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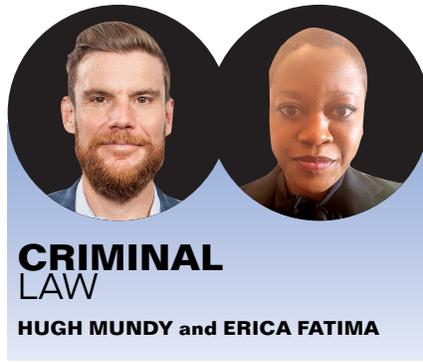
Again with conviction: Focusing justice reform on evidence rules

Illinois is in the midst of sweeping criminal justice reform, as highlighted by the General Assembly's recent passage of legislation to bolster police accountability and to abolish pre-trial release practices predicated on an arrestee's ability to post bond. In endorsing the bill, Gov. J.B. Pritzker reaffirmed his commitment to "ending cash bail and modernizing sentencing laws a legislative priority."

While Pritzker's support of the groundbreaking bill is commendable, his endorsement exposes a significant gap in its focal points. Specifically, the legislation centers on pre-trial ("bail") and post-trial ("sentencing") practices while neglecting the centerpiece of the criminal justice system: trials. To that end, the Illinois Supreme Court should stay in step with its legislative counterparts to amend rules of evidence that perpetuate systemic injustice.

Foremost among unjust rules is IRE 609, which permits an attack on a witness's credibility with proof of a prior felony conviction. First, the rule's logic is dubious. As critics of Rule 609 assert, impeachment with prior conviction assumes that any felony is per se evidence of a witness's untruthfulness irrespective of its elements of the crime. As a result, convictions for drug-related offenses, unlawful firearms possession, or assault are categorically labeled as "dishonest."

More problematically, the rule disproportionately disadvantages witnesses of color, especially defendants who wish to testify. Black men are more likely than white men to be arrested, to be convicted, and to



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receive long prison sentences. Black men are incarcerated at nearly six times the rate of white men. One in every three Black boys born in 2001 could expect to go to prison in his lifetime, as could one of every six Hispanic boys — compared to one of every 17 white boys. Rule 609 assumes that jurors will understand the counterintuitive command to use a prior conviction only to determine a witness's truthfulness as a witness, and not to assess guilt. As the rule's critics rightly note, a prosecutor's use of defendant-witness's prior convictions as probative of truthfulness amounts to a "charade." The desired inference is that a defendant-witness's prior convictions prove his guilt for the charged offense. Yet, the rule persists

without significant revision in federal courts and all but three states.

Understandably, the threat of prior conviction impeachment frequently quells defendant testimony. In a study of exonerees, Cornell Professor John Blume found that 91% of those with prior convictions had waived their right to testify at trial. It follows that if jurors do not hear directly from the defendant on the witness stand, they are more inclined to use implicit as well as explicit biases, including racial stereotypes when assessing a defendant's potential guilt.

A reformed Rule 609 might draw inspiration from *United States v. Gomez*, a 2014 7th U.S. Circuit Court of Appeals opinion. In that case, an appellate panel held that a defendant-witness's impeachment with a prior conviction "applies only to witnesses with a history of dishonesty" and cannot rely on "the forbidden [propensity] inference" that a defendant-witness acted "in accordance" with his or her criminal character with respect to the charged offense. Further, the prosecutor must tie the conviction's relevance directly to a specific purpose other than the defendant's character or propensity.

The current use of Rule 609 is rife with systemic injustice. In fact, FRE 609 exposes a fundamental truth: The justice system, still haunted by the remnants of slavery and informed by the "new Jim Crow laws," incarcerates Black defendants at an alarmingly high rate. In this way, FRE 609 is less a vehicle to impeach a witness's untruthfulness than a vestige of America's blemished past.