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## **Racial Character Evidence in Police Killing Cases**

**Jasmine B. Gonzales Rose**

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## RACIAL CHARACTER EVIDENCE IN POLICE KILLING CASES

JASMINE B. GONZALES ROSE\*

The United States is facing a twofold crisis: police killings of people of color and unaccountability for these killings in the criminal justice system. In many instances, the officers' use of deadly force is captured on video and often appears clearly unjustified, but grand and petit juries still fail to indict and convict, leaving many baffled. This Article provides an explanation for these failures: juror reliance on "racial character evidence." Too often, jurors consider race as evidence in criminal trials, particularly in police killing cases where the victim was a person of color. Instead of focusing on admissible evidence, jurors rely on race to determine the defendant's innocence, the victim's propensity for violence, and the witnesses' credibility. This Article delineates the ways in which juror racial bias is utilized to take on evidentiary value at trial and constructs evidence law solutions to increase racial equality in the courtroom.

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\* Assistant Professor of Law, University of Pittsburgh School of Law. I am honored that this Article was selected for the American Constitution Society Junior Public Law Scholars Workshop at the 2018 Association of American Law Schools Annual Meeting. This project has benefited greatly from the feedback of Deborah Archer, Mario Barnes, Devon Carbado and the students of his Advanced Critical Race Theory Scholarship Workshop at the UCLA School of Law, Alexandra Farone, Allison Hall, Laura Victorelli, and others.

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## INTRODUCTION

*“I think he did it because he’s Mexican” and the alibi witness was not credible because he’s “an illegal.”*<sup>1</sup>

Too often jurors consider race as evidence of a person’s character in criminal trials. Instead of focusing on admissible evidence, jurors impermissibly rely on “racial character evidence”<sup>2</sup> to determine

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1. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 862 (2017). This case offers an example of a juror’s reliance on racial character evidence against a defendant and his alibi witness to discriminatorily convict the defendant. Although less recognized, racial character evidence against a victim can similarly be relied upon to discriminatorily acquit a defendant, which is the subject of this Article.

2. This term was coined in Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2262–63 (2017) and refers to an

whether a defendant is guilty or innocent, whether a victim is aggressive or peaceful, or whether a witness is credible or not credible. The term “racial character evidence” refers to the way a person’s race is used as de facto proof of his or her character. More specifically, it describes how race—in tandem with racial stereotypes and biases—is relied upon or emphasized to establish the person’s character propensity to be peaceful, violent, truthful, deceptive, or a variety of other traits. Fact-finders then rely upon this racial character evidence to determine how a party, witness, or victim acted during a given event, such as during an interaction between a police officer and community member. Character evidence to prove one’s propensity to engage in certain behavior is generally prohibited,<sup>3</sup> and *racial* character evidence is never appropriate. Yet, the use of racial character evidence generally falls beneath the radar of judges.

Juror reliance on racial character evidence has been difficult to uncover since, in most jurisdictions, evidence rules barred jurors from testifying about racial bias in deliberations or grand jury proceedings during an inquiry into the validity of the verdict or indictment.<sup>4</sup>

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instance in which admitted evidence introduced ostensibly for non-character purposes aligns with or promotes reliance on racial stereotypes or bias (whether negative or positive) and has the effect of character evidence by suggesting something is more likely to have occurred based on the race of the subject. *See also* Montré D. Carodine, *Contemporary Issues in Critical Race Theory: The Implications of Race as Character Evidence in Recent High-Profile Cases*, 75 U. PITT. L. REV. 679, 687 (2014) (“[W]hen what we think of in a more traditional sense as evidence confirms any negative racial stereotypes (like blacks being dishonest or criminally inclined), it exacerbates the preexisting problem of race as character evidence.”); Chris Chambers Goodman, *The Color of Our Character: Confronting the Racial Character of Rule 404(b) Evidence*, 25 L. & INEQ. 1, 3 (2007).

The term [racial character evidence] is partly accurate and partly a misnomer. Racial character evidence is evidence in the sense that juries often rely upon it in reaching a verdict. However, it is not technically evidence because it is usually not formally introduced or subjected to evidentiary scrutiny. In other words, it is not admissible legal proof.

Gonzales Rose, *supra*, at 2262.

3. *See, e.g.*, FED. R. EVID. 404(a)(1) (“Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.”). However, limited exceptions exist for criminal defendants to introduce opinion or reputation evidence of their or a victim’s character. FED. R. EVID. 404(a)(2). Or it may be introduced in rare instances when character evidence is an essential element of a claim or defense. FED. R. EVID. 405.

4. *See, e.g.*, FED. R. EVID. 606(b). The rule states:

During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury’s deliberations; the effect of anything on that juror’s or another juror’s

Recently, in *Peña-Rodriguez v. Colorado*,<sup>5</sup> the Supreme Court of the United States held that such no-impeachment rules must yield to the Sixth Amendment’s guarantee of the right to an impartial jury when a juror clearly relies upon racial bias in rendering a guilty verdict.<sup>6</sup>

The *Peña-Rodriguez* ruling was a positive step forward in tackling jurors’ overt reliance on racial character evidence, and many might assume that the problem of such juror racial bias has been put to rest. This opinion, however, does not address one of the most concerning racial and criminal justice issues of our times: police killings of people of color. *Peña-Rodriguez* invokes the Sixth Amendment’s impartiality clause and thus directly addresses only racial bias used to convict a criminal defendant, but not racial bias against a victim of color to acquit a defendant.<sup>7</sup> Accordingly, further evidence law solutions are needed to address the problem of racial character evidence in police deadly force and other criminal cases where racial bias against a victim might result in a discriminatory acquittal. This is not to imply that evidence solutions are a panacea for racialized killings by police, but it is one overlooked avenue that should be employed along with policing reforms and other racial and criminal justice efforts, which are beyond the scope of this Article.

Police killing cases are often racially-charged. In the majority of prosecutions of law enforcement officers for killing people while on-duty,<sup>8</sup> the victims are black and the police officers are white or otherwise not black.<sup>9</sup> Police are rarely criminally prosecuted for killing

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vote; or any juror’s mental processes concerning the verdict or indictment. The court may not receive a juror’s affidavit or evidence of a juror’s statement on these matters.

*Id.*

5. 137 S. Ct. 855 (2017). The author notes that the Supreme Court Reporter used the incorrect spelling of Peña, spelling it “Pena,” in the case name. The replacement of the letter “ñ” with the entirely different letter “n” not only changes the party’s name and its pronunciation, but it also contributes to structural erasure of Latinx identity and existence. Thus, the author has consciously opted to use a more accurate spelling of Mr. Peña-Rodriguez’s name. See generally *English-Language Media: What is Wrong with the Letter Ñ?*, AL DÍA (Aug. 20, 2015), [<https://perma.cc/8NMK-US92>].

6. *Peña-Rodriguez*, 137 S. Ct. at 869.

7. *Id.* at 867–69.

8. This distinction of “on-duty” is made because of the numerous cases of domestic violence committed by off-duty police officers that have resulted in the deaths of white women. *The Counted: People Killed by Police in the US*, GUARDIAN, [<https://perma.cc/TRB4-YB7T>] [hereinafter *The Counted*]. See generally DOMESTIC VIOLENCE BY POLICE OFFICERS (Donald C. Sheehan ed. 2000).

9. Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015),

people, but when such cases do go to trial, the evidence against the officer is usually exceptionally strong. Often, the victim was unarmed, shot in the back, while hands were raised or while fleeing, and with the incident caught on video.<sup>10</sup> In deadly force cases, the primary question of fact is whether the officer reasonably feared for his or her safety or the safety of others.<sup>11</sup> In the absence of proof, other than the officers' own testimonies of such fear, the victims' blackness (or brownness) too frequently stands in as "evidence" that the officers' fear was objectively reasonable.<sup>12</sup>

Jurors rely upon racial stereotypes about blacks and other people of color being violent, aggressive, and criminally-inclined, as well as dishonest and otherwise lacking credibility to conclude that the officers' fear of a victim of color was reasonable and that witnesses of color should not be believed.<sup>13</sup> Particularly pernicious is reliance on the black "brute" or "thug" stereotype, which casts black youth as "super-predators" and black people of all ages as bigger, stronger, and more aggressive and threatening than people of other races to serve as "proof" that an officer's use of deadly force was called for, despite legitimate evidence to the contrary. Before a grand jury and at trial, attorneys—including prosecutors who only begrudgingly pursue criminal charges or convictions—may try to emphasize these racial stereotypes.

In prosecutions of police for killing people of color, jurors' consideration of racial character evidence works in favor of the criminal defendant and thus does not directly violate the Sixth Amendment's impartiality clause. The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the *accused* shall enjoy the right to a speedy and public trial, by an impartial jury[.]"<sup>14</sup> Thus, while the

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[http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/?utm\\_term=.23bdb0c89b8c](http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/?utm_term=.23bdb0c89b8c) ("Among the officers charged since 2005 for fatal shootings, more than three-quarters were white. Two-thirds of their victims were minorities, all but two of them black.").

10. *Id.*

11. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) ("[T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.").

12. Mikah K. Thompson, *Blackness as Character Evidence*, 29 MICH. J. RACE & L. 321, 335–40 (2015); see generally Carodine, *supra* note 2; Blanche Bong Cook, *Biased and Broken Bodies of Proof: White Heteropatriarchy, the Grand Jury Process, and Performance on Unarmed Black Flesh*, 85 UMKC L. REV. 567, 573 (2017).

13. See generally Carodine, *supra* note 2; Goodman, *supra* note 2.

14. U.S. CONST. amend. VI (emphasis added).

Sixth Amendment serves to protect defendants against juror racial bias, it does not protect victims against juror racial bias. Accordingly, the *Peña-Rodriguez* decision, which relied on the Sixth Amendment for establishing a racial bias exception to no-impeachment rules, will not usually apply directly to cases of police killing people of color. Additionally, while juror racial discrimination against victims of color may violate constitutional equal protection guarantees,<sup>15</sup> juror immunity and the double jeopardy clause foreclose post-acquittal remedies. This makes it all the more important that pre-verdict evidence law responses are developed and employed. This Article seeks to construct such pre-acquittal evidence law solutions.

As police killings are more frequently video-recorded and shared on social and broadcast media, and as public awareness about the problem increases, two topics are at the forefront of public and scholarly dialogue: race and evidence. However, these subjects are usually discussed separately. This Article serves as an attempt to connect the two and encourage a critical race evidentiary inquiry into police killing cases. Such an inquiry asks: How do race and racism play evidentiary roles in criminal prosecutions of law enforcement officers who have used deadly force against people of color? And: How can reforms of evidence law and practice increase racial equality?

Put simply, a critical race evidentiary inquiry is important because evidence law is important. The facts submitted to a jury at trial are not determined by any independent investigation into the truth, but rather by how the rules and doctrines of evidence are employed to admit and exclude evidence.<sup>16</sup> Evidence law is used to shape the available legal proof and, ultimately, the narrative or story that is considered by the fact-finder to determine guilt or innocence:<sup>17</sup> to determine whether a state actor's taking of a life was warranted or unjustified.

The manner that racial subordination is advanced through evidence law has been largely overlooked. Racial subordination in the criminal justice system goes far deeper than overt racial animus or bias. Racial

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15. See Tania Tetlow, *Discriminatory Acquittal*, 18 WM. & MARY BILL RTS. J. 75, 79–80 (2009) [hereinafter Tetlow, *Discriminatory Acquittal*] (“A jury may not constitutionally acquit based on discrimination against the victims of the crime any more than that jury could constitutionally convict a defendant based on discrimination. It is one of the most basic tenets of equal protection law that state actors may not discriminate based upon race or gender, particularly within criminal trials.”); see also Tania Tetlow, *Granting Prosecutors Constitutional Rights to Combat Discrimination*, 14 U. PA. J. CONST. L. 1117, 1121 (2012) [hereinafter Tetlow, *Granting Prosecutors Rights*].

16. Gonzales Rose, *supra* note 2, at 2243.

17. *Id.*



subordination permeates many aspects of our legal system in inconspicuous ways. Most judges, lawyers, and scholars appear to assume that since evidence law is facially race-neutral, it applies equally to all persons irrespective of race and is immune from racially disparate application and impact.<sup>18</sup> However, as this Article demonstrates through the example of the role of racial character evidence in police deadly force cases, evidence rules—and perhaps, even more importantly, the principles and values behind these rules—are not applied or enforced equally along racial lines. Consequently, white parties and institutions collectively gain an unfair evidentiary advantage while people of color are disadvantaged by the role of racial character evidence. To increase racial equality, we must root out all of the ways that racial subordination is perpetuated through the law. A critical race evidentiary inquiry and resultant evidentiary solutions should be one of the many approaches developed to address structural racism in the criminal justice system.

This Article proceeds in four parts. Part I describes the national crisis of unaccountability for racialized police killings. It looks at the failures at every stage in our criminal justice system to pursue charges, indict, convict, and sentence law enforcement officers who unjustifiably kill people of color. Part II examines racial character evidence and explains its role in deadly force cases. It delineates three categories of racial character evidence: inherent reliance, stereotype emphasis, and expert or lay opinion. Part III demonstrates how juror reliance on racial character evidence, which results in discriminatory acquittals, violates the equal protection rights of victims of color. It further sets forth how the double jeopardy prohibition and juror immunity foreclose post-acquittal remedies, thereby necessitating the construction and implementation of pre-verdict evidence solutions.

Finally, Part IV sets forth these evidence law solutions, including education of the bar and bench on critical evidentiary inquiry methods to identify racial character evidence; proper objections to impermissible racial character evidence; rebuttal evidence to counter racial stereotypes and bolster victims and witnesses of color's good character; and jury instructions concerning racial character evidence. Although these solutions directly apply to the trial stage of prosecutions and the vast majority of police killing cases never make it to trial, the implementation of these evidence solutions would shape the formal and

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18. See Carodine, *supra* note 2, at 681 (“Interestingly, however, in traditional evidence law and criminal law scholarship as well as in critical race theory scholarship, race as an evidentiary concept is largely overlooked.”).

informal evidence potentially available in a case. This could, in turn, influence all aspects of a prosecution, including the decision to pursue charges and an indictment.

### I. UNACCOUNTABILITY FOR RACIALIZED POLICE KILLINGS

Police killings in the United States are pervasive and frequent, and the victims are disproportionately people of color.<sup>19</sup> Grand jury indictments, prosecutions, convictions, and prison sentences for these killings are rare. Even when the evidence demonstrates that deadly force was not warranted, offending officers are not held accountable. This has an impact on the actual and perceived legitimacy of our law enforcement organizations and criminal justice system.

#### A. *Pervasiveness and Recurrence of Racialized Police Killings*

The United States is facing a dual-faceted crisis: frequent police killings of people of color and unaccountability for these killings.<sup>20</sup> The number of police killings in the United States is astonishingly high compared to other developed democratic countries, even when accounting for differences in population size.<sup>21</sup> Police in the United States shoot to death more people in a span of mere days and months than police in other countries do over years and decades.<sup>22</sup> Victims of police violence are disproportionately people of color. Over the two-year period of 2015–2016, Latinos, blacks, and Native Americans were respectively 1.15 times, 2.5 times, and 2.7 times more likely to be killed by police than whites.<sup>23</sup> Law enforcement officers kill over 1,000

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19. For instance, from January 1 to February 9, 2017, police killed approximately three people every day in the United States. Mike Blake, *Police Killings Rise to an Estimated 136 in First 6 Weeks of 2017*, RT (Feb. 10, 2017, 11:47 AM), [https://perma.cc/V2PS-9BP4]. For statistics on the race of victims of police killings, see *infra* note 23 and accompanying text.

20. See generally Colin Taylor Ross, Note, *Policing Pontius Pilate: Police Violence, Local Prosecutors, and Legitimacy*, 53 HARV. J. ON LEGIS. 755 (2016).

21. Jamiles Lartey, *By the Numbers: US Police Kill More in Days than Other Countries Do in Years*, GUARDIAN (June 9, 2015, 6:00 AM EDT), [https://perma.cc/YZ3S-YRAW].

22. *Id.*

23. In 2015, 2.95 whites, 3.45 Latinos, 7.69 Blacks, and 5.49 Native Americans were killed per million people within their respective racial group. *The Counted*, *supra* note 8 (referencing the 2015 database tab). In 2016, 2.9 whites, 3.23 Latinos, 6.66 Blacks, and 10.13 Native Americans were killed per million of people of their respective racial group. *Id.* (referencing the 2016 database tab).

people<sup>24</sup> every year in the United States. A significant number of these victims in 2015 and 2016 were unarmed,<sup>25</sup> and many more did not present an immediate threat to the officers or public. Only a miniscule fraction of these killings are prosecuted, however, and convictions are rare. From January 2005 to mid-April 2015, there were only fifty-four police officers criminally charged for the shooting deaths of a total of forty-nine people.<sup>26</sup> Thus, taking into account the estimated number of people killed by police in the decade, it appears only 0.05% of all police killings result in criminal charges. Each stage of the criminal prosecution process yields too little accountability for these deaths.

### *B. Prosecutorial Reluctance to Pursue Charges*

Historically, prosecutors have been reluctant to empanel grand juries or otherwise initiate criminal proceedings against law enforcement officers in deadly force cases.<sup>27</sup> Most of the time, prosecutors do not seek charges against police—“even if there are strong suspicions that an officer has committed a crime.”<sup>28</sup> More recently, in response to increased public awareness and pressure, prosecutors have become more inclined to allow grand juries to determine whether police officers should be prosecuted.<sup>29</sup> The result has been largely the same, however; police are rarely indicted for killing people. In fact, “the failure to indict is an anomaly for normal cases,

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24. Jon Swaine & Ciara McCarthy, *Killings by US Police Logged at Twice the Previous Rate under New Federal Program*, GUARDIAN (Dec. 15, 2016, 5:00 PM EST), [<https://perma.cc/6J4R-TEUQ>] (explaining the Guardian recorded 1,146 police homicides in 2015 and 1,025 between January 1 and December 15, 2016). Precise numbers of police killings are difficult to ascertain with certainty since it was not until 2015, after President Barack Obama put pressure on federal authorities that the United States’ government began to more accurately count killings by police. *Id.* Prior to 2015, the FBI’s annual count of homicides by police depended entirely on local police chiefs voluntarily submitting information. *Id.* This resulted in a count of less than half of all police killings. *Id.*

25. Approximately twenty percent of people killed by police in 2015 and fifteen percent in 2016 were unarmed. *The Counted*, *supra* note 8 (select the year, click on “list” then select “unarmed” from the drop down menu under “filter by”).

26. Kindy & Kelly, *supra* note 9.

27. Jonathan Witmer-Rich, *Restoring Independence to the Grand Jury: A Victim Advocate for Police Use of Force Cases*, 65 CLEV. ST. L. REV. 535, 538 (2017).

28. Kindy & Kelly, *supra* note 9.

29. Ross, *supra* note 20, at 761–62 (discussing how local prosecutors are increasingly choosing to automatically empanel a grand jury in police killing cases to allow the “people” to decide, rather than allowing themselves to be blamed by the public for failure to prosecute).

but a routine outcome for police cases.”<sup>30</sup> For instance, federal grand juries indict 99.99% of the time<sup>31</sup> but in police killings cases, federal grand juries usually fail to vote for indictment.<sup>32</sup> Many factors contribute to this discrepancy, such as grand jurors’ implicit trust in the police<sup>33</sup> and prosecutors’ lenient treatment of cases where the offender is a law enforcement officer.

The investigation of the killing of Tamir Rice is a prime example of how prosecutors frequently treat police deadly force cases differently than cases where the suspects are not law enforcement officers.<sup>34</sup> Tamir Rice was a twelve-year-old black child from Cleveland, Ohio.<sup>35</sup> On the afternoon of November 22, 2014, Tamir was playing in a nearly empty community park with a toy gun.<sup>36</sup> A man calmly called the Cleveland Police to report that someone was intermittently brandishing a gun outside of the park.<sup>37</sup> The caller noted that the gun was likely fake and that the person was probably a juvenile, although these details were not conveyed to the responding officers Frank Garmback and Timothy Loehmann.<sup>38</sup>

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30. *Id.* at 764.

31. In 2009–10, federal prosecutors initiated approximately 160,000 cases, and grand juries only failed to return an indictment for 11 of those cases. MARK MOTIVANS, U.S. DEP’T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2010 – STATISTICAL TABLES 12 (2013), [https://perma.cc/9RF4-QTEU]; Zachary A. Goldfarb, *The Single Chart that Shows that Federal Grand Juries Indict 99.99 Percent of the Time*, WASH. POST (Nov. 24, 2014), [https://www.washingtonpost.com/news/wonk/wp/2014/11/24/the-single-chart-that-shows-that-grand-juries-indict-99-99-percent-of-the-time/?utm\\_term=.28ef87e9d6dd](https://www.washingtonpost.com/news/wonk/wp/2014/11/24/the-single-chart-that-shows-that-grand-juries-indict-99-99-percent-of-the-time/?utm_term=.28ef87e9d6dd) (citing MOTIVANS, *supra* at 11, 12).

32. Ross, *supra* note 20, at 762–63 (citing Ben Casselman, *It’s Incredibly Rare for a Grand Jury to Do What Ferguson’s Just Did*, FIFTYEIGHT (Nov. 24, 2014, 9:30 PM), [https://perma.cc/25WM-WSE9]). University of Illinois Law Professor Andrew Leipold noted, “[i]f the prosecutor wants an indictment and doesn’t get one, something has gone terribly wrong.” *Id.*

33. Kindy & Kelly, *supra* note 9.

34. Ross, *supra* note 20, at 757; Witmer-Rich, *supra* note 27, at 538–39.

35. Melissa Etehad, *Cleveland Policeman Who Shot Tamir Rice is Fired, but Not Because of the 12-Year-Old’s Death*, L.A. TIMES (May 30, 2017, 6:50 PM), [https://web.archive.org/web/20180331163427/http://www.latimes.com/nation/nationnow/la-na-tamir-rice-officer-fired-20170530-story.html].

36. Emma G. Fitzsimmons, *Video Shows Cleveland Officer Shot Boy in 2 Seconds*, N.Y. TIMES (Nov. 26, 2014), <http://www.nytimes.com/2014/11/27/us/video-shows-cleveland-officer-shot-tamir-rice-2-seconds-after-pulling-up-next-to-him.html>.

37. Eric Heisig, *Tamir Rice Shooting: A Breakdown of the Events that Led to the 12-Year-Old’s Death*, CLEVELAND.COM (Jan. 18, 2017, 2:00 PM), [https://perma.cc/3SW4-XEDK].

38. *Id.*

Surveillance video footage shows that Officer Garmback drove the patrol car at a high speed directly up to the gazebo in the park where Tamir was standing alone with nothing in his hands.<sup>39</sup> Before the patrol car reached a full stop,<sup>40</sup> Officer Loehmann leapt out of the passenger side and shot Tamir in the chest from barely ten feet away.<sup>41</sup> Less than two seconds passed from the officers' arrival and the fatal shot.<sup>42</sup> Officer Loehmann initially claimed that Tamir reached for the gun in his waistband, but surveillance video footage revealed that was not true.<sup>43</sup> After he was shot, the officers did not administer first aid to Tamir<sup>44</sup> or allow his fourteen-year-old sister to comfort him.<sup>45</sup>

Despite the fact that Officer Loehmann's egregious actions were caught on video<sup>46</sup> and despite the resulting national outcry,<sup>47</sup> state authorities were slow to hold him criminally accountable. Nearly six months after the killing, investigators still had not even questioned Officers Garmback or Loehmann.<sup>48</sup> Due to the state's inaction, private

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39. See Sean Flynn, *The Tamir Rice Story: How to Make a Police Shooting Disappear*, GQ (July 14, 2016), [https://web.archive.org/web/20180331165228/https://www.gq.com/story/tamir-rice-story]; News 5 Cleveland, *Full Video: Tamir Rice Shooting Video*, YOUTUBE (Dec. 3, 2014), [https://www.youtube.com/watch?v=dw0EMLM1XRI].

40. Judgment Entry at 2, *In re Affidavits Relating to Timothy Loehmann & Frank Garmback* (Cleveland Mun. Ct., June 11, 2015) (Adrine, J.) ("On the video, the Zone Car containing Patrol Officers Loehmann and Garmback is still in the process of stopping when Rice is shot.").

41. Flynn, *supra* note 39.

42. *Id.*

43. See Helen A. Anderson, *Police Stories*, 111 NW. U. L. REV. ONLINE 19, 25 & n.33 (2016), [https://perma.cc/7X2T-RKDH] (citing Associated Press, *Cleveland Boy Tamir Rice Wasn't Reaching for Pellet Gun: Report*, NBC NEWS (Dec. 5, 2015, 5:20 PM), [https://perma.cc/NQ96-JMUQ]).

44. Judgment Entry, *supra* note 40, at 2 ("Following the shooting, four additional minutes pass, during which neither officer approaches Tamir as he lies wounded on the ground.").

45. While Tamir lay fatally wounded, Tamir's fourteen-year-old sister was prevented from approaching and comforting him and was instead forced to the ground, handcuffed and placed in a patrol car. See *Cleveland Police Handcuff Tamir Rice's Sister After Shooting 12-Year-Old – Video*, GUARDIAN (Jan. 8, 2015, 4:36 PM EST), [https://perma.cc/3WDM-HM9B].

46. *Tamir Rice: Police Release Video of 12-Year-Old's Fatal Shooting – Video*, GUARDIAN (Nov. 26, 2014, 6:07 PM EST), [https://perma.cc/8V42-82FA].

47. Ryllie Danylko, *Protests Break Out in Cleveland over Tamir Rice Shooting, Ferguson Grand Jury Decision*, CLEVELAND.COM (Nov. 26, 2014), [https://perma.cc/9VHN-FN28].

48. Jaeah Lee, *It's Been 6 Months Since Tamir Rice Died, and the Cop Who Killed Him Still Hasn't Been Questioned*, MOTHER JONES (May 15, 2015, 10:00 AM), [https://perma.cc/9QCJ-D6PS].

citizens brought forth a petition and affidavits asking a state judge to order the arrests of Loehmann and Garmback.<sup>49</sup> On June 11, 2015, Judge Ronald B. Adrine responded with a judgment finding probable cause that would support charges against Loehmann for murder, involuntary manslaughter, reckless homicide, negligent homicide, and dereliction of duty, as well as charges against Garmback for negligent homicide and dereliction of duty.<sup>50</sup> The court noted it was “thunderstruck by how quickly this event turned deadly[.]”<sup>51</sup>

After Judge Adrine’s finding that probable cause existed to charge Officers Loehmann and Garmback, Cuyahoga County Prosecutor Timothy McGinty issued a statement that a grand jury would decide whether the police officers would actually be charged.<sup>52</sup> Prosecutor McGinty was slow to investigate and commence grand jury proceedings, actively sought to exonerate the officers, and ultimately “recommended that the grand jurors not bring charges in the killing of the boy, Tamir Rice.”<sup>53</sup> This type of action (and inaction) by prosecutors in homicide cases which do not involve law enforcement would be highly unusual but is increasingly common in cases where the suspects are police officers accused of killing people of color.

### C. Grand Juries Fail to Indict

A grand jury was eventually empaneled against Officers Loehmann and Garmback, but the grand jury took Prosecutor McGinty’s recommendation and failed to indict.<sup>54</sup> Similar to other high-profile police killing cases—including those for the police killings of Michael Brown<sup>55</sup> and Eric Garner<sup>56</sup>—prosecutors in the case of the killing of

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49. Judgment Entry, *supra* note 40, at 1.

50. *Id.* at 8–9.

51. *Id.* at 2.

52. Dana Ford, *Judge: Probable Cause to Charge Cleveland Officers in Tamir Rice Case*, CNN (June 11, 2015, 9:53 PM ET), [<https://perma.cc/M9QZ-7J8U>].

53. Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES (Dec. 28, 2015), [<https://www.nytimes.com/2015/12/29/us/tamir-rice-police-shooting-cleveland.html>].

54. *Id.*

55. Michael Brown was a black, eighteen-year-old, unarmed recent high school graduate fatally shot by white police officer Darren Wilson on August 9, 2014 in Ferguson, Missouri. Frances Robles & Julia Bosman, *Autopsy Shows Michael Brown was Struck at Least 6 Times*, N.Y. TIMES (Aug. 17, 2014), [<https://www.nytimes.com/2014/08/18/us/michael-brown-autopsy-shows-he-was-shot-at-least-6-times.html>]; *Ferguson Protests: What We Know About Michael Brown’s Last Minutes*, BBC (Nov. 25, 2014), [<https://perma.cc/ZBP3-29M8>].

Tamir Rice “conducted what appeared to be an extensive full-blown ‘trial’ before the grand jury,” instead of the regular brief and cursory presentations focused on passing the low hurdle of probable cause.<sup>57</sup> In all three of these cases, the jury failed to indict.<sup>58</sup> Normally, in homicide cases where the suspects are not police officers, prosecutors are eager to get an indictment and do so easily. However, police killing cases are treated differently. The oft-repeated saying that a grand jury would “indict a ham sandwich” if instructed to do so by a prosecutor does not appear to apply to prosecutions of white police officers charged with killing black Americans.<sup>59</sup>

In police killing cases, prosecutors sometimes actually intimate to the jury that an indictment is undesirable. In the grand jury convened to consider the killing of Tamir Rice, Prosecutor McGinty went so far as to hire experts to testify to the grand jury that the shooting was reasonable.<sup>60</sup> Further, the two officers were permitted to give self-serving statements without being subjected to cross-examination, and the police-use-of-force experts who testified that the officers’ use of force was unreasonable “were treated with hostility and aggressive cross-examination by the prosecutors.”<sup>61</sup> These expert witnesses and others have claimed that the prosecution used “theatrics” to signal to the jurors that the officers should not be charged and acted more like

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56. On July 17, 2014, Eric Garner was arrested in Staten Island, New York on suspicion of selling loose, single cigarettes. An NYPD officer put Mr. Garner in a chokehold while arresting him. Garner told officers “I can’t breathe” eleven times but the officer did not let up. He was pronounced dead one hour later. *‘I Can’t Breathe’: Eric Garner Put in a Chokehold by NYPD Officer – Video*, GUARDIAN (Dec. 4, 2014, 2:46 PM EST), [<https://perma.cc/MVU3-CQFE>]; Amy Davidson Sorkin, *Safer Streets*, NEW YORKER (Dec. 15, 2014), [<https://www.newyorker.com/magazine/2014/12/15/safer-streets>].

57. Witmer-Rich, *supra* note 27, at 539.

58. Lauren Gambino, *Eric Garner: Grand Jury Declines to Indict NYPD Officer over Chokehold Death*, GUARDIAN (Dec. 3, 2014, 5:43 PM EST), [<https://perma.cc/77W5-RGPV>]; Jon Swaine et al., *Grand Jury Decline to Charge Darren Wilson for Killing Michael Brown*, GUARDIAN (Nov. 25, 2014, 4:23 AM EST), [<https://perma.cc/KN23-VYMA>]; William & Smith, *supra* note 53.

59. See Christopher Hooton, *A Grand Jury Could ‘Indict a Ham Sandwich,’ But Apparently Not a White Police Officer*, INDEPENDENT (Nov. 25, 2014, 3:18 PM GMT), [<https://web.archive.org/web/20180331190153/https://www.independent.co.uk/news/world/americas/a-grand-jury-could-indict-a-ham-sandwich-but-apparently-not-a-white-police-officer-9882529.html>].

60. Williams & Smith, *supra* note 53.

61. Witmer-Rich, *supra* note 27, at 555.

“defense counsel” than prosecutors.<sup>62</sup> Prosecutor McGinty even made statements implicitly blaming young Tamir for his own death.<sup>63</sup>

Grand jury proceedings are usually cursory events which present one-sided evidence bent on securing an indictment against the suspect.<sup>64</sup> Conversely, likely due to local prosecutors’ reluctance to bring charges against local law enforcement officers with whom they work closely, grand jury proceedings in police killing cases are often more akin to a non-adversarial mini-trial crafted to exonerate the officers.<sup>65</sup> Since grand jury proceedings are held in secrecy and prosecutors control the proceedings, “[m]any observers now see the process as a way for prosecutors to hold a secret, skewed trial for a police officer defendant.”<sup>66</sup>

#### *D. Juries Fail to Convict*

In the atypical case where a grand jury elects to indict a police officer for a killing, the excessive use of force must have been particularly flagrant.<sup>67</sup> The “overwhelming majority” of these cases involved an unarmed victim, “[b]ut it usually took more than that,” such as “a victim shot in the back, a video recording of the incident, incriminating testimony from other officers or allegations of a coverup.”<sup>68</sup> Specifically, in about half of the cases that survive the grand jury, the victim was shot from behind.<sup>69</sup> In one-third of the cases, videos show that the victims posed no threat at the time they were killed.<sup>70</sup> “In nearly a quarter of the cases, an officer’s colleagues turned on him, giving statements or testifying that the officer opened fire even though the suspect posed no danger at the time.”<sup>71</sup> “[A]bout a fifth of the time, prosecutors alleged that officers either planted or destroyed

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62. Flynn, *supra* note 39.

63. Daniel Marans, *How a Prosecutor Managed to Blame a 12-Year-Old for Getting Killed by a Cop*, HUFFPOST (Dec. 29, 2015, 11:22 PM), [<https://perma.cc/6UDV-5CQT>].

64. See Jeffrey Toobin, *How Not to Use a Grand Jury*, NEW YORKER (Nov. 25, 2014), <http://www.newyorker.com/news/news-desk/use-grand-jury>.

65. See Ross, *supra* note 20, at 763–64 (discussing grand juries related to the police killings of Michael Brown and Tamir Rice).

66. *Id.* at 764 (citing Dahlia Lithwick & Sonja West, *Shadow Trial*, SLATE (Nov. 26, 2014, 4:35 PM), [<https://perma.cc/ULN2-4FBN>]).

67. Kindy & Kelly, *supra* note 9.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*



evidence in an attempt to exonerate themselves,” indicating “that the officers themselves recognized the shooting was unjustified.”<sup>72</sup> According to Philip M. Stinson, a criminologist at Bowling Green State University, “[t]o charge an officer in a fatal shooting, it takes something so egregious, so over the top that it cannot be explained in any rational way[.]”<sup>73</sup> However, even in these most egregious cases, the majority of officers are not convicted.<sup>74</sup>

Defendant police officers are usually acquitted or not retried after their proceedings result in mistrials due to hung juries. Of the fifty-four officers criminally charged from 2005–2015, only twenty-six have been convicted (either after a finding of guilt or entering a guilty plea).<sup>75</sup> Five of these convictions were for the single event of the Danziger Bridge tragedy, where unarmed black survivors of Hurricane Katrina sought assistance and were gunned down by police officers who then attempted to cover up the killings.<sup>76</sup>

Some of the remaining twenty-one convictions for this decade of police killings were for significantly lesser offenses than originally charged. For instance, Richard Combs, the white police chief of Eutawville, South Carolina was charged and tried for the murder of an unarmed black man named Bernard Bailey, but ultimately pled guilty to

72. *Id.*

73. *Id.*

74. *Id.*

75. *Police Officers Prosecuted for Use of Deadly Force*, WASH. POST (Apr. 11, 2015), <https://www.washingtonpost.com/graphics/investigations/police-shootings/>; Ray Sanchez, *Charging the Police: By the Numbers*, CNN (Sept. 23, 2016, 3:24 PM ET), [<https://perma.cc/P9EL-6DF3>]. Notably, there is a general lack of comprehensive data on police crime. Philip Stinson and fellow researchers have sought to fill this void and, in doing so, confirm the low arrest and conviction rate of police. *See, e.g.*, PHILIP MATTHEW STINSON, SR. ET AL., *POLICE INTEGRITY LOST: A STUDY OF LAW ENFORCEMENT OFFICERS ARRESTED* (2016); Philip M. Stinson, *Police Shootings Data: What We Know and What We Don't Know*, CRIM. JUST. PUBLICATIONS (Apr. 20, 2017), [[https://web.archive.org/web/2018040622217/https://scholarworks.bgsu.edu/cgi/viewcontent.cgi?article=1077&context=crim\\_just\\_pub](https://web.archive.org/web/2018040622217/https://scholarworks.bgsu.edu/cgi/viewcontent.cgi?article=1077&context=crim_just_pub)] [hereinafter *Police Shootings Data*] (showing that in 2015, alone, 991 fatal on-duty police killings, only 2% were considered “not justified” and resulted in the arrest of the offending officer).

76. John Burnett, *Verdict in Katrina Shooting Buys Police Reform*, NPR (Aug. 18, 2011, 12:01 AM ET), [<https://web.archive.org/web/20180331195706/https://www.npr.org/sections/thetwo-way/2016/04/20/474973779/5-former-new-orleans-police-officers-enter-guilty-pleas-over-danziger-bridge-kil>]; Bill Chappell, *5 Former New Orleans Police Officers Plead Guilty Over Danziger Bridge Killings*, NPR (Apr. 20, 2016, 1:17 PM ET), [<https://web.archive.org/web/20180331195706/https://www.npr.org/sections/thetwo-way/2016/04/20/474973779/5-former-new-orleans-police-officers-enter-guilty-pleas-over-danziger-bridge-kil>].

misconduct in office.<sup>77</sup> In 2011, Combs chased down and shot into Bailey's vehicle when he tried to arrest him on a trumped-up obstruction of justice charge, weeks after the two had argued about Bailey's daughter's traffic ticket for a broken taillight.<sup>78</sup> Combs was prosecuted for murder and voluntary manslaughter in two separate trials.<sup>79</sup> The first jury voted 9–3 to convict Combs, and the second jury voted 8–4 for conviction.<sup>80</sup> Both resulted in mistrials since the juries were unable to reach a unanimous verdict.<sup>81</sup> Rather than be tried a third time, Combs pled guilty to the minor misconduct charge.<sup>82</sup>

### *E. Judges Fail to Punish*

Of those police officers successfully convicted of an offense, most served little prison time, if any. Those who did serve time received relatively short sentences. The average prison time for a police officer convicted of killing someone is four years.<sup>83</sup> This is less than half the average sentence for non-police officers who are convicted of similar crimes.<sup>84</sup> Some convicted officers received no prison time, such as

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77. Alan Blinder, *Rural Justice Focus of Ex-Police Chief's Murder Trial*, N.Y. TIMES (Jan. 7, 2015), <https://www.nytimes.com/2015/01/08/us/richard-combs-bernard-bailey-shooting-case.html>.

78. *Id.*

79. Associated Press, *Ex-Police Chief who Shot Unarmed Black Man Avoids Jail with Plea Deal*, GUARDIAN (Sept. 1, 2015, 5:06 PM EDT), [<https://perma.cc/ANC4-JQVJ>].

80. *Id.*

81. *Id.*

82. *See id.*

83. Kindy & Kelly, *supra* note 9.

84. For example, between 2009 and 2010, the average *minimum* term of imprisonment for homicide-related offenses was over 8.5 years, and an average aggregate sentence of nearly 12 years imprisonment. ISABEL TAUSSIG, NSW BUREAU OF CRIME STATISTICS & RESEARCH, SENTENCING SNAPSHOT: HOMICIDE AND RELATED OFFENCES 3 (2012), <http://www.bocsar.nsw.gov.au/Documents/BB/bb76.pdf> [<https://perma.cc/BEM2-JV8G>]. Between 2005 and 2017, by contrast, police convicted of on-duty shooting crimes were sentenced to an average *total* term of 48 months, or four years of incarceration, and most often, were sentenced to 0 (zero) months of incarceration. *Police Shootings Data*, *supra* note 75; *see also* Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 680 (1996) (“In many instances, police officers manage to avoid prison altogether for criminal acts that, if committed by civilians, would lead to many years imprisonment. When police do go to prison, it is often for a fraction of the sentence that normally results from a particular crime. This is so even when their brutality causes permanent disability or death.”).

Officer Combs after he pled guilty to misconduct.<sup>85</sup> Similarly, another white police officer from South Carolina, Justin Craven, who fatally shot a sixty-eight-year-old black motorist, Ernest Satterwhite, received a sentence of probation.<sup>86</sup> The killing was captured on the police cruiser dash cam.<sup>87</sup> The prosecution sought manslaughter charges, but a grand jury chose to indict for misconduct in office; Craven pled out, resulting in no prison time.<sup>88</sup> In the past ten years, from 2007 to 2017, only five white police officers have served prison time for killing black people,<sup>89</sup> despite the fact that, on average, police (who are disproportionately white)<sup>90</sup> kill an unarmed black man every nine days.<sup>91</sup>

#### *F. The Impact of Unaccountability*

Unaccountability for police killings of people of color has a broad impact on our nation. It not only leaves the victims' loved ones devastated, it also disheartens communities of color. When trial juries routinely acquit defendants of racialized police violence, the legal system "sends the message that black males [and other men and women of color] are entitled to less physical safety than whites."<sup>92</sup> Discriminatory acquittals not only convey "that [the] government will provide less protection from violence based on race," but they also "enforce the racial . . . order."<sup>93</sup> Further, it causes the general public to

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85. Associated Press, *supra* note 79.

86. *South Carolina Officer Gets Probation in Black Driver's Shooting*, CHI. TRIB. (Apr. 11, 2016, 10:35 PM), [https://web.archive.org/web/20180331204333/http://www.chicagotribune.com/news/nationworld/ct-south-carolina-police-shooting-ernest-satterwhite-20160411-story.html].

87. *Id.*

88. *Id.*

89. Michael Harriot, *White Men Can't Murder: Why White Cops Are Immune to the Law*, ROOT (June 22, 2017, 1:28 PM), [https://web.archive.org/web/20180331204734/https://www.theroot.com/white-men-cant-murder-why-white-cops-are-immune-to-the-1796309966].

90. Jeremy Ashkenas & Haeyoun Park, *The Race Gap in America's Police Departments*, N.Y. TIMES (Apr. 8, 2015), https://www.nytimes.com/interactive/2014/09/03/us/the-race-gap-in-americas-police-departments.html.

91. Nancy C. Marcus, *From Edward to Eric Garner and Beyond: The Importance of Constitutional Limitations on Lethal Use of Force in Police Reform*, 12 DUKE J. CONST. L. & PUB. POL'Y 53, 67 (2016) (noting police killed an average of one unarmed black man every nine days in 2015).

92. Andrew E. Taslitz, *What Feminism Has to Offer Evidence Law*, 28 SW. U. L. REV. 171, 215 (1999).

93. Tetlow, *Discriminatory Acquittal*, *supra* note 15, at 79.

lose faith in policing and the criminal justice system. Prosecutors' failure to pursue charges, grand juries' failure to indict, trial juries' failure to convict, and judges' light sentencing in police deadly force cases have a significant impact on the American people and on the actual and perceived legitimacy of our criminal justice legal system.<sup>94</sup>

There are undoubtedly many contributing reasons for the unaccountability for police killings of racial minorities. As Devon Carbado has elucidated, the causes of "Blue-on-Black" violence are manifold:<sup>95</sup> a convergence of social forces subjecting blacks to ongoing police surveillance; the frequency of police surveillance exposes blacks to increased opportunities for police violence; police culture and training which encourage violence; translation of police violence into "justifiable force" by the law and legal actors; qualified immunity that prevents civil recovery; and local government indemnification which limits financial consequences to offending officers—all of which leave little incentive for law enforcement to exercise care toward communities of color.<sup>96</sup> This Article focuses on one often underexplored aspect of this phenomena: the role of evidence law. It scrutinizes racialized police killings under the lens of a critical evidentiary inquiry, specifically targeting the problem of racial character evidence, and proposes evidence law solutions.

## II. RACIAL CHARACTER EVIDENCE AND ITS ROLE IN POLICE KILLING CASES

When a law enforcement officer is criminally prosecuted for killing a victim of color, the actual charges may vary. Generally, irrespective of the charged offense(s), the primary question the jury will consider is: Was the officer reasonably afraid for his or her life or the lives of others when he or she used deadly force?<sup>97</sup> Police have broad

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94. See Kami Chavis Simmons, *Increasing Police Accountability: Restoring Trust and Legitimacy Through the Appointment of Independent Prosecutors*, 49 WASH. U. J.L. & POL'Y 137, 139 (2015) ("[R]ecent public outrage reached a fever pitch when officers were not held criminally responsible for recent high-profile deaths.").

95. Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479 (2016).

96. *Id.* at 1479. See also Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125 (2017) (discussing the connection between police killings of African Americans with the legalization of racial profiling in Fourth Amendment law).

97. See *Graham v. Connor*, 490 U.S. 386, 396 (1989); *Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985).

authority to use deadly force,<sup>98</sup> and, as discussed above, they are not usually prosecuted unless the evidence against them is extraordinarily strong.<sup>99</sup> Generally, there is little evidence that the victim posed a threat, aside from the defendant officer's own self-serving testimony. Often, video evidence or eyewitness testimony actually provides evidence that neither the officer nor anyone else was in imminent risk of harm.<sup>100</sup> However, even when the evidence against the officer is overwhelming, juries still acquit.<sup>101</sup>

Jurors (or judges in a bench trial) acquit because they believe the officer. They believe it was reasonable for the officer to perceive the victim of color as threatening. They find that the officer was honest and credible on the stand. In contrast, they find that the eyewitnesses—often people of color—were not credible. Ultimately, it comes down to character: of the victim, the defendant, and witnesses. Often, race itself serves as character evidence, and reliance on racial character evidence can be outcome determinative.<sup>102</sup>

### *A. Racial Character Evidence in General*

#### 1. OVERVIEW OF CHARACTER EVIDENCE

Character evidence is based on the commonsense notion that someone who has lived a morally righteous, honest, and peaceful life is more likely to have acted in accordance with that character during the event in question or on the stand.<sup>103</sup> Likewise, someone who has led a morally corrupt, dishonest, or violent life is more likely to have acted consistently with those traits during the incident at issue or while

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98. Peggy Triplett, *Police Use of Deadly Force: Research Efforts of the National Institute of Law Enforcement and Criminal Justice*, in *A COMMUNITY CONCERN: POLICE USE OF DEADLY FORCE 61* (Robert N. Brenner & Marjorie Kravitz eds., 1979), [<https://perma.cc/EX2L-GZKB>]; Ross, *supra* note 20, at 758 (citing *Graham*, 490 U.S. at 396 (“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer in the scene, rather than with the 20/20 vision of hindsight.”))).

99. Kindy & Kelly, *supra* note 9.

100. *Id.*

101. *See supra* Part I.D.

102. Gonzales Rose, *supra* note 2, at 2265 (citing Carodine, *supra* note 2, at 679); *see also* Montré D. Carodine, “*The Mis-Characterization of the Negro*”: *A Race Critique of the Prior Conviction Impeachment Rule*, 84 *IND. L.J.* 521, 527 (2009).

103. *See* Barrett J. Anderson, *Recognizing Character: A New Perspective on Character Evidence*, 121 *YALE L.J.* 1912, 1926–28 (2012) (explaining the basic logic behind a character propensity argument).

testifying.<sup>104</sup> Although the character of a party, witness, or victim may be probative, judging someone by the type of person they are or their past, unrelated actions goes against the well-established Anglo-American legal principle that a person should be judged on the basis of his or her conduct on the particular occasion and not on the basis of his or her character.<sup>105</sup> Thus, character evidence, whether for good or bad traits, is generally prohibited at trial.<sup>106</sup>

There are exceptions to the general character propensity ban. In criminal trials, defendants can often introduce opinion or reputation<sup>107</sup> evidence of their or a victim's pertinent character trait.<sup>108</sup> For instance, when a defendant is charged with homicide, manslaughter, or other offense related to killing someone, a defendant could call a character witness to testify that the defendant is peaceful and non-violent and that the victim was violent and aggressive. The defendant's introduction of character evidence comes with risks. When a defendant affirmatively offers character evidence about themselves or a victim, the defendant opens the door to character evidence. The prosecution can respond with opinion or reputation character evidence about the defendant's or victim's matching trait.<sup>109</sup> Further, in homicide cases where a defendant claims the victim was the first aggressor, the prosecution can introduce evidence of the victim's character for peacefulness, even if the defendant did not introduce character evidence.<sup>110</sup> Moreover, in both criminal and civil trials, once a witness testifies, his or her credibility for truthfulness can be impeached.<sup>111</sup> Only after a witness's credibility has been attacked, can a party bolster his or her witness's credibility with good character evidence for truthfulness.<sup>112</sup>

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104. *Id.*

105. David P. Leonard, *Character and Motive in Evidence Law*, 34 LOY. L.A. L. REV. 439, 450 (2001).

106. *See, e.g.*, FED. R. EVID. 404(a) (providing that “[e]vidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait”).

107. FED. R. EVID. 405 (“When evidence of a person’s character or character trait is admissible, it may be proved by testimony about the person’s reputation or by testimony in the form of an opinion.”).

108. FED. R. EVID. 404(a)(2)(A) & (B).

109. *Id.*

110. FED. R. EVID. 404(a)(2)(C).

111. FED. R. EVID. 608(a).

112. *Id.*

## 2. OVERVIEW OF RACIAL CHARACTER EVIDENCE

Racial character evidence is where a person's—whether it be a party, witness, or victim—race is considered by a fact-finder as proof of the person's character: the type of person they are and their propensity to act in certain ways.<sup>113</sup> Implicit racial preferences and stereotypes about characteristics of racial groups are used to determine whether the defendant, witness, or victim is (or was) peaceful or violent, honest or dishonest, or a variety of other characteristics.<sup>114</sup> Racial character evidence is rooted in racial stereotypes.<sup>115</sup>

There are many prevalent (but unfounded) racial stereotypes in the United States. For instance, common stereotypes about blacks are that they are criminally-inclined, violent, aggressive, physically powerful, dishonest, shiftless, and drug users.<sup>116</sup> Stereotypes about Latinos are that they are “illegal” immigrants—which indicates both a law-breaking nature and foreignness—untrustworthy, gang members, drug traffickers, and the men sexist and oppressive towards women.<sup>117</sup>

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113. Gonzales Rose, *supra* note 2, at 2262 (“In today’s criminal justice system, blackness and brownness are frequently de facto ‘evidence’ of bad character, while whiteness is de facto ‘evidence’ of good character. In this Article, I refer to this phenomena as ‘racial character evidence.’”); *see also* Montré D. Carodine, *Race Is Evidence: (Mis)Characterizing Blackness in the American Civil Rights Story*, in *CIVIL RIGHTS IN AMERICAN LAW, HISTORY, AND POLITICS* 64–67 (Austin Sarat ed. 2014).

114. Gonzales Rose, *supra* note 2, at 2264.

115. *Id.*

116. *See* Lei Guo & Summer Harlow, *User-Generated Racism: An Analysis of Stereotypes of African Americans, Latinos, and Asians in YouTube Videos*, 25 *HOW. J. COMM.* 281, 286 (2014) (citing JOHN DOWNING & CHARLES HUSBAND, *REPRESENTING ‘RACE’: RACISMS, ETHNICITY AND THE MEDIA* 27 (2005); Linus Abraham & Osei Appiah, *Framing News Stories: The Role of Visual Imagery in Priming Racial Stereotypes*, 17 *HOW. J. COMM.* 183 (2006) (“[R]acial stereotypes tend[] to link Blacks with dangerous, criminal behavior, portraying them as poor, uneducated and violent.”); *see also* Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 *ANN. REV. L. & SOC. SCI.* 269, 280 (2015) (citing William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors’ Race and Jury Racial Composition*, 3 *U. PA. J. CONST. L.* 171, 265–66 (2001)) (“Post-trial interviews of capital jurors show that White jurors, especially men, are more likely to have negative views of defendants, seeing them as vicious and dangerous individuals who made their victims suffer.”); D. Aaron Lacy, *The Most Endangered Title VII Plaintiff?: Exponential Discrimination Against Black Males*, 86 *NEB. L. REV.* 552, 564 (2008) (“[T]he stereotypes related to Blackness are athletic, incompetent, guilty, unworthy, occupational instability, primitive morality, threatening, and dangerous.”).

117. *See* Guo & Harlow, *supra* note 116 (citations omitted) (“Latinos, especially Latino immigrants, often are portrayed in the news as criminals, invaders, a threat to national security, culturally different, and job thieves.”); *see also* Andrew W. Bribriescio, Note, *Latino/a Plaintiffs and the Intersection of Stereotypes, Unconscious*

“Native Americans are frequently stereotyped as alcoholic, untrustworthy, violent, and prone to crime.”<sup>118</sup> American Indians historically and contemporarily are also stereotyped as “wild” and “savage,” in a variety of contexts including case law.<sup>119</sup> Middle Eastern and Arab Americans are stereotyped as terrorists and tyrannical toward women.<sup>120</sup> Stereotypes about Asian-Americans oscillate between myths of “yellow peril” and “model minority,” and include that they are overly-reserved, unfeeling, disloyal, shifty, tricky, hard-working, academically-inclined, and foreign.<sup>121</sup> While it is generally assumed that racial stereotypes only apply to racial minorities, whites are also subject to racial stereotyping, although usually to their benefit.<sup>122</sup> Whites are generally considered honest, truthful, law-abiding, reasonable, and—most notably—normal.<sup>123</sup>

These racial stereotypes are carried into the courtroom where jurors (and judges in bench trials) are tasked with assessing the credibility of witnesses and discerning the facts of the case. A witness’s race might be considered in determining whether he or she was honest or dishonest when testifying on the stand.<sup>124</sup> The race of a victim or

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*Bias, Race-Neutral Polices, and Personal Injury*, 13 J. GENDER RACE & JUST. 373, 400–01 (2010) (citations omitted) (“Jurors possess the stereotype that Latinos are untrustworthy and dishonest . . . less intelligent . . . [and] . . . foreigners.”).

118. Aliya Saperstein et al., *The Criminal Justice System and the Racialization of Perceptions*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 104, 107 (2014); see also Walter C. Fleming, *Myths and Stereotypes About Native Americans*, 88 PHI DELTA KAPPAN 213, 213 (2006).

119. See generally Ann E. Tweedy, “Hostile Indian Tribes . . . Outlaws, Wolves, . . . Bears . . . Grizzlies and Things like That?” *How the Second Amendment and Supreme Court Precedent Target Tribal Self-Defense*, 13 U. PA. J. CONST. L. 687 (2011).

120. Rachel Saloom, *You Dropped a Bomb on Me, Denmark—A Legal Examination of the Cartoon Controversy and Response as it Relates to the Prophet Muhammad and Islamic Law*, 8 RUTGERS J.L. & RELIGION 1, 22–25 (2006).

121. See generally Colin Ho & Jay W. Jackson, *Attitudes Toward Asian Americans: Theory and Measurement*, 31 J. APPLIED SOC. PSYCHOL. 1553 (2001).

122. See, e.g., Bribriescio, *supra* note 117, at 400–01 (pointing out that many of the stereotypes exist relative to other social groups, “primarily Whites”); Wesley G. Jennings et al., *A Critical Examination of the “White Victim Effect” and Death Penalty Decision-Making from a Propensity Score Matching Approach: The North Carolina Experience*, 42 J. CRIM. JUST. 384, 385 (2014) (citation omitted) (explaining the “White victim effect” as rooted in the erroneous assumption that “crime and violence among Blacks [is] ‘normative’ and Whites [is] atypical”).

123. See Lacy, *supra* note 116, at 564 (“There are many classical stereotypes related to Whiteness. Some adjectives include innocence, worthiness, competence, collegial, articulate, intelligent, and non-threatening.”).

124. See generally Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261 (1996).



defendant may be relied upon to determine whether they were violent or peaceful, or more specifically, whether during the event in question they were the first aggressor or reluctant to resort to violence and only acted in self-defense.<sup>125</sup> An example that will be discussed in detail is how “[r]acial stereotypes about Black men as dangerous, violent criminals may encourage jurors to see the victim’s actions as threatening and the defendant’s actions as reasonable.”<sup>126</sup>

### 3. PEÑA-RODRIGUEZ V. COLORADO: A RACIAL CHARACTER EVIDENCE CASE STUDY

The *Peña-Rodriguez* case<sup>127</sup> provides a clear example of a juror’s explicit use of racial character evidence. In May 2007, a Latino man entered a women’s restroom at a Colorado horse-racing track.<sup>128</sup> The man asked two teenage sisters whether they would like to drink or “party.”<sup>129</sup> The girls declined, and when they tried to leave, the man turned off the light and grabbed the girls’ shoulders, moving his hands towards one girl’s breast and the other girl’s buttocks.<sup>130</sup> The girls quickly exited the restroom and told their father who worked at the racetrack.<sup>131</sup> The girls described the man and said they thought he was also employed at the racetrack.<sup>132</sup> Their father thought the man described was Miguel Angel Peña-Rodriguez and reported the incident to the racetrack’s security personnel, who in turn contacted the police.<sup>133</sup> Later that night, the police seized Peña-Rodriguez, and the girls identified him in a show-up as the assailant.<sup>134</sup>

Peña-Rodriguez was charged with felony attempted sexual assault on a child, as well as the misdemeanor offenses of unlawful sexual contact and sexual harassment.<sup>135</sup> At trial, Peña-Rodriguez’s defense

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125. See generally Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367 (1996).

126. Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843, 859 (2015); see also Thompson, *supra* note 12, at 322–23.

127. 137 S. Ct. 855 (2017).

128. Brief for Petitioner at 4, *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (No. 15-606).

129. *Id.*

130. *Id.* at 4–5.

131. *Id.* at 5.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

was misidentification.<sup>136</sup> The prosecution's evidence consisted primarily of the pretrial and in-court identification.<sup>137</sup> The defendant did not testify but called an alibi witness, who was also Latino.<sup>138</sup> The jury found him guilty on the misdemeanor charges but were unable to come to a conclusion on the attempted sexual assault charge, and as a result, the court declared a mistrial as to this felony charge.<sup>139</sup> He was sentenced to two years' probation and had to register as a sex offender.<sup>140</sup>

After the verdict, two jurors approached defense counsel and reported that fellow Juror H.C. had made multiple racially-biased statements.<sup>141</sup> After securing permission from the trial court, defense counsel obtained affidavits from the two jurors about Juror H.C.'s statements.<sup>142</sup> One of Juror H.C.'s statements included: "I think [Peña-Rodriguez] did it because he's Mexican and Mexican men take whatever they want."<sup>143</sup> Juror H.C. made other statements concerning Mexican men being "physically controlling of women because of their sense of entitlement" and that they "can take whatever they want" with women.<sup>144</sup> He also said he "believed that the defendant was guilty because in [his] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women."<sup>145</sup> He specified that "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls."<sup>146</sup> Finally, concerning the defendant's alibi witness, Juror H.C. stated he "did not find the petitioner's alibi witness credible because, among other things, he was 'an illegal.'"<sup>147</sup>

Juror H.C.'s statement, "I think he did it because he's Mexican" is an incredibly clear and blatant example of racial character evidence.<sup>148</sup> The inference is that the defendant is guilty because of his racialized

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136. *Id.* at 5–6.

137. *Id.* at 6.

138. Brief for Respondent at 8, *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (No. 15-606).

139. Brief for Petitioner, *supra* note 128, at 7.

140. *Id.* at 9.

141. *Id.* at 7–8.

142. *Id.* at 8.

143. *Peña-Rodriguez*, 137 S. Ct. at 862.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

background. The juror's other statements explain the racial character propensity chain of inferences: (1) the defendant is Mexican; (2) Mexican men have a propensity to take whatever they want, are physically controlling of women, have a sense of entitlement that they can do whatever they want with females, have a bravado, and are frequently guilty of being aggressive towards females; (3) on the night in question defendant was Mexican and thus, acted in accordance with the character of a Mexican; (4) hence, it is likely he entered the bathroom, touched the teenage girls in a sexual manner, and attempted to sexually assault them; (5) therefore, he is guilty of the offenses charged.

The racial character propensity reasoning here is that Mexican men are sexual offenders, and since the defendant is Mexican then he must be guilty of the charged sexual offenses, is based on racial bias. Although the juror couched his assumptions about the character of Mexican men in terms of his personal observations and professional work experience as a police officer, decades earlier,<sup>149</sup> these assumptions are based on widely-held racist stereotypes.<sup>150</sup> Juror H.C.'s statement likely resonated with other jurors because of the prevalence of such stereotypes. An example of the pervasiveness and tolerance of this stereotype is that Donald Trump commenced his successful presidential campaign claiming that Mexican immigrants were rapists and a threat to the United States.<sup>151</sup> As jurors discussed the evidence in the case, Juror H.C. put forth racial character evidence and tried to persuade other jurors that Peña-Rodriguez was guilty of the charged sexual offenses because he is Latino.<sup>152</sup> The juror also acted as an "expert" opinion witness of sorts in the deliberation room, relying upon his expertise as a former police officer to convince his fellow jurors that they should return a verdict of guilt.<sup>153</sup>

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149. Brief for Respondent, *supra* note 138, at 13.

150. See Celia Jaes Falicov, *Changing Constructions of Machismo for Latino Men in Therapy: "The Devil Never Sleeps"*, 49 FAM. PROCESS 309 (2010).

151. Michelle Ye Hee Lee, *Donald Trump's False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015), [https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/?utm\\_term=.a66d8b1faf16](https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/?utm_term=.a66d8b1faf16).

152. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 862 (2017). The use of racial character evidence to determine guilt for sexual assault is particularly troubling because it is reminiscent of when being black was de facto evidence of rape. See Gonzales Rose, *supra* note 2, at Part II.A.; Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345 (2010); Carodine, *supra* note 2, at 680–81.

153. *Peña-Rodriguez*, 137 S. Ct. at 870 ("Not only did juror H.C. deploy a dangerous racial stereotype to conclude petitioner was guilty and his alibi witness

Not only did Juror H.C. find that the defendant’s Latino background confirmed that he was guilty, the juror found the defendant’s alibi witness was not credible because he was also Latino.<sup>154</sup> Specifically, the juror “did not find petitioner’s alibi witness credible because, among other things, he was ‘an illegal.’”<sup>155</sup> “Illegal” is a racialized label attached to Latinos in the United States.<sup>156</sup> The undisputed evidence in the record was that the alibi witness was a lawful permanent resident of the United States, and thus legally present.<sup>157</sup> However, the juror still concluded that the alibi witness was “an illegal.”<sup>158</sup> This is not merely a mistaken notion of an individual’s immigration status; it is a prevalent racist stereotype and a tolerated racial slur against Latinos. Despite the reality that the majority of Latinos—including people of Mexican descent—in the United States are citizens or otherwise lawfully present,<sup>159</sup> racist assumptions that Latinos are foreign and “illegals” prevail. Latinos, especially those of Mexican descent, are branded “illegal” and assumed to be criminally inclined and dishonest.<sup>160</sup> Here, Juror H.C. observed the alibi witness’s appearance, assumed he was an “illegal” because he appeared and sounded Latino, and concluded he was accordingly dishonest. Ultimately, it is evident that Juror H.C. based his vote to convict the

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should not be believed, but he also encouraged other jurors to join him in convicting on that basis.”).

154. *Id.* at 862.

155. *Id.*

156. *See* Guo & Harlow, *supra* note 116 (explaining how Latinos are often portrayed as criminals and invaders).

157. *Peña-Rodriguez*, 137 S. Ct. at 862 (“In fact, the witness testified during trial that he was a legal resident of the United States.”).

158. *Id.*

159. In fact, the majority of Latinos in the country are born in the United States. Jens Manuel Krogstad, *10 Facts for National Hispanic Heritage Month*, PEW RES. CTR. (Sept. 15, 2016), [<https://perma.cc/BS5Y-UQDG>] (explaining the percentage of U.S. Latinos who are foreign-born decreased from forty percent to thirty-five percent between 2007 and 2014).

160. David G. Embrick, *Two Nations, Revisited: The Lynching of Black and Brown Bodies, Police Brutality, and Racial Control in ‘Post-Racial’ Amerikkka*, 41 CRITICAL SOC. 835, 840 (2015) (“And violence toward Latino/as by the police are routinely dismissed as Latino/as are often seen as ‘illegal’ in the US and therefore criminal, and deserving of whatever punishment they receive . . . .”); Derek Hawkins, *The Long Struggle Over What to Call ‘Undocumented Immigrants’ or, as Trump Said in His Order, ‘Illegal Aliens’*, WASH. POST (Feb. 9, 2017), [[https://www.washingtonpost.com/news/morning-mix/wp/2017/02/09/when-trump-says-illegals-immigrant-advocates-recoil-he-would-have-been-all-right-in-1970/?utm\\_term=.c667aafaea6](https://www.washingtonpost.com/news/morning-mix/wp/2017/02/09/when-trump-says-illegals-immigrant-advocates-recoil-he-would-have-been-all-right-in-1970/?utm_term=.c667aafaea6)]; *see also supra* note 117 and accompanying discussion.

defendant, persuading other jurors to follow suit, on the basis of racial character evidence.

*B. Racial Character Evidence in Police Killing Cases*

Racial character evidence is not only used against a defendant or witness in a criminal trial. Racial character evidence can also apply to a victim, including a deceased victim. This is typical in deadly force or self-defense scenarios where the deceased victim was a person of color.<sup>161</sup> It is also important to note that racial character evidence is not always negative. It can be used in favor of a racialized group.<sup>162</sup> Jurors serving on grand and petit juries in police deadly force cases can be particularly susceptible to the use of racial character evidence because the majority of police killings are committed by white (or non-black) police officers with an overrepresentation of victims being people of color.<sup>163</sup>

Even when the officer is a person of color, the victim's blackness can still be used against him or her. Studies have shown that non-whites also hold implicit racial bias against blacks and are more likely to perceive a black person as dangerous and armed.<sup>164</sup> Further, in rooting out racial subordination the focus should be more on the outcome than the race of the perpetrator. "The contemporary system of race and racism does not require intentional race-based discrimination or animus, but instead centers on whites collectively receiving privileges and benefits from the systemic subordination of non-whites."<sup>165</sup> The killing of black persons subordinates the black victims, their families, their communities, and blacks as a population who experience a

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161. See Gonzales Rose, *supra* note 2, at 2265–68.

162. *Id.* at 2260–61.

163. See *supra* note 23; see also Kindy & Kelly, *supra* note 9.

164. See Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 357 (2007) (stating that "‘shooter bias’ refers to participants’ propensity to shoot Black perpetrators more quickly and more frequently than White perpetrators and to decide not to shoot White bystanders more quickly and frequently than Black bystanders. Studies have also shown that participants more quickly identify handguns as weapons after seeing a Black face . . ."). See also Saul L. Miller et al., *The Basis of Shooter Biases: Beyond Cultural Stereotypes*, 38 PERSONALITY & SOC. PSYCHOL. BULL. 1358 (2012) (citing that black men are stereotyped as dangerous and finding in a study that black men are often erroneously assumed to be armed).

165. Gonzales Rose, *supra* note 2, at 2251–52 (citing Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1023–24 (1989)).

diminished sense of safety and freedom.<sup>166</sup> Commentators have made analogies between recent police killings of unarmed blacks and lynching in the Jim Crow era<sup>167</sup> because both are demonstrations of white control over blacks.<sup>168</sup> Police killings and the resultant fear of future killings yield white dominance, irrespective of whether the officer is white or a person of color. The race of the police officer who kills a black person does not negate the presence of structural racism.<sup>169</sup>

### 1. CASE STUDY: PROSECUTION OF JERONIMO YANEZ FOR KILLING PHILANDO CASTILE

The recent trial and acquittal of Latino police officer Jeronimo Yanez for the killing of Philando Castile, a thirty-two-year-old black man,<sup>170</sup> provides an illustration of juror reliance on racial character evidence in police killing cases. On the evening of July 6, 2016, in a suburb of Saint Paul, Minnesota,<sup>171</sup> Yanez saw Castile drive past and noticed he matched the description of a robbery suspect due to his “wide-set nose.”<sup>172</sup> Castile’s girlfriend Diamond Reynolds was in the passenger seat along with her four-year-old daughter in the backseat.<sup>173</sup> After Yanez and another officer, Joseph Kauser, pulled Castile’s vehicle over, Yanez approached Castile’s driver-side window, told him that he had a broken taillight, and asked for his driver’s license and proof of insurance.<sup>174</sup> Kauser stood on the passenger side of the

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166. Tetlow, *Discriminatory Acquittal*, *supra* note 15, at 95.

167. Isabel Wilkerson, *Mike Brown's Shooting and Jim Crow Lynchings Have Too Much in Common. It's Time for America to Own Up*, *GUARDIAN* (Aug. 25, 2014, 6:45 AM EDT), [<https://perma.cc/X8S5-FSMX>]; *see also* Tetlow, *Discriminatory Acquittal*, *supra* note 15, at 82–84.

168. Embrick, *supra* note 160, at 838–39 (referencing control over black and brown bodies in his article that compares Jim Crow to recent police killings).

169. This does not mean that racial character evidence could not be used against a police officer of color.

170. Crimesider Staff, *Philando Castile Case Verdict: Jeronimo Yanez Not Guilty*, *CBS NEWS* (June 16, 2017, 4:01 PM), [<https://web.archive.org/web/20180401234648/https://www.cbsnews.com/news/philando-castile-case-verdict-jeronimo-yanez/>].

171. *Id.*

172. Tim Nelson, *Philando Castile Traffic Stop Shooting Footage Released*, *NPR* (June 21, 2017, 5:00 AM ET), [<https://web.archive.org/web/20180401235224/https://www.npr.org/2017/06/21/533764381/philando-castile-traffic-stop-shooting-footage-released>].

173. Jay Croft, *Philando Castile Shooting: Dashcam Video Shows Rapid Event*, *CNN* (June 21, 2017, 10:14 AM ET), [<https://perma.cc/E6AB-DR7T>].

174. *Id.*; Nelson, *supra* note 172.

vehicle.<sup>175</sup> As Castile had a license to carry firearms, he calmly told Yanez, “Sir, I have to tell you I do have a . . . firearm on me.”<sup>176</sup> Yanez replied, “Ok . . . [d]on’t reach for it then.”<sup>177</sup> Castile calmly affirmed he was not pulling it out.<sup>178</sup> Yanez then suddenly fired seven bullets, five of which struck Castile.<sup>179</sup> Castile’s last audible words were: “I wasn’t reaching . . . .”<sup>180</sup> Yanez fatally shot Castile within forty seconds of approaching his vehicle.<sup>181</sup> The shooting was captured on the police cruiser’s dash-cam, and Reynolds live-streamed the immediate aftermath of the shooting on Facebook where she repeatedly confirmed that Castile had just been reaching for his wallet to locate his license or identification as instructed.<sup>182</sup>

Yanez was charged with second-degree manslaughter of Castile and two counts of dangerous discharge of a firearm without regard to the safety of Reynolds and her child.<sup>183</sup> At trial, the primary issue in regards to the manslaughter charge was whether Officer Yanez was truly afraid for his life.<sup>184</sup> The only admissible evidence put forth to prove Yanez was reasonably afraid for his life was his own testimony and an expert witness who testified that, from Yanez’s account, it was likely he had seen a gun since Yanez reported seeing Castile’s hand form into a C-shape.<sup>185</sup> Yanez’s testimony was contradicted by Castile’s

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175. Croft, *supra* note 173.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*; *Timeline of Key Events in Philando Castile Shooting*, CBS MINN. (June 14, 2017, 12:22 PM), [<https://perma.cc/F5E4-TEGL>].

183. Mark Berman, *Minn. Officer Acquitted in Shooting of Philando Castile During Traffic Stop, Dismissed from Police Force*, WASH. POST (June 17, 2017), [[https://www.washingtonpost.com/news/post-nation/wp/2017/06/16/minn-officer-acquitted-of-manslaughter-for-shooting-philando-castile-during-traffic-stop/?utm\\_term=.2a8f334f5065](https://www.washingtonpost.com/news/post-nation/wp/2017/06/16/minn-officer-acquitted-of-manslaughter-for-shooting-philando-castile-during-traffic-stop/?utm_term=.2a8f334f5065)].

184. See Martin Kaste, *Cop Shooting Death Cases Raise Question: When is Fear Reasonable?*, NPR (June 30, 2017, 10:37 AM ET), [<https://web.archive.org/web/20180402003642/https://www.npr.org/2017/06/30/534992121/cop-shooting-death-cases-raise-question-when-is-fear-reasonable>].

185. KARE Staff, *Yanez Trial: How Things Unfolded*, KARE 11 (June 13, 2017, 11:29 AM CDT), [<https://perma.cc/7CVS-HVC5>].

final words, Reynolds’s eyewitness testimony, and the dash-cam video.<sup>186</sup>

It is likely Yanez lied on the stand that Castile had reached for his firearm. At trial, Yanez testified that he actually saw Castile’s gun.<sup>187</sup> Immediately after the shooting, however, Yanez admitted that he had not seen the firearm.<sup>188</sup> As captured by the dash-cam video, within minutes of the shooting, Yanez was questioned by a responding officer and made statements clearly indicating that he had not seen the gun. Specifically, Yanez said “I don’t know where the gun was, he didn’t tell me where the fucking gun was, and then it was just getting hinky, he gave, he was just staring ahead, and then I was getting fucking nervous[.]”<sup>189</sup> Similarly, the following day, when interviewed by the Minnesota Bureau of Criminal Apprehension (BCA), Yanez never definitively stated that he saw a firearm.<sup>190</sup> He did nothing more than to suggest the perceived presence of a firearm;<sup>191</sup> yet when questioned in court nearly a year later, Yanez testified that he saw a firearm in Castile’s hand and thus was forced to shoot him.<sup>192</sup>

Not only was Yanez’s testimony unreliable due to direct contradictions, but his testimony that Castile was pulling out a gun was contradicted by numerous pieces of additional evidence, including Castile’s own last words.<sup>193</sup> The dash-cam video reveals that immediately before, during, and after the incident, Castile and Reynolds are describing the situation, particularly stating that Castile was not reaching for his firearm. Castile’s last audible words were “I wasn’t reaching . . . .”<sup>194</sup> Further, Castile’s calm voice before the

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186. See Susan Du, *Interviews Contradict Jeronimo Yanez Trial Testimony He Saw Philando Castile’s Gun*, CITY PAGES (June 20, 2017), [<https://perma.cc/J8UN-D5SK>]; see also Croft, *supra* note 173.

187. KARE Staff, *supra* note 185.

188. Mark Berman, *What the Police Officer Who Shot Philando Castile Said About the Shooting*, WASH. POST (June 21, 2017), [[https://www.washingtonpost.com/news/post-nation/wp/2017/06/21/what-the-police-officer-who-shot-philando-castile-said-about-the-shooting/?utm\\_term=.16455c5e48a0](https://www.washingtonpost.com/news/post-nation/wp/2017/06/21/what-the-police-officer-who-shot-philando-castile-said-about-the-shooting/?utm_term=.16455c5e48a0)].

189. Du, *supra* note 186.

190. *Id.*; see also Interview with Jeronimo Yanez, Officer, Minn. Dep’t of Pub. Safety, Bureau of Criminal Apprehension (July 7, 2016), [<https://perma.cc/S7W5-LQNT>].

191. Interview with Jeronimo Yanez, *supra* note 190.

192. When Yanez told Castile not to reach for his weapon, Yanez testified that he “was able to see [Castile’s] right hand, it was in a C-shape. And he continued to pull out the firearm.” KARE Staff, *supra* note 185.

193. See *supra* note 186.

194. Croft, *supra* note 173.



shooting indicates that he was not reaching for a firearm.<sup>195</sup> Reynolds's eyewitness testimony was that he was not reaching for the gun but trying to unbuckle his seatbelt to retrieve his license as requested.<sup>196</sup> Castile's firearm was still in his pocket when paramedics moved his body into the ambulance.<sup>197</sup> Officer Kauser, who accompanied Yanez and was Yanez's long-time friend, did not see Castile's weapon and was surprised<sup>198</sup> when Yanez began shooting.<sup>199</sup> This testimony is consistent with Kauser's physical reaction on the dash-cam video where Kauser did not appear to see a gun or react in any way that he perceived a dangerous situation and then was startled when Yanez began shooting.<sup>200</sup> Additionally, the prosecution's expert witness testified that there was "absolutely no reason to believe Mr. Castile was some kind of threat,"<sup>201</sup> and that Yanez's actions were "objectively unreasonable" that day.<sup>202</sup>

Ultimately, the determination of whether Defendant Yanez was reasonably afraid for his safety came down to character. The jury had to determine who they believed. Did they believe Defendant Yanez when he claimed Castile attempted to pull a gun on him? Or did they believe Castile, whose literal last words denied reaching for his gun (an assertion which was supported by other pieces of evidence)? Did the

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195. Sarah Horner, *Witness Testimony from the Jeronimo Yanez Trial: A Summary*, TWINCITIES PIONEER PRESS (July 5, 2017, 11:36 AM), [<https://perma.cc/CA3X-F59C>] ("Viewed through that lens, [an expert at trial] said a reasonable officer would not have viewed Castile as a threat, given that he politely disclosed to Yanez that he was carrying a firearm, was traveling with a woman and child in his car, and had no reason to believe he was being stopped for anything more than a broken taillight. 'There (was) absolutely no reason to believe Mr. Castile was some kind of threat,' [the expert] testified. '(Yanez was) stopping a motorist driving his family home from shopping. . . . (Castile was) cooperative. He hands over his insurance card. . . . He's calm.'").

196. *Id.*

197. Du, *supra* note 186.

198. When interviewed by the BCA, Kauser stated he was "absolutely" surprised when Yanez began shooting. *Complaint Details Moments Surrounding Castile's Fatal Shooting*, CBS MINN. (Nov. 16, 2016, 1:43 PM), [<https://perma.cc/6MTY-DFLL>].

199. Sarah Horner, *Castile's Girlfriend Testifies He Was Trying to Unbuckle Seat Belt When Shot*, TWINCITIES PIONEER PRESS (June 7, 2017, 2:50 PM), [<https://perma.cc/PY8S-9MTG>].

200. Croft, *supra* note 173 (hyperlink includes embedded link of dash-cam video).

201. Horner, *supra* note 195.

202. Chao Xiong, *Expert: Jeronimo Yanez's Actions in Killing Philando Castile Were 'Objectively Unreasonable,'* STARTRIBUNE (June 8, 2017, 9:28 AM), [<https://perma.cc/RN9Q-9VBM>].

jurors believe Yanez or did they believe Reynolds who during, immediately after, and at trial consistently maintained Castile was attempting to get his identification as instructed? In the end, it came down to whether the jury believed the black victim and black eyewitness or the non-black police officer.

From an evidentiary standpoint, Castile's and Reynolds's statements during and following the incident were more trustworthy than Yanez's trial testimony. Not only were their statements less self-serving, the evidentiary principles behind these types of present sense impressions and excited utterances deem them more reliable than Yanez's inconsistent statement at trial nearly one year after the shooting. Present sense impressions are statements "describing or explaining an event or condition, made while or immediately after the declarant perceived it."<sup>203</sup> The theory behind this hearsay exception<sup>204</sup> is that a "substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation."<sup>205</sup> In other words, the declarant would not have the opportunity to forget the event or fabricate the statement. When Castile and Reynolds made statements during and immediately after the shooting, there was no time to consider or contemplate a fabrication.

Excited utterances are statements "relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused."<sup>206</sup> "The rationale of the excited utterance exception is that the stress of nervous excitement or physical shock stills the reflective faculties, thus removing an impediment to truthfulness."<sup>207</sup> Clearly, Yanez's firing of seven bullets into the vehicle at close range—some which fatally wounded Castile and one which struck one to two inches from Reynolds, as well as one bullet which struck the back seat where Reynolds's four-year-old sat in her car seat<sup>208</sup>—constitutes a startling event. Both Castile and Reynolds were unmistakably under the stress of that event when they made their statements that Castile was never reaching for his gun.

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203. FED. R. EVID. 803(1).

204. The analysis here is not whether the statements qualified under a hearsay exception, but to apply evidence law principles to weigh the relative reliability of the conflicting statements.

205. FED. R. EVID. 803(1) advisory committee's note.

206. FED. R. EVID. 803(2).

207. *United States v. DeMarce*, 564 F.3d 989, 997 (8th Cir. 2009) (internal quotations omitted) (quoting *Reed v. Thalacker*, 198 F.3d 1058, 1061 (8th Cir. 1999)).

208. Associated Press, *The Latest: Expert: No Reason to Think Motorist a Threat*, WASH. TIMES (June 7, 2017), [<https://perma.cc/7EEE-SMKG>].

Further, under evidence law principles, Yanez's own excited utterances to a responding officer (who was sent to interview him) that he did not know where Castile's firearm was before firing his own gun are particularly reliable. These statements are captured on the dash-cam video where Yanez is unambiguously in an agitated state and can be heard yelling, crying, and using frequent offensive expletives.<sup>209</sup> From an evidentiary standpoint, these statements are more trustworthy than Yanez's inconsistent testimony nearly a year later that he clearly saw Castile's firearm.

In determining whether to believe the black victim and black witness or the non-black police officer, the jury chose the latter. There was no indication that Philando Castile was violent, aggressive, or likely to pull a gun on a police officer—except his blackness. There was little to make Diamond Reynolds's testimony not credible—except her blackness. Despite the fact that both Yanez's and Reynolds's recorded statements during and after the shooting indicate Yanez did not see a gun and that deadly force was unreasonable,<sup>210</sup> jurors believed the officer over Diamond Reynolds.<sup>211</sup> They believed Yanez even though his testimony was impeached by his own recounting of the events both at the scene and the next day. Despite this evidence in the record, the jurors found Yanez more credible than Reynolds and Castile.<sup>212</sup> This outcome left many baffled;<sup>213</sup> however, it makes sense when one considers the role race plays in determinations of people's character and credibility.

### *C. Categorizing Racial Character Evidence*

Racial character evidence can be grouped into at least three categories: "inherent reliance," "stereotype emphasis," and "expert or lay opinion." Like many classifications, there is overlap. However, it is useful to consider each type of racial character evidence individually

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209. Croft, *supra* note 173.

210. *See id.*; Xiong, *supra* note 202.

211. *See, e.g.*, Kent Erdahl, *Yanez Juror: 'State Didn't Prove He Was Dishonest'*, KARE 11 (June 20, 2017, 6:00 PM CDT), [<https://perma.cc/QS9J-E2L5>] ("[A juror] says the jury largely struggled with Diamond Reynolds's credibility in court . . . .").

212. *Id.* (quoting one juror who stated, "[t]he state didn't prove he was dishonest.").

213. Croft, *supra* note 173. This CNN article includes an illustrative example: "In a commentary Saturday, CNN legal analyst Joey Jackson asked, '[h]ow did a jury not see what the rest of the world did? And why does, and how could, this continue to happen? Will there ever be accountability?'" *Id.*

since different types may warrant different evidentiary objections or remediation. The *Peña-Rodriguez* case provides examples of racial character evidence against defendants and witnesses, and the criminal proceedings which followed the killings of Trayvon Martin, Michael Brown, and Philando Castile demonstrate how racial character evidence against victims is employed in self-defense and deadly force cases.

### 1. INHERENT RELIANCE

Juror H.C.’s statement “I think he did it because he’s Mexican”<sup>214</sup> is an example of inherent reliance on racial character evidence made explicit. The juror observed that the defendant was Latino (here, a Mexican-born legal permanent resident of the United States),<sup>215</sup> and on the basis of this racial observation, believed that the defendant was the type of person to commit sexual crimes against females. The inference from this racial character evidence is that because the defendant had a character propensity—due to his race—to commit sexual offenses against girls and women, it was therefore likely he committed such offenses against the female teenage victims on the evening in question.

Oftentimes, jurors will not overtly proclaim such inherent reliance on race as a proxy for a person’s character because it is politically incorrect or socially unacceptable in many circles. Thus, it is likely that most inherent reliance on racial character evidence goes unspoken. However, it might be revealed through widely-understood coded language, such as referring to “immigrants,” “thugs,” or “those people”<sup>216</sup> to reference certain racialized populations, designate them as “other,” and allude to moral and behavioral characteristics stereotypically associated with the group. “Illegal,” “illegal immigrants,” or simply “immigrants” are “racially discriminatory codes for Hispanics.”<sup>217</sup> It is widely understood that “thug” is a current

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214. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 862 (2017).

215. Lawrence Hurley, *U.S. Top Court Backs Hispanic Man Over Juror’s Racist Comments*, REUTERS (Mar. 6, 2017, 10:34 AM), [<https://perma.cc/Y4A4-RH6L>].

216. See generally IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* (2014) (providing extensive analysis into coded language used to reference people of color and embrace racial stereotypes).

217. Kevin R. Johnson, *The Keyes to the Nation’s Educational Future: The Latina/o Struggle for Educational Equity*, 90 DENV. U. L. REV. 1231, 1239 (2013) (quoting *Cent. Ala. Fair Hous. Ctr. v. Magee*, 835 F. Supp. 2d 1165, 1193 (M.D. Ala. 2011)); see generally Kevin R. Johnson, “*Aliens*” and the U.S. Immigration Laws: *The*

iteration of the “n-word.”<sup>218</sup> “Through . . . code words it is possible to play on racial stereotypes, appeal to racial fears, and heap blame on blacks, other people of color, and immigrants without naming them.”<sup>219</sup> This is equally true in politics and the jury box.

Similarly, racial “othering” and stereotyping can be achieved by and revealed through jurors simply referring to people of color as “they” and “those people.” For example, in the trial of a Hispanic man for a robbery, a juror used coded language to discuss racial character of Latinos stating, “I guess we’re profiling, but *they* cause all the trouble.”<sup>220</sup> Another example is the manner in which a white, female juror in the trial of George Zimmerman repeatedly referred to the black victim Trayvon Martin and the prosecution’s black witness Rachel Jeantel as “they,” but defendant Zimmerman as “George.”<sup>221</sup> She spoke about “the type of life that *they* [live],” and “how *they’re* living, in the environment that *they’re* living in.”<sup>222</sup> At trial, the defense had introduced evidence of robberies in Zimmerman’s apartment complex that had been allegedly perpetrated by black males.<sup>223</sup> The same juror commented that “George Zimmerman is a man whose heart was in the right place, but just got displaced by the vandalism in the neighborhood and wanting to catch *these people* so badly he went above and beyond what he should have done.”<sup>224</sup> Again, she apparently used “these people” to reference blacks, specifically suspected black burglars.

Despite occasional disclosures of racially coded language, inherent reliance on racial character evidence is particularly insidious because it is both difficult to detect and widespread. Since the racial character evidence is “submitted” to the jury passively or disseminated by jurors

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*Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1997).

218. Calvin John Smiley & David Fakunle, *From “Brute” to “Thug:” The Demonization and Criminalization of Unarmed Black Male Victims in America*, 26 J. HUM. BEHAV. SOC. ENV. 350, 350–51 (2016).

219. STEPHEN STEINBERG, TURNING BACK: THE RETREAT FROM RACIAL JUSTICE IN AMERICAN THOUGHT AND POLICY 214 (2001).

220. *United States v. Villar*, 586 F.3d 76, 78 (1st Cir. 2009) (emphasis added).

221. Carodine, *supra* note 2, at 688–89; Dan Zak, *Who is Juror B37? Our Sole Window—for Now—into the Zimmerman Verdict*, WASH. POST (Jul. 16, 2013), [https://www.washingtonpost.com/lifestyle/style/who-is-juror-b37-our-sole-window--for-now--into-the-zimmerman-verdict/2013/07/16/7513eece-ee23-11e2-a1f9-ea873b7e0424\\_story.html?utm\\_term=.985025c12a58](https://www.washingtonpost.com/lifestyle/style/who-is-juror-b37-our-sole-window--for-now--into-the-zimmerman-verdict/2013/07/16/7513eece-ee23-11e2-a1f9-ea873b7e0424_story.html?utm_term=.985025c12a58).

222. *Id.*

223. *Id.*; Thompson, *supra* note 12, at 342.

224. Mark Mooney, *George Zimmerman Juror Says His ‘Heart Was in the Right Place,’* ABC NEWS (July 15, 2013), [<https://perma.cc/W255-UAKA>] (emphasis added).

behind the closed doors of the deliberation room, opposing counsel cannot object. Furthermore, studies have uncovered that most Americans harbor racial bias against people of color.<sup>225</sup> Thus it is likely that this racial bias is frequently relied upon when a defendant, victim, or witness is a person of color.

Inherent reliance on racial character evidence is simply the way implicit racial bias takes on evidentiary value. Implicit racial bias often causes jurors to determine that a defendant or victim is prone to violence or criminality simply by perceiving his or her race.<sup>226</sup> Similarly, the credibility of witnesses and parties is often based on observations of race. For instance, in *Peña-Rodriguez*, Juror H.C. stated he “did not find petitioner’s alibi witness was credible because, among other things, the witness was ‘an illegal.’”<sup>227</sup> The alibi witness was a legal permanent resident of the United States,<sup>228</sup> but this juror relied on a pervasive racial stereotype that Latinos, especially those of Mexican origin or descent, are not lawfully present<sup>229</sup> and therefore not honest or trustworthy. “[J]ury trials are all about character,” and a central function of juries is to make character judgments.<sup>230</sup> Juries use

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225. See, e.g., CHERYL STAATS, KIRWAN INST., STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2014 19, 72 (2014), [<https://perma.cc/D597-NLVB>] (“Extensive research has uncovered a pro-White/anti-Black bias in most Americans, regardless of their own racial group. Moreover, researchers have even documented this bias in children, including those as young as six years old.”); see generally MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE (2016).

226. See Thompson, *supra* note 12, at 329–30. According to Thompson:

Data collected from the Race IAT [Implicit Association Test] indicate that approximately 88 percent of White Americans harbor some level of implicit bias against African-Americans. Interestingly, the data also indicate that 48 percent of African-Americans show a bias in favor of White Americans. While these statistics are startling, they should not be read to suggest that 88 percent of Whites and 48 percent of Blacks hold racist attitudes toward African-Americans; however, several scientific studies have found that IAT results are at least a moderate predictor of behavior. Thus, in some instances, individuals who hold implicit biases against African-Americans may act upon those biases when engaging in decision-making . . . .

*Id.*

227. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 862 (2017).

228. *Id.*

229. The stereotype that Latinos are unlawfully present in the United States is both common and unfounded. See Angela M. Banks, *The Curious Relationship Between “Self-Deportation” Policies and Naturalization Rates*, 16 LEWIS & CLARK L. REV. 1149, 1192 (2012).

230. Josephine Ross, “*He Looks Guilty*”: *Reforming Good Character Evidence to Undercut the Presumption of Guilt*, 65 U. PITT. L. REV. 227, 229 (2004).

shortcuts to determine the credibility of witnesses, and these shortcuts include factors based on racial biases.<sup>231</sup>

## 2. RACIAL STEREOTYPE EMPHASIS

Racial character evidence can also be introduced more directly at grand jury or trial by attorneys who seek to persuade the jury that a racial minority's character is consistent with racial stereotypes. This sort of character evidence is often utilized in cases where a defendant asserts self-defense or warranted use of force against a victim of color. Instead of restricting themselves to the facts of what occurred during the incident in question which allegedly led the defendant to reasonably fear for his or her safety or the safety of others, prosecutors (who begrudgingly pursue criminal charges) and defense counsel subtly try to show that the victim was stereotypically black or brown.

### *a. Stereotypical Blackness*

A victim (or witness's) blackness or brownness is emphasized by presenting "evidence" of the victim's dress, appearance, interests, and activities that are perceived as consistent with racial stereotypes and in turn play on the jurors' implicit biases.<sup>232</sup> It would be unheard of for a young white female to be perceived as violent, aggressive, or otherwise threatening to law enforcement or the "neighborhood watch" for wearing a hoodie, listening to hip-hop music, playing basketball, experimenting with marijuana, or using popular slang on social media. The same is not true for a victim of color. A black victim's mere interest or involvement in activities stereotypically associated with black people or culture can typify the victim as stereotypically black and possessing all the racialized characteristics associated with blackness, including being dangerous and threatening.<sup>233</sup>

For instance, when George Zimmerman was prosecuted for killing black seventeen-year-old Trayvon Martin, defense counsel attempted to introduce photos of Trayvon wearing "urban"<sup>234</sup> style clothing such as

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231. *Id.* at 231.

232. *See* Thompson, *supra* note 12, at 322.

233. *See* Lacy, *supra* note 116, at 564.

234. It should be noted that "urban" attire is often a racialized code word referring to clothing stereotypically associated with African Americans although such clothing is commonly worn by people of all races. *See generally*, Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365, 413–14 (2006).

baggy pants and hooded sweatshirts, smoking what was assumed to be marijuana, wearing a “grill” of removable gold teeth, and “flipping off” the camera bare-chested or in a white tank top displaying tattoos.<sup>235</sup> They also acquired photos from his social media account of a marijuana plant, and of a gun in the hand of an unidentified black person.<sup>236</sup> The defense also sought to introduce evidence that Trayvon had been suspended from school for marijuana paraphernalia, received bad grades, and got into fights at school, as well as text messages where he referenced guns, fights, marijuana, and used certain slang lingo.<sup>237</sup> These photos, school records, and texts were primarily relevant to showing that Trayvon was a stereotypical black youth, and thus should be presumed to have been a threat to Zimmerman. Although much of this evidence was excluded pretrial in this case,<sup>238</sup> it still serves as examples of the type of racial character evidence that might be introduced at trials without appropriate objection.

Racial character evidence can also be raised at trial by the manner in which counsel questions a witness and signals to the jury that the witness is a stereotypical racial minority, and hence not credible. This occurred in the Zimmerman trial when the prosecution’s key witness, Rachel Jeantel—a black friend who had been speaking to Trayvon while Zimmerman followed him—was cross-examined.<sup>239</sup> As scholars have observed, Zimmerman’s counsel employed cross-examination tactics to show that she was “less educated and less articulate,” and accordingly “less believable than similarly situated white witnesses.”<sup>240</sup> These tactics included a harsh tone, aggressive questioning techniques, requiring her to read out-loud when she had English literacy

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235. See, e.g., Jonathon Capehart, *Pictures Put Trayvon Martin on Trial*, WASH. POST (May 28, 2013), [https://www.washingtonpost.com/blogs/post-partisan/wp/2013/05/28/pictures-put-trayvon-martin-on-trial/?utm\\_term=.34f099228855](https://www.washingtonpost.com/blogs/post-partisan/wp/2013/05/28/pictures-put-trayvon-martin-on-trial/?utm_term=.34f099228855); Michael Pearson & David Mattingly, *Gun, Drug Texts Feature in New Trayvon Martin Shooting Evidence*, CNN (May 26, 2013, 1:21 PM), [<https://perma.cc/NE44-7RU9>].

236. Pearson & Mattingly, *supra* note 235.

237. *Id.*; Casey Glynn, *George Zimmerman Lawyers Seek Trayvon Martin’s School Records, Social Media Accounts*, CBS NEWS (Oct. 19, 2012, 11:28 AM), [<https://web.archive.org/web/20180402025248/https://www.cbsnews.com/news/george-zimmerman-lawyers-seek-trayvon-martins-school-records-social-media-accounts/>].

238. Josh Levs, Graham Winch & Victim Blackwell, *Marijuana, Fights, Guns: Zimmerman Loses Key Pretrial Battles*, CNN (May 29, 2013, 6:40 AM), [<https://perma.cc/EG2K-W6U9>].

239. Tina Susman, *A Tense Cross-Examination in George Zimmerman Trial*, L.A. TIMES (June 27, 2013), [<https://perma.cc/KSV6-L2P5>].

240. Carodine, *supra* note 2, at 687.



difficulties, and repeating back her testimony as if he was providing verbal captioning to highlight the differences in her speech in comparison to his as a white, middle-aged, highly-educated male.<sup>241</sup> The attorney’s tone and questions implied not merely that Jeantel was mistaken or biased, but that she was “unintelligent and thus not credible.”<sup>242</sup> Jeantel is a multilingual immigrant whose first language is not English.<sup>243</sup> Instead of casting her in the light of a multilingual, English language learner, she was portrayed as “ignorant, ‘stupid,’ and a liar,”<sup>244</sup> playing into a racist stereotype of black girls.<sup>245</sup> “The message that Zimmerman’s lawyer sent the jury was that she looked and sounded different and so must be lying because she was not ‘one of us.’”<sup>246</sup>

The racializing effect of Zimmerman’s attorney’s cross-examination of Jeantel is not speculative. “Jeantel was almost immediately attacked on social media for her appearance, speech, and perceived level of intelligence,”<sup>247</sup> and criticized as “stereotypically black” by whites and blacks alike.<sup>248</sup> “Social media was set ablaze with criticism of Jeantel for being stereotypically Black—uneducated, hostile, inarticulate, angry toward Whites, lazy, and a thug—and it is possible that the jurors made similar assessments about Martin’s character.”<sup>249</sup> In a post-trial interview with a Zimmerman juror, the juror reported that she felt Jeantel was not credible due to her lack of education and communication skills and condescendingly stated she felt pity for Jeantel and perceived Jeantel to be embarrassed by her educational and communication shortcomings.<sup>250</sup> This reveals how

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241. *See id.* at 688–89.

242. *Id.* at 688.

243. *See* Grace Sullivan, *In Your Own Words: Investigating Voice, Intertextuality, and Credibility of Rachel Jeantel in the George Zimmerman Trial*, 1 *PROC. LINGUISTIC SOC’Y AM.* 13:6 (2016).

244. Carodine, *supra* note 2, at 689.

245. MONIQUE W. MORRIS, *PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS* 43 (2016) (discussing widely accepted stereotypes of black females “as less intelligent, hypersexual, loud, sassy, ‘ghetto,’ or domestic”).

246. Carodine, *supra* note 2, at 688 (quoting Kristin A. Randall, *The George Zimmerman Trial: Witness Rachel Jeantel*, *MENTAL HEALTH & CRIM. JUST.* (July 1, 2013), [<https://perma.cc/WRJ5-2TH8>]).

247. Thompson, *supra* note 12, at 337.

248. *Id.* at 337–38. *See also* Jelani Cobb, *Rachel Jeantel on Trial*, *NEW YORKER* (June 27, 2013), <http://www.newyorker.com/news/news-desk/rachel-jeantel-on-trial>.

249. Thompson, *supra* note 12, at 338.

250. *Id.* at 340–41.

“Jeantel’s failure to present herself in accordance with White-specific [not to mention native English-speaker] norms very likely influenced [the jurors’] assessment of the characters of both Jeantel and Martin.”<sup>251</sup>

*b. The “Black Brute” or “Thug” Stereotype*

In self-defense and deadly use of force cases, one of the most harmful uses of racial character evidence is emphasis of the centuries-old stereotype of African American victims as black “brutes” or “thugs.” Stereotypes of blacks as larger, stronger, and more dangerous than other races serve to justify their killing as reasonable. The racist black “brute,” “beast,” “fiend,” or “demon” stereotype has a long history in the United States.<sup>252</sup> This stereotype has been proliferated through literature, journalism, and the law from the time of slavery to the present.<sup>253</sup> “The brute caricature portrays Black men as innately savage, animalistic, destructive, and criminal—deserving punishment, maybe death.”<sup>254</sup> The purpose of this characterization is “to invoke fear on the part of the White audience, and to justify repressive measures towards Black Americans.”<sup>255</sup> This stereotype has resulted in a persistent fear of black criminality which has manifested as white flight and the characterization of black youth as “super-predators.”<sup>256</sup> Although facially race-neutral, the term “super-predator” has been identified as racist,<sup>257</sup> but new terms such as “thug” have emerged in its place. “Thug” is modern terminology for “black brute.”<sup>258</sup>

“The ‘black brute’ stereotype may be one of the most enduring in this nation’s history and persists even today.”<sup>259</sup> However, most people,

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251. *Id.* at 339.

252. *See generally* Marion L. Dawson, *The South and the Negro*, 172 N. AM. REV. 279 (1901).

253. Ryan P. Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis*, 11 MICH. J. RACE & L. 325, 345 (2006).

254. *Id.*

255. *Id.*

256. *Id.* at 346.

257. Michael E. Jennings, *Trayvon Martin and the Myth of Superpredator: A Note on African American Males as Problems in American Society*, in TRAYVON MARTIN, RACE, AND AMERICAN JUSTICE 191, 193 (Kenneth J. Focusing-Varnier et al. eds., 2014) (“The animal imagery summoned by the superpredator label, however, had strong racial overtones that linked African American males to a predatory culture lacking in moral character and committed to violent consumption.” (citing MARC MAURER, RACE TO INCARCERATE (2006))).

258. *See* Smiley & Fakunle, *supra* note 218, at 350–51, 354.

259. Alford, *supra* note 253, at 346 (“[N]ot only is the stereotype of the Black brute current within American society, but that in all its iterations, including those that

including jurors, are unaware of their reliance on this stereotype in assessing black victims. Whites perceive black men as bigger, taller, heavier, stronger, and more dangerous than similarly-sized white men.<sup>260</sup> In fact, whites are more likely to go as far as to attribute superhuman abilities, including strength and endurance, to blacks than other racial groups.<sup>261</sup>

Implicit bias against blacks is accompanied by implicit bias in favor of whites. The pervasiveness of the black brute, black-as-dangerous-criminal and preference for whites as innocent and virtuous has been proven through many studies. For instance, Implicit Association Tests (IATs) show that nearly seventy-five percent of test takers demonstrate implicit bias in favor of whites and against blacks.<sup>262</sup> Further, test participants are more likely to associate blackness with guilt in comparison to whiteness to the point “that the [Guilty/Not Guilty] IAT scores predicted participants’ evidence judgments.”<sup>263</sup> More specifically, numerous studies have found that “individuals are quicker to identify weapons and slower to recognize harmless objects, like tools, in the hands of Black persons than in the hands of White persons.”<sup>264</sup>

Implicit racial bias<sup>265</sup> both causes police officers to kill black people and jurors to later fail to indict or convict the police officers.

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serve to ‘racially construct’ Latino and other minority youth, it has been proven to be one of the most enduring and powerful stereotypes in the nation’s history.”).

260. A 2017 study published in the American Psychological Association’s *Journal of Personality and Social Psychology* showed that white people perceived black men as more muscular, heavier, taller, stronger and more dangerous than white men the same size and weight. See Ben Guarino, *People See Black Men as Larger and Stronger than White Men – Even When They’re Not, Study Says*, WASH. POST (Mar. 14, 2017), [https://www.washingtonpost.com/news/morning-mix/wp/2017/03/14/psychologists-we-see-black-men-as-larger-and-stronger-than-white-men-even-when-theyre-not/?utm\\_term=.a5f9bd8de0dd](https://www.washingtonpost.com/news/morning-mix/wp/2017/03/14/psychologists-we-see-black-men-as-larger-and-stronger-than-white-men-even-when-theyre-not/?utm_term=.a5f9bd8de0dd).

261. J.C. Sevcik, *Study Shows White People Think Black People Are Superhuman, Magical*, UPI (Nov. 14, 2014, 8:27 PM), [<https://perma.cc/KL4E-ASSZ>] (discussing Adam Waytz, Kelly Marie Hoffman & Sophie Trawalter, *A Superhumanization Bias in Whites’ Perceptions of Blacks*, 6 SOC. PSYCH. & PERSONALITY SCI. 352 (2014)).

262. Lee, *supra* note 126, at 861.

263. JUSTIN D. LEVINSON & ROGER J. SMITH, *IMPLICIT RACIAL BIAS ACROSS THE LAW* 22–23 (2012); Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty By Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 206 (2010).

264. Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not-Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1582 (2013).

265. Implicit bias is “unintentional bias arising from ‘attitudes or stereotypes that affect our understanding, decision-making, and behavior, without our even

Since blackness itself signifies criminality and danger and whiteness represents virtue, as Blanche Cook has observed: “In the grip of implicit bias, the black body itself becomes evidence of the crime and danger, and the white body becomes evidence of innocence and righteousness.”<sup>266</sup> Race itself is evidence that the victim of color was threatening and that the officer was justified in responding with deadly force.

Police officers’ defense counsel and prosecutors who only reluctantly pursue charges against police introduce racial character evidence by relying on the black brute stereotype and coded appeals to rouse racial fear and discrimination by jurors who are disproportionately white. An example of this is the grand jury proceedings against white officer Darren Wilson who shot to death unarmed black eighteen-year-old Michael Brown in Ferguson, Missouri.

At the grand jury proceedings, the prosecution acted more like “defense counsel,”<sup>267</sup> and allowed Wilson to offer a fantastical story portraying Brown as a mystical black superhuman brute and demon without being subject to cross-examination.<sup>268</sup> Specifically, Wilson testified that on August 9, 2014, while patrolling in his marked police SUV he noticed two young men, Brown and his friend Dorian Johnson, walking in the middle of the street.<sup>269</sup> Wilson stopped his vehicle a couple of feet in front of them and asked why they did not use the sidewalk.<sup>270</sup> Johnson said they were almost to their destination, and Brown responded with “vulgar language.”<sup>271</sup>

Wilson then noticed a box of cigarillos in Brown’s hand and that Johnson was wearing a black shirt consistent with a recent report of a

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realizing it.” *Id.* at 1559 n.23 (citing Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012)).

266. Cook, *supra* note 12, at 604, 611–12.

267. *Id.* at 570.

268. Damien Cave, *Officer Darren Wilson’s Grand Jury Testimony in Ferguson, Mo., Shooting*, N.Y. TIMES (Nov. 25, 2014), <https://www.nytimes.com/interactive/2014/11/25/us/darren-wilson-testimony-ferguson-shooting.html>.

269. Krishnadev Calamur, *Ferguson Documents: Officer Darren Wilson’s Testimony*, NPR (Nov. 25, 2014, 6:52 AM), [<https://web.archive.org/web/20180402030109/https://www.npr.org/sections/thetwo-way/2014/11/25/366519644/ferguson-docs-officer-darren-wilsons-testimony>].

270. Transcript of Grand Jury Volume V at 208, *Missouri v. Wilson* (Sept. 16, 2014), <https://assets.documentcloud.org/documents/1370569/grand-jury-volume-5.pdf>.

271. *Id.*

theft of a box of cigarillos from a convenience store.<sup>272</sup> Wilson testified that he began to open his door and asked Brown to “come here for a minute.”<sup>273</sup> Brown allegedly responded by swearing and slamming the door shut.<sup>274</sup> According to Wilson, he then tried to open the door again while Brown stared at him as if “to overpower” him with an “intense face,” eventually slamming the door and physically attacking Wilson through the open SUV window with full swing punches while still holding the box of cigarillos.<sup>275</sup> According to Wilson, Brown then handed the cigarillos to Johnson and continued to punch him through the vehicle’s window.<sup>276</sup> Wilson explained that “when I grabbed him, the only way I can describe it is I felt like a five-year-old holding onto Hulk Hogan.”<sup>277</sup> Wilson reported that he then drew his firearm threatening to shoot Brown if he did not stop.<sup>278</sup> Wilson claims that Brown responded by saying “you are too much of a pussy to shoot me,” then grabbed at Wilson’s gun, and Wilson fired the gun.<sup>279</sup> Wilson testified Brown then looked up at him and “had the most intense aggressive face. The only way I can describe it, it looks like a demon, that’s how angry he looked. He comes back towards me again with his hands up.”<sup>280</sup>

Wilson said he then fired a second time, and Brown struck him again through the window, and then ran off.<sup>281</sup> Wilson testified he pursued Brown and ordered him to get on the ground.<sup>282</sup> Brown supposedly did not comply but instead he allegedly:

[T]urn[ed], and when he looked at me, he made like a grunting, like aggravated sound and, he starts, he turns and he’s coming back towards me . . . he kind of does like a stutter step to start running. . . his left hand goes in a fist and

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272. *Id.* at 202, 209.

273. *Id.* at 209.

274. *Id.*

275. *Id.* at 209–11, 216.

276. *Id.* at 211–13.

277. *Id.* at 212.

278. *Id.* at 214.

279. *Id.* at 214, 224.

280. *Id.* at 225.

281. *Id.* at 226.

282. *Id.* at 227.

goes to his side, his right one goes under his shirt in his waistband and he starts running at me.<sup>283</sup>

Wilson testified he then fired a series of shots hitting Brown.<sup>284</sup> Wilson went on to say that Brown's body jerked and, despite being shot, that he was "still coming at me, he hadn't slowed down."<sup>285</sup> Wilson then fired another round of shots, which struck Brown again.<sup>286</sup> Officer Wilson testified that:

[A]t this point it looked like he was almost bulking up to run through the shots, like it was making him mad that I'm shooting at him. And the face that he had was looking straight through me, like I wasn't even there, I wasn't even anything in his way. Well he kept coming at me . . . .<sup>287</sup>

Wilson shot at Brown twelve times leaving only one bullet remaining in his service revolver.<sup>288</sup>

In his grand jury testimony, Wilson conveyed a story of a superhuman assailant who, despite being unarmed, repeatedly attacked a police officer with no provocation except having been asked to walk on the sidewalk and a guilty conscience of, at most, having reaching over a counter and taken a box of cigarillos.<sup>289</sup> When the officer brandished his weapon and threatened to shoot, Brown allegedly responded with vulgar insults. Wilson described Brown's expression as demonic, stating that it was "the most intense aggressive face."<sup>290</sup> According to Wilson, Brown could resist bullets, which did not slow him down and only made him angrier, requiring a second round of shots to stop him. Like a possessed beast, Brown allegedly grunted, made aggravated sounds, bulked up, and charged forward undaunted by bullet wounds. Wilson's description of Brown's expressions, strength,

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283. *Id.*

284. *Id.* at 228.

285. *Id.*

286. *Id.*

287. *Id.*

288. U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 15–16 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj\\_report\\_on\\_shooting\\_of\\_michael\\_brown\\_1.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf) [<https://perma.cc/4RVP-YC4K>].

289. *See* Transcript of Grand Jury Volume V, *supra* note 270, at 153–57.

290. *Id.* at 225.

and actions “feed into the stereotypical portrayal of the Black man as a brutish, animalistic character.”<sup>291</sup> They served to provoke racial fear in the grand jurors so that they would find Wilson’s firing of a dozen rounds into an unarmed teenager reasonable.

Instances of racial character evidence that relies on the black brute stereotype abound. Even younger black children are not immune to this dangerous stereotype. For example, in the grand jury proceedings concerning the police shooting of Tamir Rice, the twelve-year-old black child shot to death in Cleveland after someone had reported him playing with a gun that was later confirmed to be a toy, was described by prosecutors (who were tasked with bringing the white officers to justice for killing Tamir) as big, scary, and adult-like.<sup>292</sup> A 2016 study found that faces of black children as young as five years old triggered thoughts of guns and violence.<sup>293</sup>

Racialized code words and characterizations are racial character evidence employed to show that the victim was a black brute or demon that would terrify a reasonable police officer and deserved to be killed. “When such ‘code’ words trigger the implicit racial bias in jurors, it can become automatic to view the Black male as an animalistic brute with such great strength that deadly force was required in order to preserve the life of the officer.”<sup>294</sup> Emphasis on racialized stereotypes, albeit veiled in code words, is a type of racial character evidence that can be relied upon by a jury in deciding not to indict or to acquit in police killing cases.

### 3. EXPERT OR LAY OPINION

Attorneys are not the only ones who submit racial character evidence to the jury; jurors can also take on that endeavor in the deliberation room. In *Peña-Rodriguez*, Juror H.C. actually presented “expert” opinion and lay opinion evidence about the racial character of “Mexicans” to his fellow jurors. In his lay opinion, he gave evidence

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291. Kenneth Lawson, *Police Shootings of Black Men and Implicit Racial Bias: Can’t We All Just Get Along*, 37 U. HAW. L. REV. 339, 371 (2015).

292. Daniel Marans, *How a Prosecutor Managed to Blame a 12-Year-Old for Getting Killed by a Cop*, HUFFPOST (Dec. 29, 2015), [<https://perma.cc/YU5X-PTUU>].

293. Andrew R. Todd, Kelsey C. Thiem & Rebecca Neel, *Does Seeing Faces of Young Black Boys Facilitate the Identification of Threatening Stimuli?*, 27 PSYCHOL. SCI. 384, 391 (2016).

294. Lawson, *supra* note 291, at 371.

that “Mexican men take whatever they want.”<sup>295</sup> Specific to the criminal charges in the case, he stated that “Mexican men [are] physically controlling of women because they have a sense of entitlement and think they can ‘do whatever they want’ with women.”<sup>296</sup> He also gave expert opinion testimony in deliberations. Based upon his former law enforcement background, he said that he “believed that the defendant was guilty because in his experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women.”<sup>297</sup> He explained that “where he used to patrol, nine times out of ten Mexican men were guilty of being aggressive toward women and young girls.”<sup>298</sup>

Thus, in *Peña-Rodriguez*, a juror served as a pseudo lay and expert witness as to the racial character of men of Mexican origin. In his opinion, men of Mexican ancestry have a character propensity to be aggressive toward women and girls; possess a bravado and sense of entitlement; and have a tendency to take whatever they want from and do whatever they want to females. He further concluded that since the defendant was Mexican, he must have acted in accordance with a Mexican character propensity for sexual offenses against women and girls during the event in question, and accordingly was guilty of unlawful sexual contact and sexual harassment in the present case. This is a prime example of how character evidence can be submitted to the jury in the form of expert or lay opinion testimony.

Jurors are not the only individuals who might serve as expert or lay opinion racial character witnesses. Sometimes actual witnesses—whether expert or lay—in the trial will testify as to racial character evidence. An example is Dr. Walter Quijano, a psychologist in Texas who, for twenty years, “used defendants’ race as a factor in determining whether [blacks and Hispanics] are likely to commit crimes in the future.”<sup>299</sup> He based this conclusion on prison statistics that racial minorities are disproportionately incarcerated in comparison to the general population.<sup>300</sup> Dr. Quijano testified at numerous trials that black

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295. *Peña-Rodriguez v. Colorado*, 350 P.3d 287, 289 (Colo. 2015), *rev’d*, 137 S. Ct. 855 (2017).

296. *Id.*

297. *Id.*

298. *Id.*

299. Raju Chebium, *Texas Psychologist Speaks Out About His Testimony on Race and Crime*, CNN (June 9, 2000, 6:56 PM), [<https://perma.cc/5DYC-7U59>].

300. *Id.*



and brown people are more prone to violence than people of other races.<sup>301</sup>

In one such case, Duane Buck had been convicted of capital murder and faced the death penalty.<sup>302</sup> State court juries in Texas can only impose a death sentence if they unanimously agree beyond a reasonable doubt that a defendant is likely to commit future violence that constitutes a threat to society.<sup>303</sup> Buck's attorney called Dr. Quijano, who had been appointed by the trial judge to conduct a psychological evaluation of the defendant, to testify as an expert witness about the likelihood of Buck's future violence.<sup>304</sup> Although Dr. Quijano ultimately testified Buck was not likely to be dangerous in the future, he testified "that one of the factors pertinent in assessing a person's propensity for violence was his race, and that Buck was statistically more likely to act violently because he is black."<sup>305</sup> Buck was sentenced to death by the jury.<sup>306</sup> In a prior case, Dr. Quijano, had testified that a defendant's Hispanic heritage "was a factor weighing in favor of future dangerousness."<sup>307</sup> These are unambiguous examples of expert witness racial character evidence. Race itself is used as proof of a person's propensity to be dangerous or violent. Such expert witness testimony about racial character evidence is impermissible and oftentimes unconstitutional.

The Supreme Court of the United States recently issued an opinion in *Buck v. Davis*.<sup>308</sup> Writing for the Court, Chief Justice Roberts rejected this expert opinion testimony of racial character evidence.<sup>309</sup> The Court observed that, according to Dr. Quijano, Buck's "immutable characteristic [of race] carried with it an 'increased probability' of future violence."<sup>310</sup> The Court found that "[i]t would be patently

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301. *Buck v. Davis*, 137 S. Ct. 759, 770 (2017). It should be noted that Dr. Quijano was not simply articulating a personal perspective, rather he was adopting the narrative of black dangerousness which has long been a popular philosophy used to justify black captivity. See Brief for the Nat'l Black Law Students Ass'n as Amicus Curiae Supporting Petitioner at 2–4, *Buck v. Davis*, 137 S. Ct. 759 (2017) (No. 15-8049), 2016 WL 4073688.

302. *Buck*, 137 S. Ct. at 767.

303. *Id.* at 768.

304. *Id.*

305. *Id.* at 767.

306. *Id.*

307. *Id.* at 769; *Saldano v. State*, 70 S.W.3d 873, 884–85 (Tex. Crim. App. 2002).

308. 137 S. Ct. 759 (2017).

309. *Id.* at 777.

310. *Id.* at 776.

unconstitutional for a state to argue that a defendant is liable to be a future danger because of his race.”<sup>311</sup> This reasoning should apply to bar the use of race as character evidence of propensity for violence against victims in police killing cases.

It should be noted that similar to jurors and experts, lay witnesses could also potentially provide opinion evidence of racial character. This could materialize, for instance, as a generalization that people from certain black or Latino neighborhoods are known for a culture of violence, drug distribution, or gang membership. It could also manifest as generalizations about what particular American Indian tribe members, groups of Asian Americans, or immigrants act like or what activities they engage in.

### III. RACIAL CHARACTER EVIDENCE: A CIVIL RIGHTS PROBLEM

Juror reliance on racial character evidence in police killing cases is both a racial justice and an evidence law problem requiring constitutional and evidence law analysis and responses. Existing case law addressing jurors’ consideration of racial character evidence—namely, *Peña-Rodriguez*—fails to address the scenario in which racial character evidence is considered against a victim of color to support a no true bill<sup>312</sup> or acquittal. A persuasive argument can be made that discriminatory acquittals based on racial character evidence violate victims’ constitutional right of equal protection. However, because of the fact that the competing constitutional prohibition against double jeopardy, coupled with juror immunity, forecloses post-acquittal remedies, pre-verdict evidence solutions are particularly needed.

#### *A. Constitutionality of Racial Character Evidence Against Victims*

##### 1. THE PROMISE AND LIMITATIONS OF *PEÑA-RODRIGUEZ V. COLORADO*

Writing for the Court in *Peña-Rodriguez*, Justice Kennedy discussed two types of historical juror racial bias: discriminatory convictions of blacks and discriminatory acquittals of whites.<sup>313</sup> The Court denounced the pervasive practice where “[a]ll-white juries

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311. *Id.* at 775.

312. A no true bill is the grand jury’s finding that there is no probable cause to support formal criminal charges against a potential defendant. Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 266 (1995).

313. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017).

punished black defendants particularly harshly, while simultaneously refusing to punish violence by whites, including Ku Klux Klan members, against blacks . . . .”<sup>314</sup> The Court pointed to a poignant example from post-Civil War Texas: Between 1865 and 1866, five hundred prosecutions of white defendants who had been charged with killing blacks were presented to all-white juries, and every single white defendant was acquitted.<sup>315</sup> In response to this dramatic example of discriminatory acquittals, the Court concluded that “[t]he stark and unapologetic nature of race-motivated outcomes challenged the American belief that ‘the jury was a bulwark of liberty.’”<sup>316</sup>

Although the *Peña-Rodriguez* Court denounced the racial bias against black victims that privileges non-black defendants and results in discriminatory acquittals, the Court’s remedy does not address this type of juror bias. The Court found that a juror’s racial bias against the defendant and his alibi witness deprived the defendant of an impartial jury as required by the Sixth Amendment.<sup>317</sup> Colorado Rule of Evidence 606(b), which is very similar to Federal Rule of Evidence 606(b), prevents jurors from impeaching their verdict.<sup>318</sup> Federal Rule of Evidence 606(b) and its state equivalents, known as juror no-impeachment rules, provide that jurors:

[M]ay not testify about any statement made or incident that occurred during the jury’s deliberations; the effect of anything on that juror’s or another juror’s vote; or any juror’s mental processes concerning the verdict or indictment. The court may not receive a juror’s affidavit or evidence of a juror’s statement on these matters.<sup>319</sup>

A minority of jurisdictions have allowed a racial bias exception to Rule 606(b), but most have not.<sup>320</sup> *Peña-Rodriguez* changed this. The Court held that:

[W]here a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a

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314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* at 869.

318. *Id.* at 877–78.

319. FED. R. EVID. 606(b).

320. *Peña-Rodriguez*, 137 S. Ct. at 865.

criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.<sup>321</sup>

Thus, evidence of juror testimony and affidavits at the trial level asserting that Juror H.C. had stated that defendant Peña-Rodriguez was guilty of sexual offenses because he was Mexican and that his Latino alibi witness (who was a legal permanent resident) was not credible because he was an "illegal," among other anti-Latino comments, were admissible evidence.<sup>322</sup> This evidence is admissible despite Rule 606(b)'s bar because the statements were "egregious" and "unmistakable in their reliance on racial bias," thereby violating the Constitution.<sup>323</sup> As a result, jurors can now testify about blatant racial bias of their fellow jurors during deliberations after a verdict of guilty has been entered.

However, jurors are still barred from testifying about such racial bias when the defendant is acquitted for two reasons: (1) *Peña-Rodriguez* addresses only convictions, and (2) there is a lack of feasible post-verdict remedies. The racial bias exception to juror no-impeachment rules, articulated in *Peña-Rodriguez*, is based upon the Sixth Amendment impartiality clause.<sup>324</sup> The Sixth Amendment guarantees criminal defendants ("the accused") the right to an impartial jury<sup>325</sup> but does not protect the rights of victims. Thus, *Peña-Rodriguez* does not directly apply to cases where juries discriminatorily acquit police officers for the killing of people of color.

However, *Peña-Rodriguez* does provide precedential support for juridical recognition that juror racial bias against victims violates equal protection and that no-impeachment evidence rules should thus be made to yield to the equal protection components of the Fifth and Fourteenth Amendments. The *Peña-Rodriguez* Court discussed how racial discrimination by jurors, which resulted in white defendants being acquitted for the killing of blacks, was a type of "racial discrimination in the jury system [which] posed a particular threat both to the promise of the [Fourteenth] Amendment and to the integrity of the jury trial."<sup>326</sup>

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321. *Id.* at 869.

322. *Id.* at 870.

323. *Id.*

324. *Id.* at 869.

325. U.S. CONST. amend. VI.

326. *Peña-Rodriguez*, 137 S. Ct. at 867.

The constitutional right of equal protection exists, among other reasons, to protect victims of crime from racial discrimination in the criminal justice system. As Randall Kennedy has observed:

A core purpose of the 1866 Equal Protection Clause was to affirm the rights of black victims of crime; the central idea was not merely to prevent the states from treating black criminal suspects, defendants, and convicts worse than white ones, but also (and perhaps even more emphatically) to guarantee that black victims of crime receive the same protection as white victims. Of course, things didn't quite work out that way, and for the next hundred years, white-dominated police forces, grand juries, and petit juries often contrived to look the other way when blacks were victimized by crime—especially in the South, where racist whites terrorized blacks in a regime marked by lynchings and nooses and burning crosses.<sup>327</sup>

Moreover, Tania Tetlow has persuasively argued that discriminatory acquittals violate the Equal Protection Clause.<sup>328</sup> “A jury may not constitutionally acquit based on discrimination against the victims of the crime any more than that jury could constitutionally convict a defendant based on discrimination.”<sup>329</sup> Jurors serve as state actors when they render verdicts,<sup>330</sup> and it is “one of the most basic tenets of equal protection law that state actors may not discriminate based upon race or gender, particularly within criminal trials.”<sup>331</sup>

When a jury acquits a police officer based upon racial discrimination against a victim, the constitutional guarantee of equal protection under the law is violated.<sup>332</sup> As the Supreme Court has explained, “[d]iscrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice.”<sup>333</sup> Permitting juror racial bias “damages ‘both the fact and the perception’ of the jury’s role as ‘a vital check against the wrongful exercise of power by

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327. Akhil Reed Amar, Book Review, *Three Cheers (and Two Quibbles) for Professor Kennedy*, 111 HARV. L. REV. 1256, 1261–62 (1998) (citing RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 41–62 (1997)).

328. Tetlow, *Discriminatory Acquittal*, *supra* note 15.

329. *Id.* at 79–80.

330. *Id.* at 80, 106.

331. *Id.* at 80.

332. *Id.* at 107–08.

333. *Id.* at 107 (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)).

the State.”<sup>334</sup> As the Supreme Court has recently cautioned, juror racial bias is “a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice.” Just as the Court’s recognition and effort to address juror racial bias against defendants were necessary “to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy,”<sup>335</sup> it is also necessary to correct juror racial bias against victims, particularly victims of state violence.

It is time that the courts explicitly recognize that racially discriminatory acquittals violate victims’ equal protection rights. However, even if this were to happen, a racial bias exception to the no-impeachment evidence rules would not be an effective evidence law remedy due to the lack of available post-verdict remedies. Even if jurors are allowed to impeach their not-guilty verdict, and it is determined that juror racial bias against the victim (and possibly corresponding racial bias in favor of the defendant) led to a discriminatory acquittal, the defendant still cannot be retried due to the Double Jeopardy Clause. The Double Jeopardy Clause of the Fifth Amendment of the U.S. Constitution provides: “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .”<sup>336</sup> The primary protection under this clause is prohibition against retrial for the same offense after an acquittal.<sup>337</sup> Thus, a white police defendant who was acquitted on the basis that jurors were racially biased against the victim could not be retried.

In addition to the limitation of criminal post-verdict remedies, under the current system, there cannot be any civil rights action against jurors for a violation of the victim’s equal protection rights because jurors have absolute immunity for acts performed within the scope of their official duties.<sup>338</sup>

The *Peña-Rodriguez* decision was a positive step forward in addressing juror racial bias—specifically, juror reliance on racial character evidence—which results in discriminatory convictions. However, the Court did not address discriminatory acquittals. In other words, the opinion does not address the modern version of mid-

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334. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)).

335. *Id.*

336. U.S. CONST. amend. V.

337. *See Evans v. Michigan*, 568 U.S. 313, 318 (2013).

338. *See Imbler v. Pachtman*, 424 U.S. 409, 422–23 (1976).

nineteenth century juror bias in favor of white defendants who killed blacks. Today's crisis of unaccountability for police killings of people of color is the contemporary version of racially discriminatory acquittals, and a particularly concerning one given that the defendants are state actors. Therefore, despite *Peña-Rodriguez*, juror racial bias remains a serious problem that needs to be addressed. Specifically, since most post-acquittal remedies are foreclosed, pre-verdict evidence law solutions are required.

#### IV. EVIDENCE LAW SOLUTIONS TO RACIAL CHARACTER EVIDENCE

The crisis of police killings of people of color in the United States is a complex problem that requires a multitude of remedial approaches. This Article looks at the problem from only one subfield—that of evidence law—and hence proposes evidence law solutions. At first glance, this prescriptive response might appear limited to the trial stage of prosecution, since evidence rules and doctrines primarily govern the admissibility of evidence at trial. Evidence law solutions could affect all stages of a prosecution, however, including the initial decision to pursue charges.

Prosecutors may choose not to zealously prosecute police officers who kill community members of color for a variety reasons, such as a reluctance to prosecute law enforcement officers with whom they work,<sup>339</sup> due to public opinion,<sup>340</sup> or because they do not think they will be able to prove the suspect is guilty beyond a reasonable doubt. The latter determination is based, in large part, on the availability and strength of evidence. The circumscription of attorneys' use of and fact-finders' reliance on racial character evidence will affect the availability and strength of sources of proof. If, for instance, attorneys, jurors, and judges are discouraged from using or relying on a victim's blackness to prove the victim posed a threat to the officer a guilty verdict might become more attainable.

This Part first looks at the need for critical race evidence education to enable attorneys and judges to recognize racial character evidence. It pauses to consider the unique obstacles to confronting racial character evidence at the grand jury stage before outlining evidentiary objections

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339. Roger A. Fairfax, Jr., *The Grand Jury's Role in the Prosecution of Unjustified Police Killings: Challenges and Solutions*, 52 HARV. C.R.-C.L. L. REV. 397, 416–17 (2017).

340. *Id.* at 409–10.

to racial character evidence. This includes objections on the grounds of improper character evidence, relevance, unfair prejudice, and inappropriate expert witness and lay opinion testimony. This Part also advocates for permissive use of rebuttal evidence of victims' good character and the use of jury instructions addressing implicit bias and racial character evidence.

*A. Need for Critical Race Evidence Education*

Irrespective of the form that racial character evidence takes, it is always impermissible. Attorneys' use and jurors' reliance on racial character evidence usually go unnoticed, however, since most attorneys and judges are unaware of its existence and how it violates constitutional and evidence law. Awareness of the existence, effect, and unlawful nature of racial character evidence is necessary to ensure that proper evidentiary objections are asserted, rebuttal evidence of victims' good character is introduced, and the jury is properly instructed to disregard racial character evidence.

The first step to addressing racial character evidence is being able to recognize it and explain how it relates to racial bias. This is no easy task. Most often, racial character evidence is transmitted subtly, relied upon implicitly, or even generated in the secrecy of jury deliberations. Attorneys' use of stereotype emphasis or expert (or lay) opinion testimony on racial character are the most straightforward, but they still require a sophisticated understanding of how racialization and racism operate in contemporary society. Training on and study of critical race theory (CRT) and its application to evidence law and practice is useful to identifying and understanding the impact of racial character evidence in all of its expressions.<sup>341</sup>

In applying CRT to evidence law, we must answer a two-part "subordination question": "(1) whether a rule of law or legal doctrine, practice, or custom [of evidence] subordinates important interests and concerns of racial minorities and (2) if so, how is this problem best remedied?" Derrick Bell's theories of the pervasiveness and permanence of racism prompt us to be inquisitive. Even if a rule of evidence appears race-neutral on its face or in its application, we scrutinize it. CRT asserts that our justice system serves to protect and

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341. For a comprehensive discussion on the application of critical race theory to evidence law, see Gonzales Rose, *supra* note 2, at 2248–60.



preserve existing power structures that ensure “insiders” remain in power and benefit from the subordination of “outsiders.” We can test this hypothesis in the realm of evidence by asking: Are racial “insiders,” such as whites, privileged under our evidentiary system? Specifically, does our system favor evidence proffered by whites or evidence infused with racism—both of which ultimately benefit white people as a group? Does it disfavor evidence introduced by people of color or evidence that attempts to bring embedded racism to light?<sup>342</sup>

Law school courses and continuing legal education seminars on CRT generally, as well as the application of CRT to evidence law more specifically, train attorneys to identify and object to racism.<sup>343</sup> They could also assist judges to decrease their own implicit biases and become more impartial and fair in their evidentiary rulings.<sup>344</sup> Education on techniques of critical race evidentiary analysis can help us understand how racial stereotypes and biases are presented as or assumed to be evidence at trial. Once an attorney can recognize racial character evidence, he or she can object to it and encourage the court to mitigate its effects.

### *B. Confronting Racial Character Evidence in Grand Juries*

Before getting into evidentiary objections, rebuttal evidence, and jury instructions that can be made to limit the use racial character evidence at trial, we should pause to consider racial character evidence in grand jury proceedings. As discussed above, reliance on racial character evidence of victims of color as dangerous, threatening, and criminally-inclined can lead to grand juries failing to indict the police officers who killed them. Juror reliance on racial character evidence is particularly difficult to address at the grand jury stage, however, because the proceedings are conducted in secrecy<sup>345</sup> with only minimal court supervision.<sup>346</sup> Further, the rules of evidence generally do not apply to grand jury proceedings.<sup>347</sup> Thus, there is no judge to prevent

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342. *Id.* at 2260.

343. *Id.* at 2303.

344. *Id.*

345. 1 FED. PRAC. & PROC. CRIM. § 106 (4th ed. 2008); FED. R. CRIM. PROC. 6(e); Richard M. Calkins, *Grand Jury Secrecy*, 63 MICH. L. REV. 455, 459 (1965).

346. *See* 2 MOD. CONST. L. § 27:9 (3d ed. 2011).

347. *See McKethan v. United States*, 439 U.S. 936, 938 (1978).

the submission of racial character evidence or opportunity for evidentiary objections to be made to such evidence, even when racial bias against the victim might violate the victim's equal protection rights.

As we have seen in high-profile cases—such as those concerning the deaths of Michael Brown, Eric Garner, and Tamir Rice—some prosecutors have used the grand jury process as a way to hold secret one-sided trials in favor of police officer defendants.<sup>348</sup> Hence, it is critical that the problem of grand juror reliance on racial character evidence is dealt with. One possible approach would be to institute enhanced court supervision after the return of a no true bill. Courts could encourage grand jurors to come forward if they observed racial bias during the proceedings or deliberations. No-impeachment rules like Federal Rule of Evidence 606(b) and state equivalents generally do not prevent jurors from testifying about racial bias in grand juror proceedings after a failure to indict because the rule only applies to impeachment of verdicts and indictments.<sup>349</sup> Since there was no indictment, there is no Rule 606(b) bar. If the failure to indict was based upon racial bias, a second grand jury proceeding could be held. The prohibition against double jeopardy does not apply to grand jury proceedings.<sup>350</sup>

However, this safeguard is unsatisfying for several reasons. First, it is unlikely that grand jurors would be able to detect all uses of racial character evidence or be motivated to report anything but the most blatant instances. Second, there is little reason to believe that a second grand jury proceeding would yield different results. Prosecutors have significant control over grand jury proceedings and can effectively determine whether the defendant is charged.<sup>351</sup> Due to the close relationship between local law enforcement and local prosecutors, district attorneys are often reluctant to prosecute police officers.<sup>352</sup> Scholars, lawyers, and policy-makers have been critical of the use of

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348. Ross, *supra* note 20, at 764.

349. FED. R. EVID. 606(b).

350. U.S. CONST. amend. V; *United States v. Williams*, 504 U.S. 36, 49 (1992).

351. See Joshua Hegarty, *Who Watches the Watchmen? How Prosecutors Fail to Protect Citizens from Police Violence*, 37 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 305, 320–21 (2016).

352. Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 22 (2001) (“[P]rosecutors often enjoy too close of a relationship with local police and are therefore reluctant to turn against those with whom they have worked.”).

grand juries in police misconduct and killing cases and have advocated for alternatives.<sup>353</sup> Examples of these reforms include: use of special or independent prosecutors;<sup>354</sup> federal prosecution either under federal law provisions or assignment of federal prosecutors to state-level prosecutions;<sup>355</sup> direct citizen access to grand juries;<sup>356</sup> appointment of a victim advocate in grand jury proceedings;<sup>357</sup> judicial oversight of the grand jury;<sup>358</sup> and additional procedural mechanisms to supplement the grand jury.<sup>359</sup>

The problem of racial character evidence provides another basis for questioning current grand jury procedures in cases of police killings. In evaluating the advisability of reforms, the dangers posed by grand juror reliance on racial character evidence should be considered. There needs to be an opportunity to root out and address the use of racial character evidence against victims of color to prevent violations of their equal protection rights at the grand jury stage.

### *C. Evidentiary Objections to Racial Character Evidence*

There are several evidentiary objections which should be considered when an opposing party introduces racial character evidence at trial. These objections include improper character evidence, lack of relevance, unfair prejudice, inadmissible expert opinion testimony, and impermissible lay opinion. As most state evidence rules are modeled after the Federal Rules of Evidence,<sup>360</sup> these objections are discussed in the context of the federal rules.

#### 1. IMPROPER CHARACTER EVIDENCE

Federal Rule of Evidence 404(a) sets forth a general character propensity ban that “[e]vidence of a person’s character or character

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353. See Lawrence Rosenthal, *Good and Bad Ways to Address Police Violence*, 48 URB. L. 675, 681–82 (2016).

354. *Id.* at 681 (citing FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 21 (2015)).

355. *Id.* at 681–82; Fairfax, Jr., *supra* note 339, at 416–17.

356. See Peter L. Davis, *Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as a Remedy for Victims of Police Brutality When the Prosecutor Declines to Prosecute*, 53 MD. L. REV. 271, 298 (1994).

357. Witmer-Rich, *supra* note 27.

358. Fairfax, Jr., *supra* note 339, at 412.

359. *Id.*

360. GEORGE FISHER, EVIDENCE 2–3 (3d ed. 2013).

trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.”<sup>361</sup> Further, Rule 404(b) provides that “[e]vidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.”<sup>362</sup> These rules mean that evidence of a defendant’s or victim’s character or prior bad acts cannot be used to prove that he or she committed a crime or acted a certain way during the incident in question. Just as a defendant’s or victim’s character or past acts cannot be used to prove that he or she was violent during the event in question, it is impermissible for race to be used as a proxy for character traits. Similarly, race should not be used as a proxy to determine whether a witness is honest or dishonest, credible or unbelievable on the stand.

It is a well-settled principle in evidence law that character cannot be an issue in a criminal case “unless the defendant chooses to make it one.”<sup>363</sup> Defendants make character an issue at trial by utilizing exceptions to Rule 404 which allow them to introduce evidence of their good character<sup>364</sup> or a victim’s bad character, as long as the evidence is of a trait pertinent to the case.<sup>365</sup> Defendants and their counsel are often hesitant to introduce character evidence about the defendant’s character because once he or she opens the door, the prosecutor can respond with evidence to rebut it.<sup>366</sup> If a defendant offers evidence of a victim’s pertinent character trait, the prosecutor may offer evidence to rebut it and evidence of defendant’s same trait.<sup>367</sup> For instance, if a defendant calls a character witness to testify that the victim had a reputation for being violent, the prosecutor could then call a character witness to testify that the victim had a peaceful character and that the defendant had a character for violence.

The risks associated with introducing character evidence give a perverse incentive for defendants to introduce racial character evidence. Defendants may try to circumvent the character evidence rules and risks by introducing racial character evidence. For instance, a defendant police officer who has a history of violence in his

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361. FED. R. EVID. 404(a).

362. FED. R. EVID. 404(b)(1).

363. *People v. Zachowitz*, 172 N.E. 466, 468 (N.Y. 1930) (Cardozo, J.) (“Fundamental hitherto has been the rule that character is never an issue in a criminal prosecution unless the defendant chooses to make it one.”).

364. FED. R. EVID. 404(a)(2)(A).

365. FED. R. EVID. 404(a)(2)(B).

366. FED. R. EVID. 404(a)(2)(A).

367. *Id.*

professional or personal life might be hesitant to call character witnesses to testify about his own character for nonviolence or the victim's violent character since the prosecutor might rebut with a character witness attesting to the defendant's violent reputation. If the victim is a person of color, however, the defendant could circumvent these rules by introducing evidence or asserting arguments that emphasize racial stereotypes about the victim, which provoke fact-finders to make inferences about the victim's violent character and violent action during the event. Further, even if a defendant is not afraid to open the door to character evidence, they might resort to racial character evidence because the victim was truly a peaceful person, and the defendant cannot secure a character witness to testify otherwise.

Since most attorneys lack awareness of racial character evidence and its impact, opposing counsel typically fails to sufficiently object to racial character evidence. Further, since most judges are unfamiliar with the concept of race as character evidence, even when appropriate objections are made, the judge might be unpersuaded. It is imperative that attorneys and judges become educated on the role that racial character evidence plays in criminal prosecutions, especially police killing cases.

## 2. LACK OF RELEVANCE

Under Federal Rule of Evidence 401 and state equivalents, the evidence is relevant only if "it has any tendency to make a fact [of consequence] more or less probable than it would be without the evidence."<sup>368</sup> Evidence that is not relevant is never admissible.<sup>369</sup> Evidence of a fact is relevant only "if the fact is of consequence in determining the action."<sup>370</sup> Whether a fact is of consequence depends on the substantive law governing the charge, defense, or other material issue in the case.<sup>371</sup> Thus, in analyzing the relevance of racial character evidence in police killing cases, we must look to the applicable substantive law.

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368. FED. R. EVID. 401.

369. FED. R. EVID. 402. ("Irrelevant evidence is not admissible.").

370. FED. R. EVID. 401(b).

371. FISHER, *supra* note 360, at 23.

The central issue in police deadly force cases is usually whether the officer's use of deadly force was objectively reasonable.<sup>372</sup> It is implausible that (purported) evidence of a victim's racial propensity to be threatening, aggressive, or violent—or evidence that emphasizes racial stereotypes to show such a propensity—could ever be a fact of consequence. The fact that a victim of color was a racial minority does not have any tendency to show that he or she was violent, aggressive, or threatening, or that the officer reasonably felt threatened by the victim. Even conservative Supreme Court justices, who are disinclined to recognize many manifestations of racism as unlawful, find the notion that race could be a factor in predicting propensity for violence abhorrent.<sup>373</sup> Thus, it is likely a court, upon proper objection, would find direct racial character evidence, such as the likes of the expert testimony of Dr. Quijano, irrelevant. Moreover, the argument or inference that an officer was afraid of a person simply because he or she was a person of color and accordingly resorted to deadly force is redolent of blatant racism, not to mention unreasonable.

Further, racial character evidence that emphasizes stereotypes to imply a victim's racial propensity for being violent, aggressive, or otherwise threatening would likely not be relevant either. For instance, if the portions of Officer Darren Wilson's grand jury testimony characterizing Michael Brown as a black brute or thug had occurred at trial, it should have been objected to and deemed inadmissible on the basis of relevance (as well as unfair prejudice, a discussion of which follows). Wilson's subjective testimony equating himself to a "five-year-old" in comparison to the strength of Brown who was like "Hulk Hogan"<sup>374</sup> and a "grunting"<sup>375</sup> "demon"<sup>376</sup> was not relevant since the governing standard is not whether the officer was subjectively afraid of the victim, but whether the officer was reasonably afraid and whether the use of deadly force was reasonable.<sup>377</sup> The governing standard is one of objective reasonableness, not subjective fear. Accordingly, while perceiving a victim to be of hulkish strength and looking demonic might support a subjective fear, it is not relevant to the reasonableness

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372. See *Tennessee v. Garner*, 471 U.S. 1, 7 (1985); *Graham v. Connor*, 490 U.S. 386, 396 (1989).

373. See *Buck v. Davis*, 137 S. Ct. 759, 775 (2017); *Buck v. Thaler*, 565 U.S. 1022, 1022 (2011) (denying certiorari while noting that the trial testimony was "bizarre and objectionable").

374. Transcript of Grand Jury Volume V, *supra* note 270, at 212.

375. *Id.* at 227.

376. *Id.* at 225.

377. See *Garner*, 471 U.S. at 7–8; *Graham*, 490 U.S. at 396–97.

inquiry. Prosecutors should be prepared and equipped to object to such subjective, race-laden testimony on relevance grounds.

### 3. RISK OF UNFAIR PREJUDICE

Even if a piece of racial character evidence that emphasizes negative racial stereotypes is found to be relevant under the low threshold of Rule 401, the evidence is likely of low probative value. Accordingly, this probative value can be substantially outweighed by the danger of unfair prejudice. Federal Rule of Evidence 403 and equivalent state rules<sup>378</sup> provide that “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice[.]”<sup>379</sup> As I have previously advocated,<sup>380</sup> Rule 403 and its state counterparts’ use of the term “prejudice” includes racial prejudice and seeking to provoke racial prejudice in the hearts and minds of fact-finders.

When Officer Wilson described Michael Brown as superhuman in strength, like a demon, grunting and charging, and physically unaffected by multiple gunshot wounds, he was evoking a centuries-old racist stereotype about black men as threatening, animalistic, herculean brutes who are a threat to white lives. His black brute characterization of the teenager was an effort to incite racial fear in the minds of the predominately white<sup>381</sup> grand jury. If such evidence was offered at trial, the prosecution should object that any probative value of such testimony is substantially outweighed by the danger of racial prejudice. These characterizations sought to provoke the jury to rely on racial stereotypes to determine that the black victim posed a threat to the defendant and that shooting twelve rounds at an unarmed teenager, who had actually tried to flee, was reasonable. It should be recognized that

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378. Most state courts have rules similar to Federal Rule 403. *See* CLIFFORD S. FISHMAN, 2 JONES ON EVIDENCE §§ 11:10–11 (7th ed. Supp. 2016). Some states have a less stringent version of Rule 403 which more readily precludes prejudicial evidence. *See, e.g.*, PA. R. EVID. 403 (which differs from the federal rule as prejudice need only outweigh probative value and not “substantially” outweigh probative value as required by the federal rule).

379. FED. R. EVID. 403.

380. Gonzales Rose, *supra* note 2, at 2304–05.

381. Darren Wilson’s grand jury consisted of six white men, three white women, two black women, and one black man. *See* Associated Press, *Racial and Gender Makeup of Grand Jury Revealed in Ferguson Case*, CBS NEWS (Aug. 22, 2014, 4:35 PM), [<https://web.archive.org/web/20180402032300/https://www.cbsnews.com/news/ferguson-on-case-racial-and-gender-makeup-of-grand-jury-revealed/>].

Rule 403 and its state equivalents preclude such racial prejudice and efforts of a party to incite racial prejudice.

#### 4. INADMISSIBLE EXPERT WITNESS TESTIMONY

Federal Rule of Evidence 702 governs the testimony of expert witnesses. It provides that a witness “who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:”<sup>382</sup>

(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.<sup>383</sup>

An example of expert witness testimony on racial character evidence can be found in *Saldano v. Texas*<sup>384</sup> and *Buck v. Davis*,<sup>385</sup> where psychologist Dr. Walter Quijano testified that blacks and Hispanics had a greater propensity for violence than other races.<sup>386</sup> In these cases, defense counsel failed to properly object to the testimony or expert reports which contained similar statements.<sup>387</sup> In *Buck*, Dr. Quijano actually served as a witness for the defense.<sup>388</sup>

Dr. Quijano’s conclusion that blacks and Hispanics are prone to violence was built on racist supposition and unreliable methodology. In fact, Justice Alito described Dr. Quijano’s testimony as “bizarre and objectionable.”<sup>389</sup> Dr. Quijano based his conclusion on the fact that blacks and Hispanics are disproportionately incarcerated in comparison to the general population.<sup>390</sup> While it is true that blacks and Latinos are

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382. FED. R. EVID. 702.

383. *Id.*

384. 530 U.S. 1212 (2000).

385. 137 S. Ct. 759 (2017).

386. *See id.* at 768; *Saldano v. State*, 70 S.W.3d 873, 884–85 (Tex. Crim. App. 2002).

387. *See, e.g., Saldano*, 70 S.W.3d at 884–85 (where Dr. Quijano testified that the defendant’s Hispanic heritage weighed in favor of a finding of future dangerousness).

388. *Buck*, 137 S. Ct. at 768–69.

389. *See Buck v. Thaler*, 565 U.S. 1022, 1022 (2011).

390. Chebium, *supra* note 299.



overrepresented in prisons,<sup>391</sup> this is the result of racial profiling, racially disproportionate stops and frisks,<sup>392</sup> less favorable plea bargains,<sup>393</sup> as well as disproportionate convictions and sentencing<sup>394</sup>—not increased criminality.<sup>395</sup> Such racial character evidence should be objected to on Rule 702(b) grounds because it is not a product of reliable principles and methods.

#### 5. INADMISSIBLE LAY OPINION TESTIMONY

Federal Rule of Evidence 701 allows lay opinions, providing in relevant part that:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; [and] (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue[.]<sup>396</sup>

Testimony that a racialized group has a particular character trait is not rationally based on the witness's perception. Racism is never

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391. According to 2010 statistics, 62% of the national prison population is black and 27% are Latino, while whites make up only 10.7%. See Prison Policy Initiative, *United States Incarceration Rates by Race and Ethnicity, 2010* (2010), [https://perma.cc/29SE-7X7Q].

392. See Floyd D. Weatherspoon, *Racial Profiling of African-American Males: Stopped, Searched, and Stripped of Constitutional Protection*, 38 J. MARSHALL L. REV. 439, 456 (2004); *Stop-and-Frisk Data*, N.Y. C.L. UNION, [https://perma.cc/M7UM-HE8N]; Vikram Dodd, *Police Up to 28 Times More Likely to Stop and Search Black People—Study*, GUARDIAN (June 11, 2012, 7:37 PM EDT), [https://perma.cc/3ETJ-43PB] (reporting that police are “up to 28 times more likely to use stop-and-search powers” against blacks than whites).

393. Once arrested, whites are more likely to receive offers of favorable plea bargains. See Carodine, *supra* note 102, at 561–62.

394. Federal sentences imposed on black males are almost 20% longer than those imposed on whites for similar offenses. ACLU, RACIAL DISPARITIES IN SENTENCING 1 (2014), [https://perma.cc/92AU-RL36]. Further, blacks account for over 40% of current death row inmates despite only making up 13.3% of the U.S. population. AMNESTY INT’L, UNITED STATES OF AMERICA: DEATH BY DISCRIMINATION 1 (2003), [https://perma.cc/PX8Q-PLQY]; *Quick Facts: United States*, U.S. CENSUS BUREAU, [https://perma.cc/84DG-A2HQ].

395. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 131 (2010) (discussing the disproportionate number of arrests and conviction of blacks and Latinos even though whites committed equal levels of drug offenses).

396. FED. R. EVID. 701.

reasonable, and racial generalizations are never sound. It is not reasonable or rational to attribute certain moral and behavioral characteristics to a group of people simply because of the color of their skin or racial classification. Further, a witness's opinion that members of a racial group are either peaceful or violent (or any other character trait that might be pertinent in a police killing prosecution) is a baseless opinion that cannot be helpful when determining a fact in issue or otherwise understanding the witness's testimony.

*D. Rebuttal Evidence of Victims' Good Character*

Not all forms of racial character evidence can be objected to directly under the rules of evidence. There are several reasons for this. First, some racial character evidence occurs behind closed jury room doors and may not be easily detected or discovered. Second, some racial character evidence might not explicitly violate the text of the evidence rules; however, it may still contravene the important principles and values behind the rules. This is cause for concern because the aims of our evidence laws are not being fulfilled. Further, as discussed above, reliance on this racial character evidence against victims of color to support an acquittal may actually infringe on the victim's equal protection rights.<sup>397</sup> To remediate these contraventions of evidence law objectives and equal protection rights, this sub-Part advocates for more liberal admission of evidence that supports police killing victims' good character.

Due to the invidious nature of racism generally, and race as character evidence specifically, racial character evidence is rarely formally introduced. Thus, while it plays an outcome determinative role at trial, it often cannot be directly objected to at trial. This is particularly true for the inherent reliance type of racial character evidence, as well as when jurors play pseudo lay or expert opinion witnesses. In these circumstances, while evidence rules themselves have not been overtly violated, the principles, rationales, and values behind the rules have been violated.

Two examples of when racial character evidence violates the principles behind the evidence rules rather than the enumerated rules themselves are when a juror offers expert or lay opinion racial character testimony during deliberations and when race serves to bolster the credibility of witnesses. To illustrate the former, we can look at the *Peña-Rodriguez* case. Juror H.C. acted as a lay opinion

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397. See *supra* Part III.

witness, providing “evidence” from his personal experience that Mexican men have a character propensity to act with aggression, bravado, and entitlement against females.<sup>398</sup> Additionally, in reliance on his professional experience as a former law enforcement officer, he acted as an expert witness for his opinion that ninety percent of the time, Mexican men were guilty of being aggressive towards females.<sup>399</sup> While jurors are supposed to use and reflect upon the common sense judgment of the community, here Juror H.C. acted as a witness in the case and effectively testified about Mexicans’ or Mexican Americans’ propensity to commit violence against women as proof of the defendant’s guilt.

For the reasons provided above, such expert and lay opinion testimony on a victim’s racial character violates Federal Rules of Evidence 701 and 702, respectively.<sup>400</sup> It also violates Federal Rules of Evidence 401 and 403 for not being relevant and for being unfairly prejudicial,<sup>401</sup> both because it relies on racial prejudice and, as noted below, it risks overreliance by fellow jurors. Further, Rule 606(a) provides that “[a] juror may not testify as a witness before the other jurors at the trial.”<sup>402</sup> Since this expert and lay opinion racial character evidence was conveyed in the jury room and not the courtroom, it does not directly violate the rule. However, it violates the principles, values, and concerns behind the rule. A sitting juror is disqualified as a witness under Rule 606(a) for two reasons.

First, testifying would cast a juror in a conflicted role, for the juror would be asked in the end to weigh his or her own evidence against the evidence of other witnesses. Second, testimony by a sitting juror would inject serious risks of “unfair prejudice” within the meaning of Rule 403: The jury as a whole is likely to misuse such evidence, according it more or less than its due because of its close source.<sup>403</sup>

In the *Peña-Rodriguez* case, Juror H.C. was placed (or more accurately, placed himself) in this conflicted role. He seemed to have decided that the evidence in the case was outweighed by his own “evidence.” Furthermore, Juror H.C. not only relied upon this racially biased character evidence in determining his vote on the defendant’s

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398. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 862 (2017).

399. *Id.*

400. *See supra* Part IV.C.4, 5.

401. *See supra* Part IV.C.2, 3.

402. FED. R. EVID. 606(a).

403. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 6:15 (4th ed. 2013).

guilt, but he also tried to persuade other jurors with his purported expertise on and observations of people of Mexican descent or origin to convict the defendant.<sup>404</sup> There was a serious risk of unfair prejudice within the meaning of Rule 403 since fellow jurors were likely to rely more heavily on this evidence coming from such a familiar source and accordingly misuse it. While a juror's own submission of racial character evidence might not have violated the letter of Rule 606(a), it certainly violates its spirit and the rationale behind the rule.

A second example is witness credibility. Racial character evidence is not always about a negative character trait; it can also be used to assert positive character traits. Due to implicit racial bias, whites who testify at trial are generally perceived to be more credible than people of color.<sup>405</sup> Jurors often:

[C]onsider a witness's whiteness as de facto evidence of the witness's character for truthfulness. . . . [W]ithout formally entering evidence or investing resources, the party calling the white witness has been able to bolster their witness's credibility for truthfulness. Conversely, a witness of color is automatically considered less credible, and to bolster the witness of color's character of truthfulness the party must navigate rigorous evidence rules.<sup>406</sup>

Federal Rule of Evidence 608 provides that evidence of a witness's truthful character is admissible only after that witness's character for truthfulness has been attacked.<sup>407</sup> The benefits of racial character evidence for racially-privileged persons, particularly police officer defendants, are twofold. Firstly, white (or non-black) witnesses have bolstered credibility at the onset of their testimony, while witnesses of color are unable to bolster their credibility unless and until their character is formally attacked. Secondly, since racial character evidence falls below most attorneys' and judges' radar, it can be relied upon to circumvent Rule 608. The proponent of racial character evidence may stealthily attack a witness of color's character—through reliance on blackness or brownness as a proxy for dishonesty, lack of credibility,

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404. See *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 870 (2017).

405. See generally Amanda Carlin, *The Courtroom as White Space: Racial Performance as Noncredibility*, 63 UCLA L. REV. 450, 471, 477–84 (2016); Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261 (1996).

406. Gonzales Rose, *supra* note 2, at 2259.

407. FED. R. EVID. 608(a).

or otherwise bad character—without objection or recognition by the court that the witness's character has been attacked. Thus, there will be no opportunity for rehabilitation of the witness. In other words, since it is not acknowledged that the witness of color's character for truthfulness was attacked, a character witness cannot be called to bolster his or her credibility. Further, even if a witness of color's character is formally attacked, he or she can only have his or her character bolstered by an investment of time and resources to secure and introduce a character witness.

Both of these examples show how race can serve as character evidence allowing racism to permeate the jury box in violation of evidence law principles with limited, if any, opportunity for objection. These are examples of how the evidentiary playing field is not level in terms of race. This is particularly concerning in the prosecution of white or non-black police officers for killing people of color, where it is likely witnesses for the prosecution will be racial minorities. In many instances, racial bias played a role in the victim of color being killed by police on the street. Racial bias then plays a role at trial in ensuring that the officer is not held accountable for the killing.

In a criminal justice system where white or otherwise racially-privileged defendant police officers receive evidentiary benefit and where victims of color are collectively subordinated under the application or inapplicability of evidentiary rules on the basis of race, solutions should be crafted to create a more even evidentiary playing field. This is particularly necessary when racial bias might deprive a victim of the guarantees of equal protection.

One solution would be for judges, in their discretion, to more liberally permit victim character evidence on positive traits in order to counter the racialized dehumanization of a victim of color at trial when it appears there is a risk that the jurors will rely upon racial character evidence in rendering a verdict. The victim's character evidence should not be limited to the form of opinion or reputation testimony. Rather, judges should permit the prosecution leniency to present a more well-rounded representation of the victim's character when the defense paints a one-dimensional caricature of the victim based on racial stereotypes. Judges should also permit the prosecution to demonstrate the victim's character for peacefulness not only when the victim is labelled aggressive or violent outright, but also when the victim's character has been impeached insidiously and implicitly through the use of racial character evidence. A similar remedy could also be implemented when a witness's character for truthfulness is impeached through racial character evidence.

One concern about allowing the introduction of evidence of a witness's good character is that the jury might become too sympathetic about the death of the victim and convict the defendant even if the prosecution has not proven their case beyond a reasonable doubt. This is a legitimate concern in most criminal cases. Often the proverbial deck is stacked against a criminal defendant, despite the formal presumption of "innocent until proven guilty"; however, in the case of police officers who kill people, particularly people of color, the deck is stacked in favor of the officer. As set forth at the beginning of the Article,<sup>408</sup> there is a reluctance at every stage of criminal proceedings to hold law enforcement officers accountable for killing black and brown persons—from prosecutors' unwillingness to investigate and pursue charges, grand juries' failure to indict, juries' hesitance to convict, and judges' light sentencing. Judges need to be aware of the reality and role of racial character evidence in the courtroom and make admissibility decisions that enhance racial equality at trial.

#### *E. Jury Instructions*

At the beginning of trial, jurors should be given instructions about what racial character evidence is, the fact that it is impermissible, and why. Many jurisdictions already have model jury instructions directing jurors to determine facts without prejudice or bias.<sup>409</sup> For instance, Colorado's Model Criminal Jury Instructions direct that jurors "must not be influenced by sympathy, bias or prejudice in reaching [their] decision."<sup>410</sup> Some states specifically instruct jurors to not rely upon racial, ethnic, or gender bias in considering the evidence.<sup>411</sup> Several judges and jurisdictions go further and provide instructions on implicit bias.<sup>412</sup>

Most famously, U.S. District Court Judge Mark W. Bennett<sup>413</sup> gives the following instruction before opening statements in all criminal and civil trials over which he presides:

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408. See *supra* Part I.

409. Lee, *supra* note 264, at 1597–98; see also Anna Roberts, *(Re)Forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 859–60 (2012).

410. MODEL CRIMINAL JURY INSTRUCTIONS COMM., COLORADO JURY INSTRUCTIONS: CRIMINAL 2016, at E:01, 187 (2016), [<https://perma.cc/M5G5-4WLG>].

411. Lee, *supra* note 264, at 1598.

412. *Id.* at 1598–99.

413. Mark W. Bennett is a District Judge for U.S. District Court for the Northern District of Iowa. See Mark W. Bennett, *Unraveling the Gordian Knot of*

As we discussed in jury selection, growing scientific research indicates each one of us has “implicit biases,” or hidden feelings, perceptions, fears and stereotypes in our subconscious. These hidden thoughts often impact how we remember what we see and hear and how we make important decisions. While it is difficult to control one’s subconscious thoughts, being aware of these hidden biases can help counteract them. As a result, I ask you to recognize that all of us may be affected by implicit biases in the decisions that we make. Because you are making very important decisions in this case, I strongly encourage you to critically evaluate the evidence and resist any urge to reach a verdict influenced by stereotypes, generalizations, or implicit biases.<sup>414</sup>

Jury instructions on racial character evidence would not only serve to educate jurors on this important issue, but it would also help them to understand implicit bias. Asking jurors to recognize hidden biases and not allow these biases to affect their decision-making is abstract and difficult to employ. Providing an explanation of racial character evidence could supply a tangible example of how racial bias is improperly relied upon as “proof” in a way that can unknowingly influence decisions. Thus, instructions containing examples of racial character evidence would be a concrete way to explain the existence and manifestation of implicit racial bias. It is easy for judges to ask jurors to try to be impartial when deliberating and rendering a verdict, but the glaring statistics on juries’ failure to convict police officers<sup>415</sup> demonstrate that such vague instructions likely go unheard. It is time to employ more tangible, concrete means to get the jury to better understand the full effect of racial character evidence and implicit bias in the courtroom.

Jurors should be instructed to consider only the evidence formally presented in the case at hand. Our laws require that people be judged on the basis of their actions during the event in question, and not based on the type of person they are and certainly never on their race. Race is not a relevant factor to consider in determining whether a victim, witness, or defendant is good or bad, peaceful or violent, honest or dishonest, or any other character trait. Implicit bias can work both in

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*Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 149, 149 (2010).

414. *Id.* at 169 n.85.

415. *See supra* Part I.D.

favor of and against individuals on the basis of their skin color and racial classification, but no one should be given special or disfavored treatment because of their race—certainly never in the courtroom. Taking Judge Bennett’s lead, and consistent with recommendations by scholars,<sup>416</sup> potential jurors could also be educated about implicit bias and racial character evidence during juror orientation. This would serve to teach everyone summoned for jury service, irrespective of whether they ultimately are selected to serve on a jury, how to become more aware of and reduce their implicit racial biases.

### CONCLUSION

Racialized police killings are as old as policing itself and promise to continue. Modern law enforcement originated with the slave patrols,<sup>417</sup> and, as recently as July 2017, President Donald Trump openly encouraged racialized police violence, voicing support for more brutal treatment of “thugs” by arresting officers to thunderous applause from an audience of law enforcement officers.<sup>418</sup> It appears the current administration is not committed to lessening or even responding to the national crisis of police violence against people of color. In April 2018, when asked about the police killing of Stephon Clark—an unarmed black man shot eight times, primarily in the back, in his grandmother’s backyard in Sacramento, California<sup>419</sup>—the Trump Administration’s Press Secretary answered that his death was merely a “local matter.”<sup>420</sup> The lack of executive leadership on this urgent civil rights issue makes

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416. Roberts, *supra* note 409, at 860–66.

417. See, e.g., NORM STAMPER, *TO PROTECT AND SERVE: HOW TO FIX AMERICA’S POLICE* 22 (2016); *Ex-Seattle Police Chief Condemns Systemic Police Racism Dating Back to Slave Patrols*, DEMOCRACY NOW! (July 14, 2016), [<https://perma.cc/YB5X-R6ZA>].

418. Maggie Haberman & Liz Robbins, *Trump, on Long Island, Vows an End to Gang Violence*, N.Y. TIMES (July 28, 2017), [<https://www.nytimes.com/2017/07/28/us/politics/trump-immigration-gang-violence-long-island.html>].

419. Jelani Cobb, *Stephon Clark and the Shooting of Black Men, Armed and Unarmed*, NEW YORKER (Apr. 5, 2018), [<https://www.newyorker.com/news/daily-comment/stephon-clark-and-the-shooting-of-black-men-armed-and-unarmed>]; Frances Robles & Jose A. Del Real, *Stephon Clark Was Shot 8 Times Primarily in His Back, Family-Ordered Autopsy Finds*, N.Y. TIMES (Mar. 30, 2018), [<https://www.nytimes.com/2018/03/30/us/stephon-clark-independent-autopsy.html>].

420. Katie Reilly, *Trump White House Calls Fatal Police Shooting of Stephon Clark a “Local Matter,”* TIME (Mar. 28, 2018, 8:00 PM ET), [<https://web.archive.org/web/20180415204825/http://time.com/5219574/donald-trump-stephon-clark-local-matter/>].



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it all the more imperative that we understand and address the role that racial character evidence plays in the unwarranted police killings of black and brown people on the street, and, of equal importance, the function it serves in exonerating police officers at trial, or in making sure these cases never even get there in the first place. Race is impermissibly used as evidence in the courtroom every day, and evidence law needs to be employed to preclude it from further harming victims of color, their communities, and the actual and perceived legitimacy of our criminal justice system.