de la Cour suprême du Canada en procédure criminelle" (2022) 67:3 McGill LJ 259 at 272-74 [Skolnik, "Rééquilibrer le role"].

74 See *R v Grant*, *supra* note 67 at paras 54–55, 58.

75 See *R v Ladouceur,* [1990] 1 SCR 1257 at 1287, ACS no 53 [*R v Ladouceur*].

76 See *ibid*.

voluntary.[77] Courts may exclude confessions that stem from aggressive, threating, or oppressive questioning tactics.[78] Admittedly, officers may skirt or violate these constitutional and common law safeguards.[79] And the low visibility of police encounters helps explain why courts rarely adjudicate their lawfulness.[80] Yet the Constitution's protection against arbitrary detentions and the common law confession rule still limit officers' ability to remedy information failures and discover criminal wrongdoing.

Enter the third form of constitutional protection that maintains information asymmetries in policing: the right to counsel conferred by section 10 of the *Canadian Charter*.[81] Various constitutional norms limit officers' capacities to obtain confessions, fix information asymmetries, and detect criminal wrongdoing. Officers must tell individuals why they are arrested or detained.[82] They must also inform individuals of their right to contact a lawyer without delay, that they can contact duty counsel to receive preliminary legal advice, and that they can benefit from legal aid if they qualify.[83] When suspects express that they want to contact counsel, officers must refrain from questioning until the individual reaches their lawyer or has had a reasonable opportunity to do so.[84]

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77 See generally *R v Oickle,* 2000 SCC 38; Don Stuart, "Charter Standards for Investigative Powers: Have the Courts Got the Balance Right?" (2008) 40:1 SCLR (2d) 3 at 35.

78 See Laura Fallon, Weyam Fahmy & Brent Snook, *supra* note 69 at 234.

79 See e.g. Skolnik, "Policing in the Shadow of Legality", *supra* note 64.

80 See e.g. Skolnik, "Rééquilibrer le role", *supra* note 73 at 278.

81 *Canadian Charter, supra* note 59, s 10.

82 See *ibid,* s 10(a).

83 See *ibid,* s 10(b); Jonathan Dawe & Heather McArthur, "Charter Detention and the Exclusion of Evidence after Grant, Harrison and Suberu" (2010) 56:4 Crim LQ 376 at 389, n 50 (summarizing the scope of s 10(b) of the *Canadian Charter*).

84 See *R v Manninen*, *supra* note 67 at paras 1242–43; *R v Sinclair*, 2010 SCC 35 at para 58.

Together, these three constitutional guarantees—protection against illegal searches, safeguards against arbitrary detentions, and the right to counsel—contribute to information failures in law enforcement. To bypass these limitations, officers can resort to other means to rectify information asymmetries and detect crimes: they can screen potential suspects for their prior convictions. Yet as discussed more below, this screening mechanism subjects innocent individuals to invasive law enforcement scrutiny, unwanted police encounters, and humiliation.

B. Screening, Signaling, and Criminal Records

Although patrol officers routinely face information failures, signaling and screening theory may explain why they value information regarding a person's criminal record. Signaling implies that the more knowledgeable party moves first and telegraphs certain information to the less knowledgeable one.[85] For instance, doctors hang their university diplomas on their office walls to signal their competence to patients.[86] Corporate firms issue dividends to show their financial vitality to investors.[87] Manufacturers offer longer warranties to express the product's high quality to consumers.[88]

Screening, on the other hand, means that the less knowledgeable party moves first and seeks information from the more knowledgeable party.[89] Screening allows the less knowledgeable party to cut through noise, receive a stronger signal, and access relevant information with fewer transaction costs. Furthermore, screening is particularly effective to mitigate

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85 See David Kreps & Joel Sobel, "Signaling" in Aumann & Hart (eds), *Handbook of Game Theory,* vol 2 (Amsterdam: Elsevier, 1994) at 862.

86 See Jeffrey Treem & Paul Leonardi, "What is Expertise? Who is an Expert? Some Definitive Answers" in Treem & Leonardi (eds), *Expertise, Communication, and Organizing* (Oxford: Oxford University Press, 2016) at 4.

87 See Baskin, *supra* note 36 at 236.

88 See Sanford Grossman, "The Informational Role of Warranties and Private Disclosure about Product Quality" (1981) 24:3 JL & Econ 461 at 463.

89 See Kreps & Sobel, *supra* note 85 at 861.

risk. Prior to issuing loans, banks screen individuals' credit ratings to prevent economic loss.[90] Insurance companies require applicants to fill out health questionnaires to minimize the corporation's financial risk.[91] Employers require applicants to submit CVs to filter out unsuitable candidates.[92]

Signaling and screening theory also pervade street-level policing. Criminal records can function as a signal for which officers screen (note that this article does not discuss how officers' conduct may signal certain information to defendants). During patrols, police officers aim to investigate, prevent, and repress crimes. Yet they have limited time and resources, both of which they must spend wisely. Officers may use criminal records as a heuristic (or rule of thumb) to decide whom they investigate, and how thoroughly they investigate them.[93]

Patrol officers may screen for criminal history for two main reasons. First, criminal records can narrow the scope of potential investigative targets.[94] Prior convictions signal to officers that individuals may be involved in criminal activity because they have previously been convicted of one or several crimes.[95] Some US studies show that officers' knowledge about the driver—including their criminal record—is the second most common justification for a traffic stop (the most common justification being a traffic

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90 See Arnoud Boot & Anjan Thakor, "Moral Hazard and Secured Lending in an Infinitely Repeated Credit Market Game" (1994) 35:4 Intl Economic Rev 899 at 900.

91 See John Riley, "Silver Signals: Twenty-Five Years of Screening and Signaling" (2001) 39:2 J Economic Literature 432 at 436–37.

92 See Joseph Stiglitz, "The Theory of 'Screening' Education, and the Distribution of Income" (1975) 65:3 American Economic Rev 283 at 287.

93 See Amos Tversky & Daniel Kahneman, "Judging under Uncertainty: Heuristics and Biases" in Shafir, ed, *Preference, Belief, and Similarity* (Cambridge, MA: MIT Press, 2004) at 203.

94 See Stolzenberg, D'Alessio & Flexon, *supra* note 7 at 34.

95 See *ibid* at 34, 43; Megan Denver, Justin Pickett & Shawn Bushway, "The Language of Stigmatization and the Mark of Violence: Experimental Evidence on the Social Construction and Use of Criminal Record Stigma" (2017) 55:3 Criminology 664 at 671–72.

violation).[96] Certain empirical research also demonstrates that individuals with criminal records are more likely to be stopped and searched by the police than those without.[97] Other studies suggest that individuals with prior convictions are roughly 29 times more likely to be arrested than first-time offenders.[98]

There is some support for officers' use of criminal records to screen for potential criminal activity. Criminological research shows that a criminal record is a strong predictor for whether individuals will reoffend.[99] This partly explains why courts accept that a defendant's criminal record can contribute to officers' reasonable suspicion that they are involved in crime.[100] However, as discussed more below, such investigative tactics exacerbate discrimination, result in racial and social profiling, and increase the prospect of wrongful convictions.

Second, officers may use prior convictions as a heuristic to screen for potential violence during police interventions.[101] Officers want to know whether a potential suspect has been convicted of assaulting a police officer or has been found guilty of some other violent offence.[102] Aware of this information, officers may take additional precautions—such as requesting backup or conducting more secure traffic stops—during a proactive police encounter.

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96 See Richard Johnson & Mark Morgan, "Suspicion Formation Among Police Officers: An International Literature Review" (2013) 26:1 Crim Just Studies 99 at 102–03.

97 See Scot Wortley & Akwasi Owusu-Bempah, "The Usual Suspects: Police Stop and Search Practices in Canada" (2011) 21:4 Policing & Society 395 at 399.

98 See Stolzenberg, D'Alessio & Flexon, *supra* note 7 at 41.

99 See *ibid* at 32.

100 See *R v Savage*, 2011 SKCA 65 at paras 26, 30; *R v Duong,* 2018 SKCA 25 at para 22 (affirming trial judgment); *R v MacKenzie,* 2013 SCC 50 at para 122 (noting that a criminal record forms part of the constellation of factors that justify reasonable suspicion).

101 See Carrie Sanders & Stacey Hannem, "Policing 'the Risky': Technology and Surveillance in Everyday Patrol Work" (2012) 49:2 Can Rev Sociology 389 at 397–99.

102 See Stolzenberg, D'Alessio & Flexon, *supra* note 7 at 35.

Screening for criminal records also raises significant concerns. Individuals with prior convictions can be subject to disproportionate police attention.[103] They may be subject to repetitive and humiliating law enforcement encounters because they have a criminal record.[104] Furthermore, criminal records often intersect with other personal traits such as ethnicity, mental illness, or socioeconomic status that compound marginalized individuals and groups' disadvantages.[105] For instance, racialized persons are already disproportionately subject to a greater number of traffic stops, stop-and-frisk searches, use of force, arrests, and criminal charges (including those that are subsequently dropped).[106] Prior convictions worsen these tendencies. The intersection between some personal traits and prior convictions can exacerbate discriminatory police practices and decrease individuals' trust in law enforcement and in the justice system.[107]

C. Investigative Technology and Constitutional Review

Investigative technology facilitates how police officers screen for criminal records to reduce information failures, detect crimes, and skirt constitutional norms.[108] The growing use of police information databases helps explain this tendency. Centralized police databases, such as the Canadian Police Information Centre (CPIC), provide officers with important data about vehicles and persons.[109] A database search can indicate whether an individual

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103 See Alexandra Natapoff, "Misdemeanors" (2012) 85:5 S Cal L Rev 1313 at 1325.

104 See Wortley & Owusu-Bempah, *supra* note 97 at 397–99.

105 See Jessica Clarke, "Against Immutability" (2015) 125:2 Yale LJ 2 at 76–77.

106 See Terry Skolnik, "Racial Profiling and the Perils of Ancillary Police Powers" (2021) 99:2 Can Bar Rev 429 at 436–39.

107 See *ibid* at 439.

108 See Andrew Guthrie Ferguson, "The Exclusionary Rule in the Age of Blue Data" (2019) 72:2 Vand L Rev 561 at 564–66; Skolnik, *supra* note 64.

109 See Jennifer Hegel, Karen Pelletier & Mark Olver, "Predictive Properties of the Ontario Domestic Assault Risk Assessment (ODARA) in a Northern Canadian Prairie Sample" (2022) 49:3 Crim Justice & Behavior at 417.

has a criminal record, is sought by warrant, is in breach of their bail or parole conditions, or is a registered owner of a vehicle or firearm.[110] Police forces also have decentralized databases that contain more information about individuals, including photos, previous occurrence reports, intelligence reports, data regarding prior contact with law enforcement, and more.[111]

Officers can lawfully acquire individuals' identification and conduct a police database search in different contexts. Motorists must provide their drivers' license when they are pulled over by the police, irrespective of whether they committed a driving offence.[112] Pedestrians, for their part, are under no obligation to identify themselves to police officers when they have done nothing wrong.[113] Yet provincial laws require individuals who commit some low-level regulatory offence—such as jaywalking, cycling on a sidewalk, or littering—to identify themselves to police officers, which can lead to a subsequent police database verification.[114] The sheer number of regulatory offences explains why officers have the power to identify individuals in a range of circumstances, and ultimately, investigate their criminal history.[115] The Constitution prohibits officers from using regulatory offences or traffic contexts

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110 Sara Levine, "Canadian Police Information Centre" (2015), online: *BC Civil Liberties Association Privacy Handbook* <bccla.org/privacy-handbook/main-menu/privacy7contents/privacy7-14.html>.

111 See *R c Qiluqi*, 2020 QCCM 122 at paras 33, 37 (discussing individuals' photos contained in the Montreal Police Service's internal police database); *R c Viellot Blaise*, 2020 QCCM 26 at para 99 (same); *R v Mooiman and Zahar*, 2016 SKCA 43 at para 7 (describing Police Information Portal database); *Toronto (Police Services Board) (Re),* 2020 CanLII 33291 (ON IPC) at para 18 (describing access to police occurrence report in records management system); *R v Fowler*, 2021 ONSC 3180 at para 32 (describing intelligence reports).

112 See e.g. *R v Ladouceur*, *supra* note 75 at 1287. See also *Highway Traffic Act,* RSO 1990, c H.8, s 33.

113 See *R v Suberu, supra* note 73 at para 28.

114 See e.g. *Code of Penal Procedure,* c C-25.1 ss 72, 74.

115 See Skolnik, "Policing in the Shadow of Legality", *supra* note 64.

as a pretext to conduct a criminal investigation.[116] Yet pretext is notoriously difficult to prove.[117] Officers may acquire individuals' identification and verify their criminal history in a manner that skirts constitutional safeguards or evades constitutional review.

Together, officers' power to identify individuals, the risk of pretext, and the rise of police databases help officers acquire information indirectly that they cannot acquire directly. Officers cannot interrogate individuals about their criminal history if they do not satisfy certain legal thresholds— such as reasonable suspicion—and respect certain constitutional duties—such as informing the defendant of their *Canadian Charter* rights.[118] Constitutional criminal procedure prohibits the police from directly extracting criminal record information from one source in particular: suspects. But the combined forces of regulatory offence violations, traffic stop powers, and pretext help officers acquire identification and assess an individual's criminal history. Constitutional review may fail to prevent and address the unlawful acquisition of an individuals' criminal record information.

IV. CRIMINAL RECORDS AND BAIL

A. Bail, Information Asymmetries, and Risk

Criminal records also impact the bail process in important ways. When it comes to the bail process, criminal records serve a different function: they predict risk. And bail is all about risk.[119] Prosecutors must gauge whether defendants will abscond, commit

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116 See e.g. *Brown v Regional Municipality of Durham Police Service Board,* 43 OR (3d) 223 at 242–43, 167 DLR (4th) 672 (CA); *R v Mayor,* 2019 ONCA 578 at para 9.

117 See Skolnik, "Policing in the Shadow of Legality", *supra* note 64.

118 See e.g. *R v Harris,* 2007 ONCA 574 at paras 38–40 (conclusion per the majority that police violate passengers' constitutional rights to be free from unlawful search and seizure when they detain them, request identification, and run a CPIC check).

119 See Andrew Ashworth & Lucia Zedner, *Preventive Justice* (Oxford: Oxford University Press, 2014) at 65–68; Sandra Mayson, "Dangerous Defendants" (2018) 127 Yale LJ 490 at 492–94.

new crimes, tamper with witnesses, or harm others before trial.[120] Judges, for their part, must make bail decisions that maintain public confidence in the criminal justice system.[121] During the bail process, prosecutors and judges must make pre-trial decisions based on imperfect information.

Though pre-trial coercion reduces certain risks associated with information asymmetries at the bail stage, constitutional norms rightfully limit its use. Remand in custody, bail conditions, cash deposits, and sureties are all inconsistent with the presumption of innocence.[122] Defendants also have a constitutional right not be denied reasonable bail without just cause, which imposes substantive limits on the type and severity of pre-trial release.[123] The ladder principle prohibits more severe forms of pre-trial coercion unless the prosecution shows why less severe forms of it are inadequate.[124] Ultimately, the bail process aims to reduce asymmetric information in a way that balances individual and societal interests.[125]

Prosecutors and judges screen defendants' criminal records to address information imbalances and assess risks of pre-trial misconduct.[126] They consider prior convictions as a heuristic to gauge these risks and determine appropriate forms of pre-trial

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120 See *Criminal Code,* RSC, 1985, c C-46, s 515(10) [*Criminal Code*]; Terry Skolnik, "Criminal Law during (and after) COVID-19" (2020) 43:4 Man LJ 145 at 162–63 [Skolnik, "Criminal Law During (and After) COVID-19"].

121 See *Criminal Code, supra* note 120, s 515(10)(c); Carolyn Yule & Rachel Schumann, "Negotiating Release? Analysing Decision Making in Bail Court" (2019) 61:3 Can J Corr 45 at 46.

122 See Antony Duff, "Pre-Trial Detention and the Presumption of Innocence" in Ashworth, Zedner & Tomlin, eds, *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013) at 119–20.

123 See *Canadian Charter, supra* note 59, s 11(e); *R v Antic,* 2017 SCC 27 at para 26; *R v Zora,* 2020 SCC 14 at para 24 [*R v Zora*].

124 See *R v Zora*, *supra* note 123 at para 24.

125 See Jocelyn Simonson, "Bail Nullification" (2017) 115:5 Mich L Rev 585 at 612.

126 See Curtis EA Karnow, "Setting Bail for Public Safety" (2008) 13:1 Berkeley J Crim L 1 at 10.

release.[127] In some senses, the possibility to screen for criminal records may reduce the overall level of pre-trial coercion in the bail system. If criminal records did not exist, prosecutors and judges could not adequately assess whether defendants are a flight risk or determine whether they create a danger for the public based on their criminal history. The justice system might respond by increasing the total level of pre-trial coercion for all defendants to mitigate pre-trial misconduct risks (more on this below). Although the use of criminal records to gauge risk is problematic, justice system actors use them as a rough heuristic to sort low-risk from high-risk defendants in terms of the likelihood that they will abscond or re-offend pre-trial.

Predictive risk assessments raise important concerns. For one, some systematic review studies in US jurisdictions suggest that pre-trial risk assessments have lower predictive validity for racialized persons compared to white persons.[128] Some studies also suggest that Black defendants are more likely to be classified as presenting a higher recidivism risk compared to white defendants.[129] An algorithm's design may also incorporate biases or prejudices that adversely impact Black persons.[130]

A criminal record can result in less favourable bail decisions for several reasons. First, compared to individuals with no criminal history, defendants with criminal records are more likely to be remanded into custody, which generates several important consequences.[131] Defendants who are detained pending trial due

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127 See Jacobs, *supra* note 2 at 3, 228-29.

128 See Sarah L Desmarais et al, "Predictive Validity of Pre-Trial Risk Assessments: A Systematic Review of the Literature" (2021) 48:4 Crim Justice & Behavior 398 at 414.

129 See Michael Brenner et al, "Constitutional Dimensions of Predictive Algorithms in Criminal Justice" (2020) 55:1 Harv CR-CL L Rev 267 at 287–90.

130 See Sandra G Mayson, "Bias in, Bias out" (2019) 128:8 Yale LJ 2218 at 2221–22.

131 See Stephen Demuth & Darrell Steffensmeier, "The Impact of Gender and Race-Ethnicity in the Pretrial Release Process" (2004) 51:2 Social Problems 222 at 233; See Meghan Sacks, Vincenzo A Sainato & Alissa R Ackerman, "Sentenced to Pretrial Detention: A Study of Bail Decisions and Outcomes" (2015) 40:3 Am J Crim Just 661 at 666; See Julian V Roberts & Anthony N

to their criminal record are more likely to be found guilty than those released on bail.[132] Pre-trial detention also offers strong incentives to accept plea deals.[133] Compared to defendants who are sentenced to imprisonment, those who are detained before trial face worse incarceration conditions due to overcrowding and a lack of educational and rehabilitative resources.[134] These forces push defendants—including innocent ones—to plead guilty to escape pre-trial custody. Furthermore, certain research indicates that white defendants receive more favourable treatment in the bail process than Black defendants.[135]

Second, defendants' prior convictions—especially those associated with bail breaches—can justify harsher forms of pre-trial release that set defendants up to fail (note that some studies suggest that defendants who have a criminal record are more likely to be released on their own recognizance compared to defendants with no prior convictions).[136]

During the bail process, previous convictions may adversely impact defendants for the following reasons. Courts consider defendants' criminal records when they set bail.[137] In an effort to counteract risks of pre-trial misconduct, judges may impose harsher forms of pre-trial release on defendants with prior

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Doob, "Race, Ethnicity, and Criminal Justice in Canada" (1997) 21:1 Crime & Justice 469 at 501.

132 See Abby Deschman & Nicole Myers, *Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention* (2014) at 10, online (pdf): *Canadian Civil Liberties Association* <ccla.org/wp-content/uploads/2021/07/Set-up-to-fail-FINAL.pdf>.

133 See Crystal Yang, "Toward an Optimal Bail System" (2017) 92 NYU L Rev 1399 at 1423.

134 See *R v Summers*, 2014 SCC 26 at para 2.

135 See Roberts & Doob, *supra* note 131 at 503–04, 516.

136 See Gary Trotter, *The Law of Bail in Canada*, 3rd ed, (Toronto: Thompson Reuters, 2010) (loose-leaf updated 2021, release 1) at 3-11. See also *Criminal Code*, *supra* note 120, s 515(3); Rachel Schumann & Carolyn Yule, "Unbreaking Bail? Post-*Antic* Trends in Bail Outcomes" (2022) 37:1 CJLS 1 at 16–17 [Schumann & Yule, "Unbreaking Bail?"].

137 See Trotter, *supra* note 136 at 3-11; *R v Singh*, 2020 ONSC 7391 at paras 2, 39.

convictions.[138] Defendants who have a high number of bail conditions may breach them, accumulate criminal charges, and be detained pending trial.[139] This is particularly problematic because some defendants consent to bail conditions that they cannot obey to avoid remand in custody.[140] For instance, defendants who struggle with substance use disorder may agree to abstain from consuming alcohol or drugs to secure their release.[141] However, some studies also suggest that defendants without a criminal record are less likely to be released on their own recognizance compared to defendants with prior convictions.[142]

Third, criminal records may disproportionately impact lower-income defendants during the bail stage.[143] Impecunious defendants may not have access to sufficiently affluent friends or family members who can act as a surety, such that courts will detain them pending trial.[144] They may also lack adequate financial resources to put down a cash deposit and secure their

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138 See also Nicole Marie Myers, "Eroding the Presumption of Innocence: Pre-trial Detention and the Use of Conditional Release on Bail" (2017) 57:3 Brit J Crim 664 at 673 [Myers, "Eroding the Presumption of Innocence"].

139 See *ibid* at 678. See also Jane Sprott & Nicole Marie Myers, "Set up to Fail: The Unintended Consequences of Multiple Bail Conditions" (2011) 53:4 Can J Corr 404 at 417–18.

140 See Marie-Ève Sylvestre, Celine Bellot & Nicholas Blomley, "Une peine avant jugement? La mise en liberté provisoire et la réforme du droit pénal canadien" in Desrosiers, Garcia, & Sylvestre, eds, *Criminal Law Reform in Canada: Challenges and Possibilities* (Cowansville: Yvon Blais, 2017) at 194.

141 See Skolnik, "Criminal Law During (and After) COVID-19", *supra* note 120 at 170.

142 See Schumann & Yule, "Unbreaking Bail?", *supra* note 136 at 16–17.

143 Jillian Rogin, "Police-Generated Evidence in Bail Hearings: Generating Criminality and Mass Pretrial Incarceration in Canada" (2023) 46:1 Dal LJ 1 at 20–21.

144 See Department of Justice, *'Broken Bail' in Canada: How We Might Go About Fixing It,* by Cheryl Marie Webster, (Ottawa: Department of Justice: Research and Statistics Division, 2015) at 10, online (pdf): <publications.gc.ca/collections/collection_2018/jus/J4-73-2015-eng.pdf> [Department of Justice, "'Broken Bail' in Canada"]; Marianne Quirouette, "Community Practitioners in Criminal Courts: Risk Logics and Multiply-Disadvantaged Individuals" (2018) 22:4 Theoretical Criminology 582 at 593.

release.[145] Since some forms of release depend on a defendant or their social network's financial capacities, impecunious defendants may be detained pending trial or released on less favourable terms.

B. BAIL, CRIMINAL RECORDS, AND COGNITIVE BIASES

In theory, unconditional pre-trial release is the rule, while conditional release, pre-trial supervision, or remand in custody are the exceptions.[146] Defendants should be unconditionally released pending trial with an undertaking, unless the prosecutor justifies some form of pre-trial coercion, or unless the defendant committed a crime that imposes a presumption of pre-trial custody that the defendant must refute.[147]

In practice, the bail system looks very different. Remand in custody rates have roughly tripled over the past three decades.[148] In the years 2017-18 (the most recent available statistics), there were more individuals remanded in custody in provincial detention centres than serving their sentences.[149] Numerous bail conditions are both prevalent and normalized.[150] In some jurisdictions, sureties are imposed with significant frequency.[151]

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145 See *R v Antic*, 2017 SCC 27 at para 58–59.

146 See *Criminal Code*, *supra* note 120, s 515(1). See also Jillian Rogin, "Gladue and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada" (2017) 95:2 Can Bar Rev 325 at 329.

147 See *Criminal Code*, *supra* note 120, s 515(1). See also Yule & Schumann, "Negotiating Release?", *supra* note 121 at 46.

148 See Myers, "Eroding the Presumption of Innocence", *supra* note 138 at 666–67.

149 See Statistics Canada, *Adult and Youth Correctional Statistics in Canada, 2017/2018,* by Jamil Malakieh (Ottawa: Statistics Canada, 9 May 2019).

150 See also Cheryl Marie Webster, Anthony N Doob & Nicole Marie Myers, "The Parable of Ms Baker: Understanding Pre-trial Detention in Canada" (2009) 21:1 Current Issues in Crim Justice 79 at 99–100.

151 See Rachel Schumann, "Sureties as Civilian Jailers: Understanding the Role of the Court in the Lives of Accused Released on Surety Bail in Ontario" (2018) 55:4 Can Rev Sociology 532 at 536; Nicole Myers, "Shifting Risk: Bail and the Use of Sureties" (2009) 21:1 Current Issues in Crim Justice 127 at 134–35.

What explains this? And why do criminal records exacerbate these tendencies?

Some scholars observe that the bail system's culture of risk aversion accounts for excessive pre-trial coercion.[152] Since the costs of making the wrong decision can be so high, these criminal justice system actors can be reluctant to gamble on laxer types of pre-trial release.[153] Furthermore, the consequences of mistakenly detaining versus mistakenly releasing defendants are asymmetric, especially in contexts where the error is highly visible.[154] Excessive pre-trial coercion is largely normalized and tolerated within the criminal justice system, especially for more serious crimes.[155] Though there are some exceptions, the fact that a bail judge ordered a surety rather than bail conditions—or remanded rather than released a defendant—rarely makes front-page news.[156] Conversely, the costs of pre-trial release decisions gone wrong can be well-known, emotionally salient, and publicized widely via media.[157] As discussed more below, two cognitive biases may contribute to a culture of risk aversion towards those with criminal records: the representativeness heuristic and the availability heuristic.

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[152] See Benjamin L Berger & James Stribopoulos, "Risk and the Role of the Judge: Lessons from Bail" in Berger, Cunliffe & Stribopoulos, eds, *To Ensure that Justice is Done: Essays in Memory of Marc Rosenberg* (Toronto: Thomson Reuters, 2017) at 321; Webster, Doob & Myers, *supra* note 150 at 99–100.

[153] See Lauryn P Gouldin, "Disentangling Flight Risk from Dangerousness" (2016) 2016:3 BYU L Rev 837 at 890.

[154] See Martin L Friedland, "The *Bail Reform Act* Revisited" (2012) 16:1 Can Crim L R 315 at 320.

[155] See Karnow, *supra* note 126 at 18; Samuel R Wiseman, "Fixing Bail" (2016) 84:2 Geo Wash L Rev 417 at 422.

[156] For an example of such an exception, see the case of Mamadi Camara, who was wrongfully remanded into custody for a crime he did not commit. Josh Grant & Steve Rukavina, "Montreal Man, Wrongfully Arrested for Attacking Police Officer, to Sue City and Crown for Nearly $1M" (14 July 2021), online: *CBC News* <cbc.ca/news/canada/montreal/mamadi-camara-wrongful-arrest-lawsuit-1.6102099>.

[157] See Nicole M Myers, "Shifting Risk: Bail and the Use of Sureties" (2009) 21:1 Current Issues in Crim J 127 at 145.

First, the representativeness heuristic may exacerbate prosecutors' and judges' risk aversiveness. The representativeness heuristic implies that individuals calculate risks by analyzing whether a person or event resembles a broader class and reflects its salient features.[158] In other words, when assessing risk, decision-makers consider whether an individual *seems* like they belong to a broader class of persons that present certain levels of risk.[159]

For instance, to gauge the risk of pre-trial misconduct, criminal justice system actors may assess whether the defendant shares traits that belong to a broader class of persons who they believe are more likely to abscond, endanger public safety, or reoffend: defendants with criminal records.[160] Judges may employ a representative antecedent—such as a criminal record that suggests disregard for the law—to determine whether someone presents higher risks of pre-trial misconduct and requires harsher pre-trial coercion.[161]

Second, the availability heuristic may account for why prosecutors and judges tend to lean more towards pre-trial coercion for prior offenders. The availability heuristic implies that decision-makers assess the probability of events according to the ease at which they can recall information.[162] This heuristic causes decision makers to substitute a hard question with an easy

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158 See David Grether, "Bayes Rule as a Descriptive Model: The Representativeness Heuristic" (1980) 95:3 QJ Econ 537 at 538.

159 See Andrew Wistrich, Jeffrey Rachlinski & Chris Guthrie, "Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?" (2015) 93:4 Texas L Rev 855 at 865–66.

160 See generally Jason Roach & Ken Peace, "Police Overestimation of Criminal Career Homogeneity" (2014) 11:2 J Investigative Psychology & Offender Profiling 164 at 168.

161 See Victor J Gold, "Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence" (1983) 58:3 Wash L Rev 497 at 512.

162 See Norbert Schwarz et al, "Ease of Retrieval as Information: Another Look at the Availability Heuristic" (1991) 61:2 J Personality & Soc Psychology 195 at 195.

question.[163] For example, decision makers might substitute the harder question "what is the probability that something will occur?" with the easier question "how easily can the information be recalled?".[164] The availability heuristic explains why individuals overestimate the frequency of natural disasters that are publicized widely and are easy to remember.[165]

Within the criminal justice system, police officers, prosecutors, and judges are the individuals who see bail breaches and other pre-trial impropriety most frequently. The extent to which these actors can easily recall pre-trial misconduct may affect how they perceive risk. Together, the frequency of these events and their recallability may explain why prosecutors and judges can substitute the more difficult question (e.g.: what is this defendant's risk of pre-trial misconduct?) with the easier one (e.g.: how easily can I recall instances of pre-trial misconduct?). This explains why the availability heuristic may lead prosecutors and judges to systematically overestimate risk in the bail system.[166] Criminal records worsen this miscalculation because these justice system actors can easily retrieve two types of information: knowledge that the defendant has been convicted in the past, and easily recallable instances of others' pre-trial misconduct.

V. CRIMINAL RECORDS AND PLEA BARGAINING

Cognitive biases may heavily influence the plea-bargaining process more than anywhere else in the criminal justice system. Most criminal charges never make it to trial. The majority are resolved through plea bargaining—a process that also disadvantages

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163 See Daniel Kahnamen & Shane Frederick, "Representativeness Revisited: Attribute Substitution in Intuitive Judgment" in Gilovich, Griffin & Kahnamen, eds, *Heuristics and Biases: The Psychology of Intuitive Judgment* (Cambridge: Cambridge University Press, 2002) at 53.

164 See *ibid*.

165 See Cass Sunstein, "The Availability Heuristic, Intuitive Cost-Benefit Analysis, and Climate Change" (2006) 77:1 Climatic Change 195 at 198.

166 See Cass Sunstein, "Precautions against What? The Availability Heuristic and Cross-Cultural Risk Perception" (2005) 57:1 Ala L Rev 75 at 87-8.

defendants with prior convictions.[167] According to the "shadow of trial" model of plea bargaining, prosecutors calculate plea discounts according to the strength of the evidence and the potential sentence at trial.[168] Since weaker cases are less likely to lead to conviction or may result in lower sentences, prosecutors may offer defendants higher discounts in such contexts.[169] Conversely, in stronger cases with higher prospects of conviction, prosecutors may offer defendants lower discounts.[170] As discussed more below, the cumulative effects of information asymmetries, cognitive biases, and prior convictions may distort this process to prosecutors' benefit in certain circumstances.[171] Each of these factors are examined in turn.

The first factor relates to information asymmetries that pervade plea bargaining. Prosecutors often do not know whether defendants are guilty. Nor can they distinguish between innocent and guilty defendants' signals.[172] Although factually innocent defendants reject plea bargains to signal their innocence, factually guilty defendants copy that signal.[173] In addition to the strength of inculpatory evidence, prosecutors may also screen for prior convictions as a signal that the defendant is more likely guilty than innocent.[174] The availability and representativeness heuristics

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167 See Justice Canada, *Plea Bargaining*, by Milica Potrebic Piccinato (Ottawa: Justice Canada, 2004) at 6.

168 See Shawn D Bushway & Allison D Redlich, "Is Plea Bargaining in the 'Shadow of the Trial' a Mirage?" (2012) 28:3 J Quant Criminology 437 at 438-39; William M Landes, "An Economic Analysis of the Courts" (1971) 14:1 JL & Econ 61 at 61. The latter article is cited in Bushway & Redlich, *supra* note 168. See also Russell D Covey, "Signaling and Plea Bargaining's Innocence Problem" (2009) 66:1 Wash & Lee L Rev 73 at 77.

169 See Bushway & Redlich, *supra* note 168 at 438–39.

170 See *ibid*.

171 See Stephanos Bibas, "Plea Bargaining Outside the Shadow of Trial" (2004) 117:8 Harv L Rev 2463 at 2466–68 [Bibas, "Plea Bargaining"].

172 See Robert E Scott & William J Stuntz, "Plea Bargaining as Contract" (1992) 101:8 Yale LJ 1909 at 1942–43, 1946.

173 See *ibid*.

174 See *ibid* at 1944.

account for why prosecutors may overestimate this probability.[175] They may interpret criminal records as an indication that defendants are probably guilty because they have committed past crimes.

During plea bargaining, a defendant's criminal record is a valuable screening tool for two interrelated reasons, both of which can tilt the shadow-of-trial model heavily in prosecutors' favour. First, a defendant's prior convictions tend to increase their likelihood of conviction at trial.[176] Second, defendants with prior convictions who go to trial tend to receive harsher sentences.[177] Both of these factors may contribute to less favourable plea bargains for defendants with a criminal record.

The anchoring effect—another cognitive bias—may contribute to the disadvantages that defendants experience in the plea bargaining process.[178] Anchoring implies "the human tendency to adjust judgments or assessments higher or lower based on previously disclosed external information—the 'anchor.'"[179] Decision-makers are more likely to accept a particular number or value that is closer to the anchor, even when the anchor is extremely high or objectively impossible.[180] In the civil context, studies show that plaintiffs tend to receive more lucrative damage awards when they request a higher amount of damages in their

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175 See Section IV(B), *above.* See also Alafair S Burke, "Prosecutorial Passion, Cognitive Bias, and Plea Bargaining" (2007) 91:1 Marq L Rev 183 at 196–97 (note that Burke does not mention the availability or representativeness heuristic; yet she does describe how selective information processing may contribute to tunnel vision in prosecutions—an effect that prior convictions may exacerbate).

176 See Eisenberg & Hans, *supra* note 10 at 1358–64.

177 See Hester et al, *supra* note 12 at 209–10.

178 See also Bibas, "Plea Bargaining", *supra* note 171 at 2515–19 (anchoring).

179 See Mark Bennett, "Confronting Cognitive 'Anchoring Effect' and 'Blind Spot' Biases in Federal Sentencing: a Modest Solution For Reforming a Fundamental Flaw" (2014) 104:3 J Crim L & Criminology 489 at 495.

180 See Thomas Mussweiler, Birte Englich & Fritz Strack, "Anchoring Effect" in Rüdiger Pohl, ed, *Cognitive Illusions: A Handbook on Fallacies and Biases in Thinking, Judgement and Memory* (New York: Taylor & Francis, 2012) at 185–86.

statement of claim.[181] In the criminal law context, defendants may be drawn to accept harsher plea deals when the prosecutor initially offers a higher sentence.[182]

Prosecutors may cast higher initial plea offers to defendants with prior convictions—offers that reflect how criminal records influence conviction prospects and sentence severity.[183] Although defendants may reject the original offer, they will compare all subsequent ones to the initial anchor, such that all discounts will look more advantageous than if the anchor was lower.[184] The upshot: higher anchors may lead some repeat offenders to accept harsher plea deals either immediately or downstream in the negotiation process.[185] In contexts where prosecutors cast higher anchors for repeat offenders, the defendant's willingness to accept the bargain may be influenced by their risk tolerance.[186] Repeat offenders who are particularly risk averse may be more willing to accept a plea deal that diminishes the prospect of a harsher sentence at trial.[187]

However, studies also show that some repeat offenders may reject initial plea offers and wait for better deals.[188] Notably, certain repeat offenders may have deeper insider knowledge of the criminal justice system, plea bargaining practices, and the advantages of retaining some defence counsel rather than others.[189] For these reasons, they may secure more favourable plea

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181 See Yuval Feldman, Amos Schurr & Doron Teichman, "Anchoring Legal Standards" (2016) 13:2 J Empirical Legal Stud 298 at 303–04.

182 See Bibas, "Plea Bargaining", *supra* note 171 at 2517–19; Andrea Kupfer Schneider & Cynthia Alkon, "Bargaining in the Dark: The Need for Transparency and Data in Plea Bargaining" (2019) 22:4 New Crim L Rev 434 at 482.

183 See also Bibas, "Plea Bargaining", *supra* note 171 at 2517–18.

184 See *ibid*.

185 See *ibid*.

186 See Bibas, "Plea Bargaining", *supra* note 171 at 2509.

187 See *ibid*.

188 See Chloé Leclerc & Elsa Euvrard, "Pleading Guilty: A Voluntary or Coerced Decision?" (2019) 34:3 CJLS 457 at 467.

189 See *ibid* at 467–68.

deals that award their patience and their capacity to resist prosecutorial pressure.[190]

VI. CRIMINAL RECORDS, CONVICTIONS, AND PUNISHMENT

At the trial stage, a defendant's criminal record produces two adverse consequences that subject them to disparate treatment and worse criminal justice outcomes: the prior offender penalty and the silence penalty.[191] The prior offender penalty implies that defendants who testify can be cross-examined on their criminal record, which increases the likelihood that jurors will convict them.[192] The silence penalty, on the other hand, alludes to how defendants may refuse to testify to avoid being cross-examined on their criminal record, which also increases the likelihood that jurors will convict them.[193] As discussed more below, both consequences can produce worse outcomes for defendants with criminal records versus those with no criminal history.[194]

A. THE PRIOR OFFENDER PENALTY AND SUBCONSCIOUS BIAS

The prior offender penalty implies that defendants who are cross-examined on their criminal record face a higher prospect of conviction.[195] The general principles that govern such cross-examinations can be summarized as follows. The only acceptable purpose of this cross-examination is to attack the defendant's credibility.[196] The evidence cannot be used to conclude

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190 See *ibid*.

191 See Jeffrey Bellin, "The Silence Penalty" (2018) 103:2 Iowa L Rev 395 at 399 [Bellin, "The Silence Penalty"]. Note that the terms "prior offender penalty" and "silence penalty" are Bellin's terms.

192 See *ibid* at 402–06.

193 See *ibid* at 407–10; Eisenberg & Hans, *supra* note 10 at 1354–55.

194 See Eisenberg & Hans, *supra* note 10 at 1358–64; Richard Friedman, "Character Impeachment Evidence: Psycho-Bayesian (!?) Analysis and a Proposed Overhaul" (1991) 38:3 UCLA L Rev 637 at 666.

195 See e.g. *Canada Evidence Act*, RSC 1985, c C-5, s 12; *R* v *Corbett*, [1988] 1 SCR 670, 41 CCC (3d) [*R v Corbett*].

196 See Michael Plaxton, "The Shaky Foundations of *Corbett*" (2009) 13:2 Can Crim L Rev 91 at 92.

that the defendant is guilty because they have the propensity to commit crimes.[197] Leaving aside certain exceptions, the prosecution may only cross-examine the defendant on general details surrounding the conviction, such as the specific offence, the substance of the indictment, the place of conviction, and the punishment.[198] Judges also have the discretion to exclude prior convictions whose prejudicial effect exceeds their probative value.[199] Judges consider various factors to determine whether prior convictions are admissible.[200] Courts evaluate the similarity between the prior conviction and alleged offence, the proximity in time between them, whether the prior conviction involves dishonesty, and whether the defense attacked the prosecution witnesses' criminal history.[201]

These cross-examinations are limited because they present three main dangers that can flow from conscious or subconscious biases. First, triers of fact may resort to propensity reasoning; they may believe that the defendant is more likely to be guilty because they previously committed crimes.[202] Second, triers of fact may convict the defendant as a form of retaliation for their past crimes.[203] Third, triers of fact may convict the defendant because

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197 See *R v Marini*, 2017 ONCA 46 at para 20; *R v Strathdee*, 2020 ABCA 306 at para 47.

198 See *R v Strathdee*, 2020 ABCA 306 at para 46; *R v Bricker,* [1994] 90 CCC (3d) 268 at 278, 23 WCB (2d) 437 (ON CA). Note that the prosecution may question the defendant regarding more specific details of the crime if they testify to the substance of these prior convictions during examination-in-chief or put their character at issue. See also Sidney Lederman, Alan Bryant & Michelle Fuerst, *The Law of Evidence in Canada,* 5th ed (Toronto: LexisNexis, 2018) at 681.

199 See *R* v *Corbett*, *supra* note 195 at 736–44, La Forest J, dissenting.

200 Peter Sankoff, "Corbett Revisited: A Fairer Approach to the Admission of an Accused's Prior Criminal Record in Cross-Examination" (2006) 51:4 Crim LQ 400 at 401-02; Lederman, Bryant & Fuerst, *supra* note 198 at 683.

201 See *R* v *Corbett*, *supra* note 195 at 736–44, La Forest J, dissenting.

202 See Ryan Elias, "Unlikable and Before the Jury: Does Non-Probative Character Evidence Increase the Risk of Wrongful Conviction?" (2016) 63:4 Crim LQ 567 at 571–72.

203 See Sherry F Colb, "Whodunit Versus What Was Done: When to Admit Character Evidence in Criminal Cases" (2001) 79:4 NCL Rev 939 at 961.

they dislike criminals more generally, and the defendant falls within that category.[204] To combat these dangers, judges must warn jurors that the defendant's criminal record only goes to their credibility and that they cannot resort to propensity reasoning.[205] Many judicial decisions explain that these types of instructions effectively ensure that jurors do not use a defendant's criminal record for improper purposes.[206]

But various studies demonstrate that judges' and jurors' knowledge of a defendant's prior convictions increases the likelihood of conviction significantly.[207] Mock trial studies repeatedly show that jurors who are aware of a defendant's criminal record are more likely to convict them.[208] The effects tend to be worse when there is similarity between the defendants' past crimes and the alleged offence.[209] Furthermore, these studies indicate that a judge's limiting instructions—namely that prior convictions only go to credibility and cannot be used for

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204 See also Alan D Hornstein, "Between Rock and a Hard Place: The Right to Testify and Impeachment by Prior Conviction" (1997) 42:1 Vill L Rev 1 at 9, cited in Colb, *supra* note 203; Edward Roslak, "Game Over: A Proposal to Reform Federal Rule of Evidence 609" (2009) 39:2 Seton Hall L Rev 695 at 696.

205 See *R v MC*, 2019 ONCA 502 at para 37.

206 See e.g. Peter Sankoff, "*Corbett* Revisited: A Fairer Approach to the Admission of an Accused's Prior Criminal Record in Cross-Examination" (2006) 51:4 Crim LQ 400 at 413–15 (providing an overview of such decisions).

207 See Eisenberg & Hans, *supra* note 10 at 1358–64. Note that most of the following studies are cited and discussed by Eisenberg and Hans.

208 See Anthony Doob & Hershi Kirshenbaum, "Some Empirical Evidence on the Effect of s. 12 of the *Canada Evidence Act* Upon an Accused" (1972) 15:1 Crim LQ 88 at 93–96; Anthony Doob & Valerie Hans, "Section 12 of the *Canada Evidence Act* and the Deliberations of Simulated Juries" (1975) 18:2 Crim LQ 235 at 251–52; Jennifer Hunt & Thomas Budesheim, "How Jurors Use and Misuse Character Evidence" (2004) 89:2 J of Applied Psych 347; Roselle Wissler & Michael Saks, "On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt" (1985) 9:1 Law & Human Behavior 37 at 43–44; Edith Greene & Mary Dodge, "The Influence of Prior Record Evidence on Juror Decision Making" (1995) 19:1 Law & Human Behavior 67 at 76. Note that many of these studies are mentioned in Elias, *supra* note 202, and in Eisenberg & Hans, *supra* note 10.

209 See Wissler & Saks, *supra* note 208 at 38.

propensity reasoning—do not mitigate this risk.[210] One of the few mock trial studies that involved judges—more precisely, magistrates in England and Wales—also showed that they were more likely to convict defendants with a criminal record than those without.[211]

Empirical studies into the US National Center for State Court (NCSC) data show similar trends. These studies elucidate that juries convict defendants with criminal records at significantly higher rates than first-time offenders.[212] Furthermore, when the State presents weaker evidence against defendants with a criminal record, the jury's knowledge of that record produces a stronger effect that increases the likelihood of conviction.[213] In other words, the defendant's criminal record may be *the* decisive factor that pushes juries to convict in close cases.[214]

The combined effects of the availability and representativeness heuristics may explain why triers of fact are more likely to convict defendants with a criminal record, especially in closer cases.[215] Knowledge of a criminal record (especially a lengthy one) is highly salient information that is easy to recall, and shapes how triers of

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[210] See *ibid* at 38, 43–45.

[211] See also Eisenberg & Hans, *supra* note 10 at 1361–63. Citing Sally Lloyd-Bostock, "The Effects on Lay Magistrates of Hearing That the Defendant Is of 'Good Character' Being Left to Speculate, or Hearing That He Has a Previous Conviction" (2006) Crim L Rev 189 at 194–95.

[212] See Larry Laudan & Ronald J Allen, "The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process" (2011) 101:2 J Crim L & Criminology 493 at 504, table 2. See also Daniel Givelber & Amy Farrell, "Judges and Juries: The Defense Case and Differences in Acquittal Rates" (2008) 33:1 L & Soc Inquiry 31 at 45–46; Eisenberg & Hans, *supra* note 10 at 1388–89.

[213] See Eisenberg & Hans, *supra* note 10 at 1385–86.

[214] See *ibid.*

[215] See Jenny McEwan, "Fact Finding and Evidence" in David Carson et al, eds, *Applying Psychology to Criminal Justice* (West Sussex: John Wiley & Sons, 2007) at 105 (although the authors discuss media coverage of highly salient crimes, similar concerns may apply to knowledge of highly salient criminal records); Edie Greene & Leslie Ellis, "Decision Making in Criminal Justice" in David Carson et al, eds, *Applying Psychology to Criminal Justice* (West Sussex: John Wiley & Sons, 2007) at 184.

fact assess probability of guilt.[216] This knowledge may lead triers of fact to determine that defendants are guilty in the immediate case because they are representative of a class of persons who typically commit crimes: those with criminal records.[217] Here too, information asymmetries complicate jurors' tasks. In borderline cases, only defendants know whether they are guilty. Yet, like everyone else, triers of fact are vulnerable to cognitive biases and employ heuristics when they decide difficult cases.

B. The Silence Penalty and Subconscious Bias

Second, the silence penalty can also produce worse outcomes for defendants with a criminal record.[218] The term "silence penalty" implies that defendants refuse to testify to avoid being cross-examined on their prior convictions, which increases the likelihood that they will be found guilty.[219] Prior convictions are an important factor that influences whether defendants testify.[220] Surveys, empirical studies, and anecdotal evidence show that individuals draw adverse inferences from the right to silence being exercised and believe that defendants who refuse to testify are guilty.[221] In the criminal trial context, the right to silence results in a form of "acoustic separation" between how defendants and jurors interpret that right.[222] While defendants see themselves as

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216 See generally Pager, *supra* note 5 at 949 (describing the salience of a criminal record).

217 See also Bellin, "The Silence Penalty", *supra* note 191 at 420; Russell Korobkin & Thomas Ulen, "Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics" (2000) 88:4 Cal L Rev 1051 at 1086–87.

218 See Bellin, "The Silence Penalty", *supra* note 191 at 421–23.

219 See *ibid* at 408–09. See also Hornstein, *supra* note 204 at 1–2; Blume, *supra* note 11 at 480–81.

220 See Bellin, "The Silence Penalty", *supra* note 11 at 407; Jeffrey Bellin, "Improving the Reliability of Criminal Trials through Legal Rules that Encourage Defendants to Testify" (2008) 76:3 U Cin L Rev 851 at 867–8.

221 See e.g. Bellin, "The Silence Penalty", *supra* note 191 at 407–09 (providing an overview of these studies).

222 See Meir Dan-Cohen, "Decisions Rules and Conduct Rules: On Acoustic Separation in Criminal Law" (1984) 97:3 Harv L Rev 625 at 630–31.

exercising a fundamental right, jurors may interpret silence as a strong signal of guilt.[223]

The silence penalty raises various concerns. Defendants with prior convictions are encouraged to forgo one of their most fundamental rights in a criminal trial: the right to testify in their own defence.[224] But these same defendants are also more likely to be convicted if they exercise another fundamental right: the right to silence.[225] This is especially problematic because a defendant's testimony can carry significant weight. Some studies indicate that judges view the defendant's testimony as the second most valued piece of testimonial evidence (the victim's testimony is the most highly valued).[226] Furthermore, research shows that defendants who do not testify are more likely to be convicted than those who do.[227]

Together, the prior offender penalty and the silence penalty place defendants with a criminal record in an untenable position.[228] If they testify, they can be cross-examined on their prior convictions, and in turn, face a higher likelihood of conviction.[229] If they do not testify, jurors may inappropriately infer that the defendant is guilty because their silence shows that they have something to hide (recall how limiting instructions do not effectively prevent such reasoning).[230]

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223 See also Anna Roberts, "Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight against Implicit Stereotyping" (2016) 83:2 U Chi L Rev 835 at 858–59.

224 See also Dale Ives, "The Role of Counsel and the Courts in Safeguarding the Accused's Opportunity to Decide Whether to Testify" (2006) 51:4 Crim LQ 508 at 508 (describing the fundamental importance of this right).

225 See Bellin, "The Silence Penalty", *supra* note 191 at 407.

226 See Eisenberg & Hans, *supra* note 10 at 1369–70.

227 See Robert D Okun, "Character and Credibility: A Proposal to Realign Federal Rules of Evidence 608 and 609" (1992) 37:3 Vill L Rev 533 at 554–55; Bellin, "The Silence Penalty", *supra* note 191 at 420.

228 See Bellin, "The Silence Penalty", *supra* note 191 at 420.

229 See *ibid*.

230 See *ibid*.

Criminal records—and the penalties they impose on defendants—also play a major role in wrongful convictions.[231] As Kevin Findley notes, the US National Registry of Exonerations shows that 44% of wrongfully convicted defendants had a criminal record.[232] Furthermore, the exoneration rate is 50% higher for individuals with prior convictions than those without.[233] Using existing data from the Innocence Project and the NCSC, John Blume examined what percentage of wrongfully convicted persons testified at trial.[234] His research shows that 91% of wrongfully convicted defendants refused to testify, and that the fear of being cross-examined on prior convictions was the main reason for their choice.[235]

C. Criminal Records, Recidivist Premiums, and Punishment

Defendants with criminal records also tend to be sentenced more harshly than first-time offenders, which is often referred to as a "prior conviction enhancement" or "recidivist premium".[236] Various statutory and common law principles underpin this disparity. Certain crimes—such as impaired driving, firearms offences, simple possession of narcotics, drug trafficking, and selling contraband tobacco—subject repeat offenders to an enhanced sentence.[237] These recidivist premiums either impose a

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231 See also A Roberts, "Reclaiming the Importance of the Defendant's Testimony", *supra* note 223 at 836–37.

232 See Keith A Findley, "Reducing Error in the Criminal Justice System" (2018) 48:4 Seton Hall L Rev 1265 at 1301.

233 See *ibid* at 1301–02.

234 See Blume, *supra* note 11 at 489–92.

235 See *ibid*.

236 Hester et al, *supra* note 12 at 209–10.

237 See *Criminal Code, supra* note 120, s 320.19 (impaired driving), s 121.1 (selling contraband tobacco), s 85(3) (using firearm in the commission of the offence); *Controlled Drugs and Substances Act,* SC 1996, c 19, s 4(3)(b)(ii) (possession of drugs), s 5(3)(a)(i)(D) (drug trafficking).

mandatory minimum punishment for the repeat offence or expose the defendant to tougher maximum punishments.[238]

Certain common law principles also benefit first-time offenders and disadvantage recidivists. Some courts have recognized that first-time offenders—especially youthful ones—should be sentenced to imprisonment only as a last resort.[239] Conversely, certain courts affirm that repeat offenders should generally be punished more harshly, especially for violent offences or when the timeframe is shorter between their current and previous offence.[240]

Prior record enhancements are problematic for various reasons. For one, they exacerbate the disadvantages of Indigenous, racialized, and impecunious defendants who are already overrepresented in the criminal justice system.[241] Recidivist premiums may also be counterproductive. Some believe that prior record enhancements are partly justified because they deter recidivism optimally.[242] On the contrary, criminological research generally shows that the severity of punishment does not deter crime more effectively; the prospect of detection and celerity of

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238 See generally George P Fletcher, "The Recidivist Premium" (1982) 1:2 Crim Just Ethics 54 at 54 (describing the notion of a recidivism premium).

239 See also Clayton Ruby, *Sentencing,* 10th ed (Toronto: LexisNexis, 2020) at §8.14, citing *R v Biron,* [1991] JQ no 260 at 223, 65 CCC (3d) 221 (CA); *R v Randhawa*, 2020 ONCA 668 at para 30. Note that courts still impose prison sentences on first-time offenders in certain circumstances, especially for more severe crimes or offences that take place over a span of time. See e.g. *R v RM*, 2019 BCCA 409 at paras 22–23. See also *R v Gilchrist,* 2004 MBCA 21 at para 17.

240 See also Ruby, *supra* note 239 at §8.111.

241 See Rhys Hester, "Disproportionate Impacts on Minority Offenders" in Richard Frase & Julian Roberts, eds, *Paying for the Past: The Case Against Prior Record Sentence Enhancements* (Oxford: Oxford University Press, 2019) at 128, 147–48.

242 See Margaret Fitzgerald O'Reilly, *Uses and Consequences of a Criminal Conviction Going on the Record of an Offender* (London: Palgrave MacMillan, 2018) at 128. Note that recidivist premiums are also justified by incapacitation.

punishment does.[243] Furthermore, studies generally show that custodial punishments tend to increase recidivism rates compared to non-custodial punishments, not the opposite.[244] Incarceration decreases access to housing, employment opportunities, and income potential, all of which make it more difficult for prior offenders to reintegrate into the community.[245] For these reasons, recidivist premiums are counterproductive and result in a self-fulfilling prophecy for marginalized defendants.[246]

Prior record enhancements are also difficult to reconcile with retributive justifications for punishment, which posit that offenders should be punished because they deserve it.[247] One of retributivism's core tenets is that a defendant's punishment must be proportional to their moral blameworthiness and to the crime's gravity.[248] Yet defendants who have already been punished for past crimes have received their just desserts for those offences.[249] Prior conviction enhancements resemble a form of double punishment that violates proportionality constraints.[250] Recidivist premiums

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243 See Anthony N Doob & Cheryl M Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis" (2003) 30 Crime & Justice 143 at 145–55, 173–87. See also Michael Tonry, "An Honest Politician's Guide to Deterrence: Certainty, Severity, Celerity, and Parsimony" in Nagin, Cullen & Jonson, eds, *Deterrence, Choice, and Crime* (New York: Routledge, 2019) 365 at 365–69.

244 See Julian Roberts & Richard S Frase, "The Problematic Role of Prior Record Enhancements in Predictive Sentencing" in de Keijser, Roberts & Ryberg, eds, *Predictive Sentencing: Normative and Empirical Perspectives* (Oxford: Hart, 2019) 149 at 159.

245 See Stephanos Bibas, "Small Crimes, Big Injustices" (2019) 117:6 Mich L Rev 1025 at 1029–30.

246 See Roberts & Frase, *supra* note 244 at 159.

247 See Michael S Moore, "Justifying Retributivism" (1993) 27:1-2 Israel LR 15 at 15.

248 See *R v M* (CA), [1996] 1 SCR 500 at paras 40, 73, ACS no 28; Andrew von Hirsch, "Proportionality in the Philosophy of Punishment: From "Why Punish? to "How Much?" (1992) 16 Crime & Justice 55 at 74–75.

249 See Roberts & Frase, *supra* note 244 at 153–54.

250 Mirko Bagaric, "The Punishment Should Fit the Crime - Not the Prior Convictions of the Person That Committed the Crime: An Argument for Less Impact Being Accorded to Previous Convictions in Sentencing" (2014) 51:2 San Diego L Rev 343 at 351, 415.

tend to punish defendants for something other than their culpable conduct in the immediate case: their bad character.[251] Although recidivist premiums are difficult to justify by deterrence or retributivist rationales for punishment, some scholars note that they may be justified by incapacitation in discrete cases.[252] As discussed above, though, recidivist premiums do not generally function this way. Instead, they are imposed in a wide variety of cases, ranging from trivial to more severe. Like in each preceding step of the criminal justice process, prior offenders can also be treated more harshly in the sentencing stage and receive heavier sentences than first-time offenders.

VII. ALTERING CHOICE ARCHITECTURE IN THE CRIMINAL JUSTICE SYSTEM

What can be done to reduce prior offenders' adverse treatment inside and outside the justice system, and ultimately, promote more equitable outcomes for individuals with a criminal record? How can the State reduce the gulf between the two criminal justice systems discussed above? One important solution is to alter the choice architecture associated with previous convictions.

This section offers two examples of how choice architecture—meaning the way that choices are structured and presented—can foster a more egalitarian justice system for prior offenders.[253] To be clear, these proposals are not intended to be exhaustive, nor can they rectify all the problematic consequences associated with criminal records. Yet, they demonstrate how choice architecture—and the insights of behavioural economics—can help address some of the most egregious consequences of prior convictions.

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[251] See also Michael Tonry, "The Questionable Relevance of Previous Convictions to Punishments for Later Crimes" in Roberts & von Hirsch, *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (London: Hart, 2010) at 97.

[252] See Bagaric, *supra* note 250 at 416.

[253] See generally Robert Münscher, Max Vetter & Thomas Scheuerle, "A Review and Taxonomy of Choice Architecture Techniques" (2016) 29:5 J Behavioral Decision Making 511 at 511 (defining choice architecture).

A. Automatic Record Suspensions: From Opt-in to Default Enrolment

Consider first how lawmakers can modify the choice architecture associated with record suspensions (formerly pardons) to decrease discrimination and promote fairer outcomes.[254] Choice architecture alludes to "the background conditions for people's choices".[255] The ways in which choices are structured and presented to individuals, the degree of friction associated with exercising a choice, and the disclosure of information related to certain choices all shape how individuals make routine decisions.[256]

Choice architecture is all around us. To incentivize customers to make healthier choices, stores or cafeterias may place more nutritious food and beverages at eye level and in more convenient locations.[257] To increase efficiency, institutions place handles on doors that must be pulled rather than pushed—a strategy referred to as stimulus response compatibility.[258] Some countries have increased organ donations by converting the default scheme from an opt-in model to opt-out model, such that individuals are automatically enrolled as donors unless they unenroll.[259] Instead of resorting to coercion or threats, the State may use choice

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254 See Yoko Murphy, "Contextualizing Opposition to Pardons: Implications for Pardon Reform" (2020) 20:1 Criminology & Crim Justice 21 at 23.

255 Cass R Sunstein, *The Ethics of Influence: Government in the Age of Behavioral Sciences* (Cambridge: Cambridge University Press, 2016) at 5.

256 See also Richard H Thaler, "Nudge, not Sludge" (2018) 361:6401 Science 431 at 431; Cass R Sunstein, "Sludge Audits" (2020) 6:4 Behavioural Pub Policy 1 at 1–3; Richard H Thaler & Cass R Sunstein, *Nudge*: *Improving Decisions about Health, Wealth, and Happiness* (New Haven: Yale University Press, 2008) at 83–86.

257 See Anne N Thorndike et al, "Choice Architecture to Promote Fruit and Vegetable Purchases by Families Participating in the Special Supplemental Program for Women, Infants, and Children (WIC): Randomized Corner Store Pilot Study" (2017) 20:7 Pub Health Nutrition 1297 at 1301.

258 See also Thaler & Sunstein, *supra* note 256 at 81–82.

259 M Usman Ahmad et al, "A Systematic Review of Opt-out Versus Opt-in Consent on Deceased Organ Donation and Transplantation (2006–2016)" (2019) 43:12 World J Surg 3161 at 3162.

architecture to nudge individuals towards healthier, safer, or more lawful options.[260] However, the level of bureaucracy, complexity, friction, or effort associated with certain options may steer individuals away from optimal choices that align with their preferences—a concept referred to as "sludge".[261] As Cass Sunstein notes, even small amounts of sludge generate profound consequences—it can discourage individuals from making their desired choice, completing a process, or achieving a goal.[262]

For example, although individuals with prior convictions may apply for record suspensions, the process is mired with sludge.[263] To illustrate this point, consider the bureaucracy, friction, delays, and costs associated with this process within Canada (note that some US jurisdictions impose similar levels of sludge).[264]

To obtain a record suspension in Canada, ten years must have passed since they completed their sentence for an indictable offence, while the waiting period is five years for summary conviction offences (no waiting period applies for simple possession of cannabis convictions).[265] Individuals must then fill

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[260] See Cass R Sunstein, "Nudging: A Very Short Guide" (2014) 37:4 J Consumer Policy 583 at 583. As Sunstein notes, the term "nudge" implies "liberty-preserving approaches that steer people in particular directions, but that also allow them to go their own way": See *ibid*.

[261] Cass R Sunstein, "Sludge and Ordeals" (2019) 68:8 Duke LJ 1843. Although some scholars contend that sludge is normative in that it involves negative intentions by the choice architect, this article adopts a different approach that focuses primarily on the behaviour-altering effects of choice architecture rather than its intentions. See e.g. Stuart Mills, "Nudge/Sludge Symmetry: on the Relationship between Nudge and Sludge and the Resulting Ontological, Normative and Transparency Implications" (2020) Behavioural Pub Policy 1 at 2–3.

[262] See Cass R Sunstein, Sludge: What Stops Us from Getting Things Done and What to Do About It (Cambridge: MIT Press, 2021) at 21–36.

[263] See also Samantha McAleese, "Suspension, Not Expungement: Rationalizing Misguided Policy Decisions around Cannabis Amnesty in Canada" (2019) 62:4 Can Pub Administration 612 at 613.

[264] See Colleen Chien, "America's Paper Prisons: The Second Chance Gap" (2020) 119:3 Mich L Rev 519 at 574–76, 578.

[265] See *Criminal Records Act*, *supra* note 34, ss 4(1), 4(3.1). Furthermore, certain offences—namely crimes committed against minors or involving them—are

out numerous forms, pay fees for different services, and submit documentation to different agencies.[266] They must complete a federal criminal record check and local criminal record checks in each jurisdiction where the applicant lived during the waiting period. [267] The applicant must fill out forms and pay fees for each criminal record check.[268] They must also submit a copy of their fingerprints as part of their application, which must be taken by a police service or accredited private agency.[269] As part of that process, the applicant must fill out more forms, pay more fees, and submit copies of their identification.[270] They must then submit their completed record suspension application form to the Parole Board of Canada and pay the relevant fee.[271] In short, the system imposes significant hurdles on individuals who wish to obtain a record suspension.

Unsurprisingly, the percentage of eligible individuals who apply for criminal record suspensions is very low. Take the example of marijuana pardons, where the record suspension rate should be

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excluded from record suspensions, unless the crime meets certain criteria, and the Parole Board of Canada authorizes the record suspension (ss 4(2) and 4(3)). Lastly, individuals are ineligible for record suspensions if they have been convicted of three indictable offences (s 4(3)).

266 Parole Board of Canada, *Record Suspension Application Guide*, (Ottawa: 2022) at 4-11, additional forms annexed.

267 See Parole Board of Canada, "Application Fee Reduction – Record Suspension (Pardon)" (21 December 2021), online: *Canada* <canada.ca/en/parole-board/services/record-suspensions/record-suspension-pardon-application-fee-reduction.html> ($50 application cost to Parole Board of Canada for a criminal record suspension); Toronto Police Service, "Background checks: Criminal Record Checks", online: *TPS* <tps.ca/services/background-checks>($45 fee for a local criminal record check associated with the Toronto Police Service); RCMP, "Processing Times and Fees", online: *RCMP* <rcmp-grc.gc.ca/en/processing-times-and-fees> (25$ fee for a federal RCMP CPIC criminal record check) [RCMP, "Processing Times and Fees"].

268 See *ibid*.

269 See RCMP, "Processing Times and Fees", *supra* note 267.

270 See *ibid;* RCMP, "Steps for Getting a Certified Criminal Record Check" (16 April 2021), online: *RCMP* <rcmp-grc.gc.ca/en/steps-getting-a-certified-criminal-record-check>.

271 Parole Board of Canada, *supra* note 267.

higher compared to other crimes because there is no waiting period. Although the Government of Canada estimated that 10,000 individuals were eligible to receive a record suspension for a possession of marijuana conviction, only 780 applied between August 1st 2019, and October 1st 2021.[272] Out of the 780 who applied, 288 of those applications were returned because they were incomplete or the applicant was ineligible.[273] Other studies have shown that relatively few admissible individuals apply for criminal record suspensions. In Michigan, only 6.5% of all eligible persons received a record suspension in the five-year period since they became eligible.[274]

The State can significantly reduce sludge and increase uptake levels by converting the record suspension process from opt-in to automatic enrolment.[275] Spent-regime models (or automatic expungement models) exemplify default enrolment schemes because an individual's prior convictions automatically become sealed after a certain period.[276] This model is in place in many European countries.[277] Furthermore, following the introduction of "Clean Slate" bills in recent years, some US jurisdictions automatically seal individuals' criminal records when they have not reoffended for several years.[278]

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[272] See Peter Zimonjic, "Only 484 Marijuana Pardons have been Granted since Program Started in 2019" (31 October 2021), online: *CBC* <cbc.ca/news/politics/pot-pardons-still-low-484-1.6230666>.

[273] See *ibid*.

[274] See JJ Prescott & Sonja B Starr, "Expungement of Criminal Convictions: An Empirical Study" (2020) 133:8 Harv L Rev 2460 at 2466, 2489–90 [Prescott & Starr, "Expungement of Criminal Convictions"].

[275] See Richard Thaler, Cass Sunstein & John Balz, "Choice Architecture" in Shafir, eds, *The Behavioral Foundations of Public Policy* (Princeton: Princeton University Press, 2013) at 430–31.

[276] See *ibid*.

[277] See Jeffrey Selbin, Justin McCrary & Joshua Epstein, "Unmarked: Criminal Record Clearing and Employment Outcomes" (2018) 108:1 J Crim L & Criminology 1 at 53, n 216, citing Jacobs, *supra* note 2 at 119.

[278] See Sonja B Starr, "Expungement Reform in Arizona: The Empirical Case for a Clean Slate" (2021) 52 Ariz St LJ 1059 at 1059.

Spent-regime models facilitate record suspensions for three reasons. First, automatic expungements promote frictionless default choices that align with applicants' preferences.[279] One of the most effective ways to secure specific outcomes is by converting opt-in schemes to default enrollment—a simple arrangement that can confer maximum benefits yet requires minimal effort from its beneficiaries.[280] Automatic expungement regimes also reduce sludge by removing application forms and fees, both of which discourage eligible applicants from requesting record suspensions.[281] Research demonstrates that when the Parole Board of Canada introduced the $50 application fee for pardons, the number of applicants dropped by over 25%.[282] Spent-regime models rectify this problem and make record suspensions more egalitarian, accessible, and inclusive. Automatic expungements increase uptake levels because they benefit individuals who are unaware that record suspensions are an option—another reality that functions as a barrier to sealing one's prior convictions.[283]

Second, since record suspensions are associated with lower recidivism rates, spent-regime models may produce a stronger deterrent effect than opt-in schemes.[284] Studies show that recidivism rates tend to be very low for individuals who receive

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279 See generally Mills, *supra* note 267 at 8.

280 See Cass Sunstein, "Default Rules are Better than Active Choosing (Often)" (2017) 21:8 Trends in Cognitive Science 600 at 600–04.

281 See Prescott & Starr, "Expungement of Criminal Convictions", *supra* note 274 at 2502-4; Katherine Ganick, "Increasing Access to Expungements: Expungement Statutes Are Intended for the Greater Good. But Are They Working?" (2020) 98:1 U Det Mercy L Rev 1 at 13–15.

282 See Rick Ruddell & L Thomas Winfree Jr, "Setting Aside Criminal Convictions in Canada: A Successful Approach to Offender Reintegration" (2006) 86:4 Prison J 452 at 457.

283 See Ganick, *supra* note 281 at 15.

284 See Prescott & Starr, "Expungement of Criminal Convictions", *supra* note 274 at 2551–52; Mackenzie Yee, "Expungement Law: An Extraordinary Remedy for an Extraordinary Harm" (2017) 25:1 Geo J on Poverty L & Policy 169 at 179–80; JJ Prescott & Sonja Starr, "The Power of a Clean Slate" (2020) 43:2 Regulation 28 at 29.

record suspensions. According to certain studies, within the five-year period following expungement, approximately 7.1% of individuals are re-arrested, while roughly 4.2% are re-convicted.[285] Therefore, the State may be able to deter recidivism more optimally if it adopts an automatic expungement model.[286]

Third and interrelatedly, this latter model can increase employment opportunities and income levels—both of which help individuals reintegrate into the community and decrease the chance of recidivism.[287] The automatic expungement model is particularly effective because it mitigates some of the most significant criminal and collateral consequences associated with criminal records that mutually reinforce one another: recidivist premiums, unemployability, and lack of access to housing.[288]

B. Presumptive Inadmissibility, Anchoring, and Principled Asymmetries

Consider a second way to modify the choice architecture associated with prior convictions to reduce discrimination and promote fairer outcomes. Lawmakers or judges can use a specific legal tool—presumptions—to counteract decision-makers' biases against prior offenders at trial.[289] Parliament or courts can replace multifactor balancing tests that govern the admissibility of a defendant's criminal record with a presumption of inadmissibility—a burden that prosecutors can displace only in narrow circumstances (more on this below).[290] To be clear,

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285 See Prescott & Starr, "Expungement of Criminal Convictions", *supra* note 274 at 2513.

286 See *ibid* at 2551–53.

287 See *ibid* at 2551.

288 See Prescott & Starr, "The Power of a Clean Slate", *supra* note 284 at 28.

289 See generally Cass Sunstein, "Nudges Do Not Undermine Human Agency" (2015) 38:3 J Consumer Policy 207 at 208 (describing how choice architecture can counteract biases).

290 See e.g. Terry Skolnik, "Precedent, Principles, and Presumptions" (2021) 54:3 UBC L Rev 935 at 964–68 [Skolnik, "Precedent, Principles, and Presumptions"]; Jeffrey Bellin, "Circumventing Congress: How the Federal

although this presumption of inadmissibility would better protect defendants at trial, it would not mitigate police and prosecutors' use of criminal records in other stages of the criminal justice process.

Presumptions are crucial because they produce strong anchoring effects in adjudication.[291] As a legal tool, presumptions draw judges towards a pre-determined outcome: excluding the defendant's criminal record. The exclusion of this evidence helps ensure that triers of fact are not exposed to highly prejudicial information that triggers their cognitive biases against defendants with a criminal history.[292]

The law frequently uses presumptions to promote principled asymmetries in the criminal justice system—a justification that supports the presumptive inadmissibility of a defendant's criminal record.[293] The term "principled asymmetry" implies that evidentiary rules favour a vulnerable party, witness, or complainant to foster values that are consistent with a liberal criminal justice system.[294] These values include dignity, liberty, fairness, equality, and respect for persons.[295] Various legal presumptions exemplify principled asymmetries, such as the presumption of innocence, the presumption of pre-trial liberty during the bail stage, the presumption that crimes impose a subjective standard of fault, and the presumed inadmissibility of a

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Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions" (2008) 42:2 UC Davis L Rev 289 at 337–38.

[291] See Skolnik, "Precedent, Principles, and Presumptions", *supra* note 290 at 978–79.

[292] See *ibid* at 978–82.

[293] See *ibid*.

[294] See *ibid.* The term is initially described by scholars such as Andrew Ashworth and Paul Roberts. *See* Andrew Ashworth, "Four Threats to the Presumption of Innocence" (2006) 10 Intl J Evidence & Proof 241 at 248; Paul Roberts, "Double Jeopardy Law Reform: A Criminal Justice Commentary" (2002) 65 Mod L Rev 393 at 402–04.

[295] See Sharon Dolovich, "Legitimate Punishment in Liberal Democracy" (2004) 7:2 Buff Crim L Rev 307 at 314. See also *R v Oakes,* [1986] 1 SCR 103 at para 64, 26 DLR (4th) 200.

complainant's prior sexual activity.[296] These default outcomes can reduce biases that disadvantage defendants or complainants, invite discrimination, and produce illogical outcomes that are not supported by the evidence.[297]

The presumption that a defendant's criminal history is inadmissible at trial reinforces principled asymmetries in three ways. First, the presumption reduces error costs that produce wrongful convictions.[298] To illustrate this point, note how the presumption of innocence and the presumptive inadmissibility of prior convictions both combat cognitive biases that contribute to miscarriages of justice. The presumption of innocence reduces the likelihood that triers of fact convict defendants based on prejudicial but irrelevant information that taps into their cognitive biases.[299] Without the presumption of innocence, judges and jurors may inappropriately infer guilt from the fact that the defendant was arrested by the police, charged with a crime, and tried before a court.[300] The presumption of innocence mitigates the confirmation bias that the defendant must be guilty because they are charged with a crime.[301] Together, the prosecutor's high burden of proof and the defendant's presumed innocence requires decision-makers to consider exculpatory evidence that refutes their intuitions about the defendant's guilt.[302]

Similar considerations justify a presumption that prior convictions are inadmissible at trial when the defendant chooses

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296 See Skolnik, "Precedent, Principles, and Presumptions", *supra* note 290 at 968–73.

297 See Richard Lippke, "The Presumption of Innocence in the Trial Setting" (2015) 28:2 Ratio Juris 159 at 169–70 (describing how the presumption of innocence counters confirmation bias).

298 See David Hamer, "Presumptions, Standards and Burdens: Managing the Cost of Error" (2014) 13:3–4 Law, Probability & Risk 221 at 225.

299 See *ibid*.

300 See *ibid,* citing *Taylor v Kentucky,* 436 US 478 (1978) at paras 484–85.

301 See *ibid;* Dan Simon, *In Doubt: The Psychology of the Criminal Justice Process* (Cambridge: Harvard University Press, 2012) at 193–94.

302 See also Richard Lippke, *Taming the Presumption of Innocence* (Oxford: Oxford University Press, 2016) at 93–95.

to testify. The presumption of inadmissibility helps ensure that triers of fact do not resort to confirmation bias, the availability heuristic, or the representativeness heuristic based on the defendant's criminal record—biases that underpin the prior offender penalty and contribute to wrongful convictions.[303] This same presumption also counteracts the silence penalty because it encourages defendants to testify.[304] Indeed, some studies indicate that defendants are more likely to testify in jurisdictions where prior convictions are largely inadmissible at trial.[305]

There is a second reason why a presumption that defendants' criminal records are inadmissible fortifies principled asymmetries. Namely, the presumption of inadmissibility reduces defendants' transaction costs by displacing sludge—an approach that promotes access to justice.[306] When defendants must present a motion to exclude prior convictions, they bear the financial costs and effort associated with such litigation (self-represented litigants pay a metaphorical cost if they do not know that these motions exist).[307]

Remark how this sludge adversely impacts low-income defendants.[308] Impecunious defendants may only have enough money to advance a limited number of procedural claims.[309] So, they may forego exclusionary motions to finance other litigation strategies.[310] Different constraints affect legal-aid counsel. Overburdened legal-aid counsel face two pressures: high caseloads and time constraints.[311] Given the number of files that

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303 See Hamer, *supra* note 298 at 225; Yablon, *supra* note 291 at 232–34.

304 See Anna Roberts, "Conviction by Prior Impeachment" (2016) 96:6 BU L Rev 1977 at 2033 [A Roberts, "Conviction by Prior Impeachment"].

305 See e.g. *ibid*, citing Blume, supra note 11.

306 See Skolnik, "Precedent, Principles, and Presumptions", *supra* note 290 at 975–77.

307 See also Antonio Bernardo, Eric Talley & Ivo Welch, "A Theory of Legal Presumptions" (2000) 16:1 J L Econ & Org 1 at 24–28.

308 See Stuntz, "The Uneasy Relationship", *supra* note 71 at 31–35.

309 See *ibid*.

310 See *ibid*.

311 See *ibid*.

they manage, legal-aid counsel must be selective about the claims that they pursue and the effort that they devote to these claims.[312] High caseloads and looming deadlines may weaken the quality of motions to exclude the defendant's criminal record.

The presumption that a defendant's criminal record is inadmissible shifts certain transaction costs to prosecutors.[313] Under this scheme of presumptive inadmissibility, prosecutors must spend the time and effort to craft motions to cross-examine defendants on their prior convictions. They must successfully show that the factual circumstances rebut the presumption of inadmissibility. This form of choice architecture reinforces principled asymmetries by reallocating sludge away from more vulnerable defendants and shifting it towards more powerful and resource heavy prosecutors.[314]

Third, the presumption that a defendant's criminal record is inadmissible at trial favours their right to full answer and defence. Recall how defendants are less likely to testify at trial because they fear being cross-examined on their criminal history and convicted as a result.[315] By presumptively excluding their prior convictions, defendants are incentivized to exercise one of their most fundamental rights: the right to testify in their own defense.[316] And since defendants who testify tend to enjoy higher acquittal rates, the presumption of inadmissibility can produce outcomes that may be more fair and less discriminatory.[317]

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312 See *ibid*.

313 See Skolnik, "Precedent, Principles, and Presumptions", *supra* note 290 at 975–77.

314 See *ibid*.

315 See generally Bellin, "The Silence Penalty", *supra* note 191 at 402–10; Vida Johnson, "Silenced by Instruction" (2020) 70:2 Emory LJ 309 at 336–37.

316 See also A Roberts, "Conviction by Prior Impeachment", *supra* note 304 at 2033.

317 See Jeffrey Bellin, "The Evidence Rules That Convict the Innocent" (2021) 106:2 Cornell L Rev 305 at 341–42; Ric Simmons, "An Empirical Study of Rule 609 and Suggestions for Practical Reform" (2018) 59:3 BC L Rev 993 at 1036–37; Richard Friedman, "Character Impeachment Evidence: Psycho-Bayesian Analysis and a Proposed Overhaul" (1991) 38:3 UCLA L Rev 637 at 689–91.

In some US states—such as Kansas, Hawaii, and Montana—prior convictions are presumptively inadmissible.[318] In Kansas, a defendant's criminal history can be admitted only to rebut their good character evidence and may consist solely of crimes of dishonesty.[319] As a narrow exception to these requirements, a prior conviction can be adduced to rebut the defendant's testimony that they have never committed a crime or that they have never been convicted of a particular crime.[320] Hawaii's rules of evidence adopt a similar approach.[321] Montana, for its part, has the strongest presumption of inadmissibility: prior convictions are admissible only to rebut the defendant's claim that they never committed a crime.[322]

The preceding account also demonstrates how presumptions exploit some cognitive biases to neutralize others. The presumption that a defendant's criminal record is inadmissible uses the anchoring effect to offset confirmation, availability, and representativeness biases associated with prior conviction evidence. Given the ubiquity of information failures in the criminal justice system—and the use of heuristics to address them—lawmakers and courts can create evidentiary rules that cause some biases to overpower others.

VIII. CONCLUSION

This article demonstrated why there are two criminal justice systems: one for first-time offenders and one for defendants with a criminal record. It showed why information failures pervade the

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318 See A Roberts, "Conviction by Prior Impeachment", *supra* note 304 at 2019 (discussing the admissibility of prior convictions in the state of Kansas), 2026 (explaining the admissibility of prior convictions in the state of Hawaii); Mark W Bennett, "Getting Clamorous about the Silence Penalty" (2018-2019) 103 Iowa L Rev Online 1 at 11.

319 See A Roberts, "Conviction by Prior Impeachment", *supra* note 304 at 2019–20, citing Kansas Stat Ann c 60 § 60-421 (2011).

320 See A Roberts, "Conviction by Prior Impeachment", *supra* note 304 at 2020.

321 See *ibid* at 2026, citing Hawaii Stat Ann c 626 s 609.

322 See A Roberts, "Conviction by Prior Impeachment", *supra* note 304 at 2027–28, citing Mont R Evid tit 26 c 10 §609.

criminal justice system. It explained why police officers, prosecutors, and triers of fact use cognitive biases to address these information asymmetries. It elucidated why the disparate treatment of repeat offenders can produce worse criminal justice outcomes: more police scrutiny, greater pre-trial coercion, inferior plea deals, higher conviction rates, and longer punishments. And it highlighted how prior offenders can be subject to various penalties that incentivize them to waive their substantive rights. The concluding parts of this article showed how choice architecture may help reduce discrimination and improve outcomes for defendants with prior convictions. By modifying the record suspension scheme from opt-in to automatic enrolment, the justice system can decrease sludge and increase the uptake rates for prior conviction expungements. By adopting presumptions that a defendant's prior convictions are inadmissible at trial, the justice system can prevent judges and jurors from resorting to certain cognitive biases that disparately impact defendants with a criminal history.

This article also laid the foundation for two future avenues of research. First, it highlighted how choice architecture is an essential tool that can improve certain aspects of the criminal justice system—a line of scholarly inquiry that merits significant attention in the future. Second, this article demonstrated how evidentiary rules can leverage certain cognitive biases to neutralize others. It set out how lawmakers and judges can change the choice architecture surrounding evidentiary rules to produce fairer, more equitable, and more accurate decisions.[323] This insight can also apply to domains outside of the criminal justice system, such as private law, tax law, administrative law, public policy, and more.[324] Ultimately, this article illustrated how choice architecture not only offers a new path forward to bridge the divide between Canada's two criminal justice systems. It also opens the door to a new era of criminal justice reform that draws on the potential of

[323] See Skolnik, "Precedent, Principles, and Presumptions", *supra* note 290 at 978–82.

[324] See *ibid*.

behavioural economics and choice architecture to foster fairness, equity, and justice.