

2017

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## Recommended Citation

Gonzales Rose, Jasmine B., "Toward a Critical Race Theory of Evidence" (2017). *Minnesota Law Review*. 176.  
<https://scholarship.law.umn.edu/mlr/176>

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## Article

# Toward a Critical Race Theory of Evidence

Jasmine B. Gonzales Rose<sup>†</sup>

### INTRODUCTION

*"It's not what you know, it's what you can prove in court!"*<sup>1</sup>

This oft-used movie line shows how even Hollywood recognizes the importance of evidence law. At trial, the facts are not determined through an independent investigation of the truth<sup>2</sup> but by how the rules of evidence are employed to admit or exclude evidence. Attorneys use evidence rules to establish the story that the finder of fact, be it a judge or jury, considers in rendering its findings or verdicts. It is often taken for granted that evidence law applies equally to all persons and provides everyone an equal voice in the courtroom, irrespective of race. This Article challenges these assumptions and reveals how evidence law and practice structurally disadvantages people of color.

In courtrooms across the United States, certain evidence receives racially disparate admissibility treatment. Evidence of

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1. LAW ABIDING CITIZEN (The Film Department 2009); *see also* TRAINING DAY (Village Roadshow Pictures 2001) (omitting but implying "in court").

2. Our adversarial common law system is party-controlled, where facts are developed on the parties' initiative, as compared to inquisitorial civil law systems where the judge has broad discretion to guide the discovery process and evaluate the evidence. *See* Francesco Parisi, *Rent-Seeking Through Litigation: Adversarial and Inquisitorial Systems Compared*, 22 INT'L REV. L. & ECON. 193, 195–96 (2002).

the “racialized reality”<sup>3</sup>—the lived experience of racial differentiation and hierarchy—of white people is too often submitted to juries with little to no evidentiary scrutiny, while the racialized reality of people of color is routinely excluded, even when supported by evidence-based social science. When the racialized reality of minorities is admitted into evidence, it often comes in only through expert witnesses’ white or “insider” voices.<sup>4</sup> This amounts to a dual-race<sup>5</sup> evidentiary system reminiscent of antiquated laws that allowed whites to testify against anyone but barred people of color from testifying against whites.<sup>6</sup> However, unlike these outdated race-based witness competency rules, today’s evidentiary racial disparities appear race-neutral.

This Article applies—and, more importantly, calls for increased application of—Critical Race Theory (CRT) to the law of evidence. Critical race evidentiary inquiry is valuable because it exposes how the law of evidence can insidiously operate to perpetuate racial subordination. Though scholars have applied CRT to other fields of law, including tax,<sup>7</sup> contracts,<sup>8</sup> and property,<sup>9</sup> too few have applied it to evidence law.<sup>10</sup> Anti-discrimination scholarship on the intersection of evidence law and race is sparse and often overlooks the institutionalized manner in which evidence law replicates and perpetuates societal discrimination in the courtroom. Evidentiary rulings ultimately determine substantive outcomes. Thus, those concerned

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3. The original concept of “racialized reality evidence” is introduced and explained *infra* Part II.B.

4. See *infra* Part II.B.5.

5. The term “dual-race” evidentiary system refers to the disparate treatment of white racialized reality evidence in comparison to the racialized reality evidence of people of color.

6. See *infra* Part I.A.

7. See, e.g., CRITICAL TAX THEORY: AN INTRODUCTION (Anthony C. Infanti & Bridget J. Crawford eds., 2009); ANDRE L. SMITH, TAX LAW AND RACIAL ECONOMIC JUSTICE: BLACK TAX (2015).

8. See, e.g., Emily M.S. Houh, *Critical Race Realism: Re-Claiming the Antidiscrimination Principle Through the Doctrine of Good Faith in Contract Law*, 66 U. PITT. L. REV. 455 (2005).

9. See, e.g., Brenna Bhandar, *Critical Legal Studies and the Politics of Property*, 3 PROP. L. REV. 186 (2014); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).

10. See, e.g., Monré 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, 681 (2014) (“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.”). A notable exception is the work of Carodine herself. See *infra* note 71.

about justice in the legal process should pause to consider how the application of evidence law might subordinate racial minorities and could undergo reform to increase fairness.

This Article proceeds in three parts. Part I argues that CRT is a useful lens to uncover racial subordination imbedded in evidence law. Specifically, this segment looks at historical race-based witness competency statutes and outlines the critical race theoretical precepts needed to expose their present day vestiges. Part II applies a critical race evidentiary inquiry to stand-your-ground defenses, flight from racially targeted police profiling and violence, and cross-racial witness identifications. The examination of stand-your-ground defenses explores how racial character evidence is considered by fact-finders even though it is not formally introduced or admissible. The investigation of the relevance of flight introduces the concept of “racialized reality evidence” and demonstrates how evidence of people of color’s lived experiences of systemic racism are regularly excluded at trial, while evidence of white norms and beliefs receives “implicit judicial notice.” Critical scrutiny of cross-racial witness identifications provides examples of the evidentiary barriers criminal defendants of color face when they seek to introduce evidence countering systemic racism. Part III examines the structural causes of the modern dual-race evidentiary system and offers suggestions about how critical evidentiary analysis by the bench, bar, and academy—including a reinterpretation of Federal Rule of Evidence 403—could make evidence law more equitable.

## I. RACE AND RACISM IN THE LAW OF EVIDENCE

Before evaluating the contemporary racial landscape of evidence law and proposing reforms, it is prudent to pause for retrospection on the law of evidence and supply a framework for its critique. Section A explores eighteenth and nineteenth century race-based witness competency rules. Section B then provides the central precepts and queries of a critical race evidentiary analysis, while Section C explains the practical function of such an analysis.

### A. LOOKING BACK: RACE-BASED WITNESS COMPETENCY RULES

Today, evidence rules, doctrines, and policies appear race-neutral, but this was not always the case. In the eighteenth through mid-to-late nineteenth centuries, laws barred people of color from testifying in court, especially if the case involved a

white person. For instance, the California Crimes and Punishments Act of 1850 provided that “no black or mulatto person, or Indian, shall be permitted to give evidence in favor of or against any white person.”<sup>11</sup> Its civil equivalent similarly directed that “[n]o Indian or Negro shall be allowed to testify as a witness in any action in which a White person is a party.”<sup>12</sup> These racial restrictions were not limited to Native and black Americans; they applied to other populations of color as well.<sup>13</sup>

Most famously, in the 1854 case of *People v. Hall*, the California Supreme Court held that its witness competency statute barred testimony of witnesses of Chinese descent and all persons who were not white.<sup>14</sup> In *Hall*, a white man had been convicted of murdering a Chinese miner on the basis of testimony by Chinese witnesses.<sup>15</sup> The defendant appealed, claiming that the state’s racial evidentiary bar prohibiting testimony by blacks, mulattoes, and Indians against whites should be extended to bar the testimony of Chinese people.<sup>16</sup> The Supreme Court of California agreed, finding that the statute’s reference to “black persons” “must be taken as contradistinguished from White, and necessarily excludes all races other than the Caucasian.”<sup>17</sup> Accordingly, the court held that the Chinese witnesses’ testimony should have been excluded at trial and reversed the conviction.<sup>18</sup>

Motivated by white supremacy, the court in *Hall* recognized the fundamental connection between people’s ability to testify in court and their status as full citizens, observing:

The same rule which would admit [non-white people] to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls.

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11. *People v. Howard*, 17 Cal. 63, 64 (1860) (quoting the California Crimes and Punishments Act of 1850, § 14).

12. *People v. Hall*, 4 Cal. 399, 399 (1854) (quoting the California Civil Practice Act, § 394).

13. *Id.* at 404.

14. *Id.* at 399, 404; see also Gabriel J. Chin, “A Chinaman’s Chance” in *Court: Asian Pacific Americans and Racial Rules of Evidence*, 3 U.C. IRVINE L. REV. 965, 967 (2013).

15. *Hall*, 4 Cal. at 399.

16. *Id.*

17. *Id.* at 404.

18. *Id.* at 405.

This is not a speculation which exists in the excited and overheated imagination of the patriot and statesman, but it is an actual and present danger.<sup>19</sup>

It is not surprising that three years later, a San Francisco court denied a Mexican American man the right to testify at trial.<sup>20</sup> Manuel Domínguez was one of California's most distinguished and affluent citizens and served on the Los Angeles County Board of Supervisors.<sup>21</sup> Despite his vast landholdings and social and political prominence, he was dismissed as a witness after plaintiff's counsel argued that his Indian blood made him incompetent to testify.<sup>22</sup> As mestizos, individuals with a mix of Spanish and American Indian descent, Mexican Americans were barred from testifying on the basis of their race.<sup>23</sup>

California was not the only state imposing race-based witness competency requirements in the nineteenth century.<sup>24</sup> Throughout most of the country, statutes and judicial decrees prohibited blacks and other people of color from testifying in cases in which white people were parties.<sup>25</sup> In slave-holding states, as well as several western and midwestern states, this bar was usually based explicitly on race.<sup>26</sup> In some northern states, the restrictions focused more on slave status,<sup>27</sup> though being black carried a presumption of slave status and thus witness incompetency.<sup>28</sup> In some states, such as Delaware, black

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19. *Id.* at 404.

20. See IAN F. HANEY LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* 66 (2009); JUAN F. PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 296 (3d ed. 2015).

21. PEREA ET AL., *supra* note 20.

22. *Id.*

23. *See id.*

24. Nearly all of the southern states and several of the northern states prohibited people of color from testifying against whites. I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1377 (2010) (citing THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619–1860*, at 239–48 (1996); Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415 (1986); Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261 (1996)).

25. Alfred Avins, *The Right To Be a Witness and the Fourteenth Amendment*, 31 MO. L. REV. 471, 473 & n.17 (1966) (stating that many of these statutes are “collected in Senator Sumner’s report entitled *To Secure Equality Before the Law in the Courts of the United States*, [S. REP. NO. 38-25, at 2–6] (1864”).

26. *Id.* at 473–74.

27. *Id.* at 473 (citing *Rogers’ Ex’rs v. Berry*, 10 Johns. 132 (N.Y. Sup. Ct. 1813)).

28. *Id.* at 473–74 (citing *Fox v. Lambson*, 8 N.J.L. 275 (N.J. 1826)).

witnesses were allowed to testify on behalf of a white party against a black party, but the opposing black party could not call a black witness to testify against the white party.<sup>29</sup> Irrespective of their articulation, these rules “withdrew the substance of the protection of the laws in many cases and left only the shadow.”<sup>30</sup> When people of color were deprived of the ability to testify, whites could abuse, rob, and kill them with near impunity.<sup>31</sup>

Official race-based witness competency rules were eradicated over 150 years ago.<sup>32</sup> Today, evidence laws do not overtly name any race for favored or disfavored treatment. Traditionalists might argue that this means racism has been eliminated entirely from the rules of evidence and that we now have a racially unitary and unbiased evidence system.<sup>33</sup> Viewed through colorblind optics, it appears that racial equality has been achieved in evidence law. However, applying CRT to the law of evidence reveals something different: a dual-race evidentiary system still exists in the United States.

#### B. LOOKING FORWARD: CENTRAL PRECEPTS OF A CRITICAL RACE EVIDENTIARY ANALYSIS

It is challenging to define CRT succinctly because of the variety of perspectives and approaches taken by scholars. Part of its richness and insight stems from its diversity<sup>34</sup> and inter-

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29. *Id.* at 474–75 (citing *Burton v. Roe*, 7 Del. (2 Houst.) 49 (1859)).

30. *Id.* at 480 (citation omitted).

31. *See id.* at 480–83; Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 19 (1990) (“[W]hite people generally had automatic immunity against crimes committed.”). In the post-revolutionary south, “[s]tates rarely prosecuted whites for kidnapping and enslaving free African-Americans because blacks were usually the only witnesses to the crime.” *Id.* at 21.

32. In 1864, Congress passed a law that provided, “in the courts of the United States there shall be no exclusion of any witness on account of color.” Stephen A. Siegel, *The Federal Government’s Power To Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 515 (1998) (quoting Act of July 2, 1864, ch. 210, § 3, 13 Stat. 351); *see also* George Fisher, *The Jury’s Rise as Lie Detector*, 107 YALE L.J. 575, 672, tbl.3 (1997) (providing a table of the first states to abolish these racial exclusion laws).

33. *See, e.g.*, ROY L. BROOKS, *RACIAL JUSTICE IN THE AGE OF OBAMA* 21 (2009) (quoting a traditionalist who believes that “[a]s long as the process is race-neutral . . . we can disregard disparate results with the confidence of knowing we have done the fair and just thing”).

34. Subgroups of CRT include Latino/a critical race theory, Asian American critical race theory, critical race feminism, and others. *See, e.g.*, THE

nal debates.<sup>35</sup> What unifies CRT more than a homogeneous viewpoint or methodology are its common questions and pursuits. CRT examines the foundations of our society—particularly, our legal structure—and questions the bases of those foundations from a racial standpoint.<sup>36</sup> In other words, as Dorothy Brown has summarized, “Critical Race Theory asks the question: ‘[W]hat does race have to do with it?’”<sup>37</sup>

It is not feasible to summarize the entire field of CRT here, but it is helpful to discuss a few central tenets. In teaching, I refer to these as the “seven Ps of critical race inquiry”: the power behind racialization; the purpose of racism; privilege; the property of whiteness; the pervasiveness of racism; the permanence of racism; and the perspectives of people of color. These concepts are interrelated and overlapping, but it is useful to consider how they apply to evidence law individually. The following will provide a guide for both the discussion in this Article and future critical evidentiary scholarship.

### 1. Power Behind Racialization

At its core, CRT views the problem of racial differentiation and racism as linked inextricably to power.<sup>38</sup> CRT posits that there are “insiders” and “outsiders” in American society and its legal systems.<sup>39</sup> Insiders are white, generally male, heterosexual, and relatively affluent.<sup>40</sup> Outsiders are people of color, wom-

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LATINO/A CONDITION: A CRITICAL READER (Richard Delgado & Jean Stefancic eds., 1998).

35. See, e.g., Richard Delgado, *Derrick Bell's Toolkit—Fit To Dismantle That Famous House?*, 75 N.Y.U. L. REV. 283 (2000) (respectfully critiquing Derrick Bell's emphasis on a binary model of racial progress that overlooks the experience of non-black people of color).

36. RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 3 (2012).

37. DOROTHY A. BROWN, *CRITICAL RACE THEORY: CASES, MATERIALS, AND PROBLEMS* 1 (3d ed. 2014).

38. See BROOKS, *supra* note 33, at xviii.

39. See Reginald Leamon Robinson, *Race, Myth and Narrative in the Social Construction of the Black Self*, 40 HOW. L.J. 1, 34–35 (1996) (“[T]he tension between ‘insider’ white traditional, conservative and liberal males, and ‘outsider’ people of color, who are currently engaged in what might amount to an intellectual life-and-death struggle for recognition within legal academe.” (citing Richard Delgado, *The Imperial Scholar Revisited: How To Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349 (1992))).

40. See Roy L. Brooks, *Brown v. Board of Education Fifty Years Later: A Critical Race Theory Perspective*, 47 HOW. L.J. 581, 582 (2004) (commenting that insiders “consist of White heterosexual males, especially cultural elites such as the captains of industry, congressional leaders, and Supreme Court



en, LGBT persons, and the poor.<sup>41</sup> The more a person is an insider, the more access to power he or she has. CRT argues that American society and its legal system are fundamentally slanted, if not heavily skewed, in favor of insiders and structurally designed to keep insiders in power.<sup>42</sup> Critical race theorists believe that racial differentiation and racism are less about racial partiality and more about maintaining existing power structures.<sup>43</sup>

Evidence law is a particularly powerful mechanism in our legal system. It determines which facts will be considered to decide a person's guilt or innocence in a criminal prosecution and one's liability or immunity from responsibility in a civil action. CRT invites us to start with the notion that the legal system is slanted in favor of racial insiders. It then prompts us to examine evidence rules thoughtfully and to question rigorously whether they are applied to preserve existing racial power structures.

## 2. The Purpose of Racism

CRT posits that there is a distinct purpose behind both racial classifications and racism. Racial distinctions are not natural, biological, scientific, or fixed. Rather, race is a deliberate social construct.<sup>44</sup> Humans share nearly all their genetics,<sup>45</sup> as well as "higher-order traits" such as intelligence, reason, and morality.<sup>46</sup> However, our society chooses to underplay our ex-

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[J]ustices themselves" (citation omitted)).

41. See Catherine Smith, *Unconscious Bias and "Outsider" Interest Convergence*, 40 CONN. L. REV. 1077, 1078 (2008) (discussing outsiders as people of color, women, and members of the LGBT community).

42. See Bernie D. Jones, *Critical Race Theory: New Strategies for Civil Rights in the New Millennium?*, 18 HARV. BLACKLETTER L.J. 1, 59 (2002) ("The outsiders are those whose truths are disregarded, and the insiders are those whose stories fit within the ideological framework of 'truth,' which meant that outsiders had the right to question the legitimacy of the prevailing truth.").

43. See BROOKS, *supra* note 33, at 91.

44. See Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 27 (1994) ("[H]uman interaction rather than natural differentiation must be seen as the source and continued basis for racial categorization.").

45. See PEREA ET AL., *supra* note 20, at 13–14 (citing *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610 n.4 (1987)); D.J. Witherspoon et al., *Genetic Similarities Within and Between Human Populations*, 176 GENETICS 351, 351 (2007) ("[I]ndividuals from different populations can be genetically more similar than individuals from the same population.").

46. DELGADO & STEFANCIC, *supra* note 36, at 8.

tensive similarities and focus on a few physical attributes—such as hair texture, skin color, and facial features—to craft distinct races.<sup>47</sup> Racial categorization then creates social structures and assigns moral qualities to members of racial groups in ways that benefit people designated to be “white.”<sup>48</sup> Hence, the purpose of racial differentiation is to confer privilege upon the insider group—white people—juxtaposed with outsider groups: people of color.<sup>49</sup>

If we recognize that race is a social construct and racism is not irrational but serves a purpose, we may be persuaded to reexamine the disparate impact evidence rules have on racial minorities. Instead of simply asking if the application of a rule intentionally discriminates against a person on the basis of race, we should consider the aggregate structural effects it has on a racial group. Often, disparate impact is considered unintentional and therefore not warranting redress, but it is as detrimental as intentional discrimination.<sup>50</sup> Racism and racial subordination can exist, even without discriminatory intent.<sup>51</sup> When we understand that the objective of racialization is to confer a collective benefit on whites, rather than simply to discriminate against racial minorities because of race-based animus, we realize a dual concern about disparate treatment and disparate impact under evidence law.

### 3. Privilege

Since white privilege and superiority are the aims of racism, the current dichotomy of race discrimination is not *oppressor-versus-oppressed* but *privileged-versus-racially subordinated* groups. The contemporary system of race and racism does not require intentional race-based discrimination or animus,

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47. *Id.*

48. T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1069 (1991).

49. See Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1659 (1995) (“The concept of race has no natural truth, no core content or meaning other than those meanings created in a social system of white privilege and racist domination.”).

50. See DeLeith Duke Gossett, *Take off the [Color] Blinders: How Ignoring the Hague Convention’s Subsidiarity Principle Furthers Structural Racism Against Black American Children*, 55 SANTA CLARA L. REV. 261, 274 (2015) (“[S]tructural racism exists despite intent, because a model of society that associates certain races with negative stereotypes will feed implicit biases that produce unconscious racism, even in the absence of blatantly racist actions.” (citation omitted)).

51. *Id.*

but instead centers on whites collectively receiving privileges and benefits from the systemic subordination of non-whites.<sup>52</sup> The racial predilections and motivations of individual white people are less important than the benefits that racial hierarchy confers upon whites en masse.

Accordingly, in examining the law of evidence, we must ask: Who benefits? Even if a rule of evidence appears to apply uniformly to all persons, does a racial group disproportionately gain an evidentiary advantage under it? As this Article argues, in many instances whites profit while people of color are disproportionately disfavored under the application of evidence law.

Concomitant with white privilege is white normativity and transparency. White normativity is the implicit belief that white ideas, practices, and experiences are inherently normal, natural, and right.<sup>53</sup> White transparency is “the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific.”<sup>54</sup> White transparency occurs when “the white point of view masquerades as colorless, raceless, and systematically devoid of bias.”<sup>55</sup> The imposition of white norms is a form of implicit bias which differs from traditional discrimination law’s fixation with race-based animosity and impetus.<sup>56</sup> White normativity and transparency inflict as much damage as overt discrimination and are even more pervasive and difficult to remedy under our current jurisprudence.

Thus, in examining evidence law, CRT prompts us to ask not only who benefits but how white norms and white transparency play a role in admissibility determinations. White transparency is so entrenched in our society and legal systems

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52. See Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1023–24 (1989) (discussing the system of racial subordination and white supremacy and how this system has persisted).

53. PATRICIA WILLIAMS, *SEEING A COLOR-BLIND FUTURE: THE PARADOX OF RACE* 6 (1997).

54. Barbara J. Flagg, “*Was Blind but Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993); see also Bonnie Kae Grover, *Growing up White in America?*, in CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 34, 34 (Richard Delgado & Jean Stefancic eds., 1997).

55. Richard Delgado, *Are Hate-Speech Rules Constitutional Heresy? A Reply to Steven Gey*, 146 U. PA. L. REV. 871, 872 (1998).

56. See Flagg, *supra* note 54, at 959.

that evidence of white norms, customs, or experiences are often submitted to the jury without opposing counsel's objection or judicial scrutiny because they are considered universal, not racially or culturally distinct. One evidence context where this is implicated—discussed in detail below—is the relevance and probative value of a defendant of color's flight from the police.<sup>57</sup> White experience assumes that running from the police indicates consciousness of guilt of a crime, but people of color often flee from law enforcement due to fear of racially targeted profiling or violence.<sup>58</sup>

The rules of evidence often call on fact-finders to employ “common sense psychology” or otherwise determine what a reasonable person would do in a given circumstance.<sup>59</sup> These situations are ripe for white transparency problems because people of color are underrepresented while whites are overrepresented—in proportion to their populations—on juries and the bench.<sup>60</sup>

Another example is when minority silence is deemed an adoptive admission. Out-of-court statements offered for their truth are generally considered hearsay and deemed inadmissible.<sup>61</sup> However, an opposing party's statements are not considered hearsay.<sup>62</sup> Further, Federal Rule of Evidence 801(d)(2)(B) (and similar state evidence rules) allows “adoptive admissions” against a party opponent.<sup>63</sup> This hearsay exemption allows a statement to be offered against an opposing party if that party adopted it as his or her own. A party may adopt a statement through verbal or nonverbal conduct, or even silence. “When silence is relied upon, the theory is that the person would, under

57. See *infra* Part II.B.

58. See *Commonwealth v. Warren*, 58 N.E.3d 333, 342 (2016).

59. See Maria L. Ontiveros, *Adoptive Admissions and the Meaning of Silence: Continuing the Inquiry into Evidence Law and Issues of Race, Class, Gender, and Ethnicity*, 28 SW. U. L. REV. 337, 337–38 (1999).

60. According to two 2009 studies, seventy percent of the federal judiciary are white men, eight percent of the federal judiciary are black, and five percent are Hispanic; only 11.6% of state court judges are minorities. RUSSELL WHEELER, BROOKINGS INST., THE CHANGING FACE OF THE FEDERAL JUDICIARY 1 (2009), [https://www.brookings.edu/wp-content/uploads/2016/06/08\\_federal\\_judiciary\\_wheeler.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/08_federal_judiciary_wheeler.pdf); Malia Reddick et al., *Racial and Gender Diversity on State Courts: An AJS Study*, 48 JUDGES' J. 28, 31 (2009).

61. FED. R. EVID. 801(c).

62. FED. R. EVID. 801(d)(2).

63. FED. R. EVID. 801(d)(2)(B) (“A statement . . . is not hearsay . . . [if] offered against an opposing party and . . . is one the party manifested that it adopted or believed to be true.”).

the circumstances, protest the statement made in his [or her] presence, if untrue.”<sup>64</sup> Thus, trial judges are asked to determine whether a person would have objected to the statement if it were untrue under the circumstances presented. When a party is a racial, ethnic, or cultural minority, a majority judge might apply white norms of conduct and communication and find that the statement called for the party to have protested.<sup>65</sup> However, under the minority party’s own cultural norms, silence may have been entirely appropriate in the situation and not indicative of adoption even if the statement was untrue.<sup>66</sup> As Maria Ontiveros has discussed, silence in Latino/a, Asian American, and African American, as well as other minority communities, does not necessarily indicate assent or tacit agreement.<sup>67</sup> This is just one example of the negative impact white transparency and normativity can have on people of color in the evidentiary sphere. Since the rules of evidence impart vast discretion to the trial judge, white transparency and normativity problems abound in evidentiary determinations.

#### 4. The Property of Whiteness

Whiteness is not merely a racial designation; it is a form of property.<sup>68</sup> As Cheryl Harris established in her seminal article, “Whiteness as Property,” “The law’s construction of whiteness defined and affirmed critical aspects of identity (who is white); of privilege (what benefits accrue to that status); and, of property (what *legal* entitlements arise from that status).”<sup>69</sup> Property is not merely a tangible thing but a right or expectation of rights. Harris provides an extensive framework of whiteness as a traditional and modern form of property, which includes the conception of reputation as property.<sup>70</sup>

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64. FED. R. EVID. 801(d)(2)(B) advisory committee’s note on proposed rules.

65. See Ontiveros, *supra* note 59, at 343–50 (discussing Latino/a, Asian American, and African American cultural reasons for silence and cases in which white norms of communication prevailed in court).

66. *Id.* (discussing aspects of Latino/a, Asian American, and African American communication which indicate silence is not agreement with or adoption of a statement).

67. *Id.*; Bret Ruber, Note, *Adoptive Admissions and the Duty To Speak: A Proposal for an Appropriate Test for the Admissibility of Silence in the Face of an Accusation*, 36 CARDOZO L. REV. 299, 312 (2014).

68. See generally Harris, *supra* note 9.

69. *Id.* at 1725.

70. *Id.* at 1725–36.

In the evidence context, reputation is central to witness credibility and character determinations. On the witness stand, as Montré Carodine has elucidated, “race itself is evidence—character evidence—and it has a real impact” on trial outcomes.<sup>71</sup> The vestiges of race-based witness competency rules which were based on a “general distrust of the veracity of blacks” and other people of color persist today.<sup>72</sup> As this Article explores, in the context of stand-your-ground defenses and cross-racial misidentifications, jurors tend to find white witnesses more credible and convincing than non-white witnesses.<sup>73</sup> This is true even where their testimony is far-fetched or suggests unreliability; the witness’s whiteness serves as racial character evidence of truthfulness.<sup>74</sup>

### 5. The Pervasiveness of Racism

CRT examines the pervasiveness and centrality of racism and white hegemony in our institutions and everyday life. The pervasive “ordinariness” of racism is perhaps the most central principle of CRT, as all the other tenets build upon this concept.<sup>75</sup> Ordinariness means racism is the norm in America, not the exception.<sup>76</sup> As Richard Delgado reflected, “[R]acism is as inherent in Americans as DNA.”<sup>77</sup> People of color face racism regularly as a part of their everyday life.<sup>78</sup> Concurrently, white people experience racial privilege as the standard each and every day.<sup>79</sup> Because racism is ordinary, it often goes unacknowledged by the majority unless manifested in its most egregious forms.<sup>80</sup> This makes most racism exceedingly difficult to address and remedy.<sup>81</sup> Until we recognize the pervasiveness

71. See Carodine, *supra* note 10; 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, 64–67 (Austin Sarat ed., 2014); see also Jasmine B. Gonzales Rose, *Introduction to Challenging Authority: A Symposium Honoring Derrick Bell*, 75 U. PITT. L. REV. 429, 431 (2014).

72. Cf. Capers, *supra* note 24, at 1378.

73. See *infra* Part II.C.

74. See *id.*

75. See DELGADO & STEFANCIC, *supra* note 36, at 7.

76. See *id.*

77. See Richard Delgado & Daniel A. Farber, *Is American Law Inherently Racist?*, 15 T.M. COOLEY L. REV. 361, 373 (1998).

78. See DELGADO & STEFANCIC, *supra* note 36, at 7.

79. See *id.*

80. See *id.*

81. See *id.* at 7.

of racism, we cannot delve beyond the surface of evidence law's race-neutral language to root out institutional racism.

## 6. The Permanence of Racism

Perhaps even more troubling than the pervasiveness of racism is its permanence. As Derrick Bell observed, "[R]acism is an integral, permanent, and indestructible component of this society."<sup>82</sup> Bell contended that while the exterior expressions of racism might change, white society will never relinquish its investment in deep-seated racism and its attendant white privileges and benefits.<sup>83</sup> Bell pointed to civil rights "victories,"<sup>84</sup> like *Brown v. Board of Education*,<sup>85</sup> and asserted that they do not indicate improvements in race relations.<sup>86</sup> Rather, he posited that African Americans remain disadvantaged "unless whites perceive that nondiscriminatory treatment for [blacks] will be a benefit for them[selves]."<sup>87</sup> Under this theory of interest convergence, *Brown* was less about racial justice and more about the United States fostering an international reputation consistent with the democratic values it touted during the Cold-War era.<sup>88</sup> This explains why the civil rights movement came about and why it ended a decade later.<sup>89</sup>

Bell's permanence-of-racism hypothesis continues to appear true today. After Barack Obama, the nation's first African American president, was elected many thought that we were living in a post-racial era where racism had been all but eradi-

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82. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM*, at ix (1992) [hereinafter BELL, *BOTTOM OF THE WELL*]; see also DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 78 (2004); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 377–78 (1992).

83. See BELL, *BOTTOM OF THE WELL*, *supra* note 82, at 4–8.

84. *Id.* at 21.

85. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding that racial segregation in public education is unconstitutional); BELL, *BOTTOM OF THE WELL*, *supra* note 82, at 24–25.

86. BELL, *BOTTOM OF THE WELL*, *supra* note 82, at 15–31.

87. *Id.* at 7; see also Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) ("The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.").

88. See Bell, *supra* note 87, at 524.

89. Richard Delgado, *Explaining the Rise and Fall of African American Fortunes-Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369, 371–77 (2002).

cated.<sup>90</sup> However, the 2016 presidential election and aftermath have showed us that wide-spread racism persists in the United States. For instance, Donald Trump's campaign centered on racist and xenophobic appeal, such as calling Mexican immigrants criminals and rapists, promising the erection of a wall along the U.S.-Mexico border, and barring all Muslims from entering into the country.<sup>91</sup> The Ku Klux Klan and other white supremacist and nationalist groups enthusiastically campaigned for and celebrated the election of Trump.<sup>92</sup> Unprecedented numbers of racially motivated hate crimes, harassment, and bullying erupted after Trump's election.<sup>93</sup> Although racism can superficially seem dormant, it is ever present and in need of remediation.

If we acknowledge the permanence of racism in our society and legal structure, signs of racial subordination in the evidence context will come more clearly into view and can be addressed. Although currently under-utilized, evidence rules could be employed to combat systemic racism. For instance, Federal Rule of Evidence 403 (and its state equivalents) provides that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice."<sup>94</sup> Often the racial prejudice posed by an item of evidence goes unnoticed. Consequently, opposing counsel does not make a Rule 403 objection even when the danger of racial prejudice substantially outweighs the evidence's probative value. As advocated below,<sup>95</sup> under Rule 403 the term "prejudice" should include racial prejudice. CRT provides analytical tools to reveal such prejudice so that it can be recognized properly and objected to by counsel, weighed by the trial judge, and the evidence possibly rejected.

90. See Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1024 (2010).

91. *From the First African-American President to One Supported by the Ku Klux Klan: Trump Wins in Upset*, DEMOCRACY NOW! (Nov. 9, 2016), [https://www.democracynow.org/2016/11/9/from\\_the\\_first\\_african\\_american\\_president](https://www.democracynow.org/2016/11/9/from_the_first_african_american_president).

92. See *id.*

93. *Update: 1,094 Bias-Related Incidents in the Month Following the Election*, SPLC (Dec. 16, 2016), <https://www.splcenter.org/hatewatch/2016/12/16/update-1094-bias-related-incidents-month-following-election>.

94. FED. R. EVID. 403.

95. See *infra* Part III.B.



## 7. Perspectives of People of Color

To combat the traditionalist contention that we live in a post-racial society where racism no longer exists, CRT invites and values the perspectives of people of color. The voice-of-color thesis holds that “[m]inority status” and experience bring with them “a presumed competence to speak about race and racism.”<sup>96</sup> The legal storytelling and counter-storytelling movement arose out of the voice-of-color thesis. It asks people of color to speak about their experiences with racism in the legal system and “apply their own unique perspectives to assess law’s master narratives.”<sup>97</sup> Because our life experiences differ by where we fall in the system’s racial hierarchy, it is crucial to create space for and listen to those who traditionally have not had a voice in the legal system. Doing so enables us to better assess the extent of and remedies for racial bias.<sup>98</sup>

In the evidence context, the ability of people of color to have a voice and share their experiences of systemic racism should be of particular concern. As the *Hall* court observed, albeit to support a discriminatory outcome, the ability of people of color to testify in the courtroom is fundamentally linked to their ability to be full citizens.<sup>99</sup> A central objective of this Article is to explore the ways evidence law silences minority narratives in the courtroom while reinforcing majority experiences and perspectives. Historical race-based witness competency rules created a dual-race system where people of color were unable to give evidence on par with whites. The critical race analysis of evidence law and practice that follows demonstrates that we still operate under a dual evidentiary structure in many respects.

### C. THE FUNCTION OF A CRITICAL RACE EVIDENTIARY ANALYSIS

The function of a critical race evidentiary analysis is two-fold. First, application of CRT to evidentiary issues brings to light overlooked racial inequalities under evidence law. Second, an evidentiary analysis of these racial inequalities reveals racial disparities in the parties’ relative ability to enter or prevent the admission of evidence. Thus, a critical race evidentiary

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96. DELGADO & STEFANCIC, *supra* note 36, at 9.

97. *Id.*

98. See Douglas E. Litowitz, *Some Critical Thoughts on Critical Race Theory*, 72 NOTRE DAME L. REV. 503, 511–12 (1997).

99. See *People v. Hall*, 4 Cal. 399, 405 (1854).

inquiry does not stop with the application of CRT principles to evidentiary matters. It also applies an evidence analysis to the racial justice problem itself. It explores how conventional treatment of evidentiary issues poses both racial justice and evidence concerns. This often exposes how evidence that supports white privilege and dominance or reflects white norms is treated more favorably than evidence which is probative of structural racism or reflects minority perspectives. The rules of evidence themselves might not have been crafted with a racially discriminatory purpose or otherwise be inherently discriminatory, but their unequal or incomplete application produces a racially subordinating effect.

To make this framework more concrete, an example might be helpful. One example, which will be discussed in more detail directly below, is witness credibility. A CRT analysis demonstrates that due to implicit racial bias white witnesses are generally perceived to be more credible than witnesses of color.<sup>100</sup> Although not officially entered into evidence, jurors consider a witness's whiteness as de facto evidence of the witness's character for truthfulness. In an instant, at first sight and without formally entering evidence or investing resources, the party calling the white witness has been able to bolster the 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.

Discussion of Federal Rule of Evidence 608, which governs when a witness's credibility for truthfulness may be supported by character evidence, illustrates some of the disparate burdens and barriers that a witness of color faces under evidence law. These barriers and burdens are particularly onerous when the witness of color is the criminal defendant or is called by the criminal defendant. A critical race evidentiary analysis reveals how the use of whiteness as character evidence is improper because it is based on racial preferences and because it runs afoul of evidence rules. Under Rule 608, evidence of the truthful character of a witness is admissible only after that witness's

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100. See generally Amanda Carlin, *The Courtroom as White Space: Racial Performance as Noncredibility*, 63 UCLA L. REV. 450, 471, 477–84 (2016) (conducting a case study of the George Zimmerman trial and noting that jurors' credibility determinations are more negative when minority witnesses do not "perform whiteness"); Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261 (1996).

character for truthfulness has been attacked.<sup>101</sup> While a white witness automatically has their credibility bolstered, a witness of color is precluded from doing so unless their character is formally attacked and then must invest resources to secure and introduce a character witness.

Critical race evidentiary analysis attempts to expose how the evidentiary playing field is not level. Recognition that the evidentiary deck is stacked against people of color in a multitude of inconspicuous ways could be an important first step to prompt mitigation of implicit and structural racial bias at trial.

## II. A CRITICAL RACE ANALYSIS OF EVIDENCE LAW

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?”<sup>102</sup> 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 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?

Though there are many topics ripe for critical evidentiary inquiry, this Article analyzes three of today’s most pressing justice issues: stand-your-ground defenses, flight from racially targeted police profiling and violence, and cross-racial eyewitness (mis)identifications. Each analysis demonstrates components of the contemporary dual-race evidentiary system. The examination of stand-your-ground defenses gives an example of how parties, witnesses, and victims of color do not start off on equal evidentiary footing because race itself is used as charac-

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

102. Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 88 (1994).

ter “evidence” to the detriment of people of color and the benefit of whites. The exploration of flight and cross-racial eyewitness identifications illustrates how evidence of people of color’s experiences of systemic racism are disproportionately excluded. Consistent with the fact that racial benefit is the contemporary corollary of racial subordination, each analysis reveals how evidence of white norms and evidence redolent of white superiority and racism receive favorable evidentiary treatment. The discussion touches on the major subjects of evidence law, including relevance, prejudice, hearsay, and character evidence. These examples are illustrative, not exhaustive. It is my hope that these examples will spark further critical race inquiry into how evidence law subordinates marginalized groups and how it can be improved to achieve greater justice.

#### A. STAND-YOUR-GROUND DEFENSES AND RACIAL CHARACTER EVIDENCE

*“I filed a pre-trial motion to keep [the issue of race] out because we don’t want to taint that jury.”*<sup>103</sup>

Michael Dunn, a middle-aged white man, fired ten bullets into a car of unarmed black teenagers—killing seventeen-year-old Jordan Davis—after a heated verbal exchange about the volume of rap music playing on their car stereo.<sup>104</sup> During Dunn’s trial for murder and attempted murder, Dunn’s defense counsel claimed that he tried to keep evidence of race from being presented at trial and that the defense never brought race into the case.<sup>105</sup> However, Dunn’s defense rested heavily on race, specifically race as a proxy for character. In Dunn’s first trial, the jury found him guilty of attempted murder of the three surviving teens but deadlocked on the first-degree murder charge for killing Davis, despite overwhelming evidence of

103. Dan Scanian, *Michael Dunn’s Defense Attorney Takes Long List of Reporters’ Questions; Here Are His Answers*, FLA. TIMES-UNION (Feb. 13, 2014), <http://jacksonville.com/news/crime/2014-02-13/story/michael-dunns-defense-attorney-takes-long-list-reporters-questions-here>. The defense counsel’s efforts “to keep [race] out” of the trial included “never identif[ying] a single witness by either the color of their skin or their gender.” *Id.*

104. See Lizette Alvarez, *Florida Man’s Fiancée Contradicts Parts of His Testimony in Killing of Teenager*, N.Y. TIMES (Feb. 11, 2014), [https://www.nytimes.com/2014/02/12/us/florida-mans-fiancee-contradicts-parts-of-his-testimony-in-killing-of-teenager.html?\\_r=1](https://www.nytimes.com/2014/02/12/us/florida-mans-fiancee-contradicts-parts-of-his-testimony-in-killing-of-teenager.html?_r=1); Scanian, *supra* note 103.

105. See Alvarez, *supra* note 104; Scanian, *supra* note 103.

his guilt.<sup>106</sup> Speaking to the press after the trial, two jurors stated that race was never discussed or considered by the jury.<sup>107</sup> Race may not have been discussed explicitly during jury deliberations, but it certainly was considered.<sup>108</sup>

As Montréal Carodine's scholarship has demonstrated, "[r]ace is evidence," and more specifically, "race is one form of character evidence."<sup>109</sup> Historically, blackness was *prima facie* evidence of being a slave,<sup>110</sup> and it could even be used to prove intent in a rape prosecution if the victim was white.<sup>111</sup> 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.<sup>112</sup> In this Article, I refer to this phenomenon as "racial character evidence." The term 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. Fact-finders simply perceive the race of a defendant, victim, or other witness and conclude that he or she is truthful or untruthful, peaceful or violent, reckless or prudent. Attorneys

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106. See Michael Muskal, *Michael Dunn Convicted on 4 of 5 Charges in Loud-Music Murder Case*, L.A. TIMES (Feb. 15, 2014), <http://www.latimes.com/nation/nationnow/la-na-nn-michael-dunn-loud-music-verdict-20140213-story.html#ixzz2uItCJPW5>.

107. Alina Machado et al., *Juror in Michael Dunn Trial: 'Race Was Never a Factor'*, CNN (Feb. 21, 2014), <http://www.cnn.com/2014/02/20/justice/florida-loud-music-case>; Seni Tienabeso, *Juror in 'Loud Music' Trial Wanted Murder Conviction*, ABC NEWS (Feb. 19, 2014), <http://abcnews.go.com/US/juror-loud-music-trial-wanted-murder-conviction/story?id=22571068>.

108. See, e.g., Ahmad Abuznaid et al., "Stand Your Ground" Laws: *International Human Rights Law Implications*, 68 U. MIAMI L. REV. 1129, 1145 (2014) ("The racist overtones and undertones of the Davis case are undeniable."); Rebekah Skiba, *Returning to the Roots of the Castle Doctrine: Why Recent Stand Your Ground Laws Are in Line with the Natural Law*, 10 S.J. POL'Y & JUST. 71, 86 (2016) (arguing that the jury's failure to find Dunn guilty of murder is evidence of an FBI report revealing "potential justification for society's position that Stand Your Ground laws are misapplied due to racial bias"); Carodine, *supra* note 10, at 691 (stating, "I do not think that anyone would seriously argue that Michael Dunn would have shot Jordan Davis if Davis had been white," during discussions of race as character evidence).

109. Carodine, *supra* note 71, at 66–67.

110. Haney López, *supra* note 44, at 1–4 (discussing *Hudgins v. Wright*, 11 Va. (1 Hen. & M.) 134 (Va. 1806)).

111. Carodine, *supra* note 10, at 680–81.

112. See Carodine, *supra* note 71, at 70.

do not introduce racial character evidence officially through traditional avenues, but many know it plays a determinative role and craftily encourage its use.<sup>113</sup>

Occasionally, the implicit reasoning behind racial character evidence is made explicit. For instance, in *United States v. Calhoun* a federal prosecutor asked on cross-examination: “You’ve got African-Americans, you’ve got Hispanics, you’ve got a bag full of money. Doesn’t that tell you—a lightbulb doesn’t go off in your head and say, this is a drug deal?”<sup>114</sup> The prosecutor’s reasoning here was plainly that African Americans and Latinos have a character propensity to engage in illegal drug trafficking and that this propensity is commonly understood.<sup>115</sup> As Justice Sonia Sotomayor (joined by Justice Stephen Breyer) observed, this kind of racial character evidence is unacceptable: “[It] diminishes the dignity of our criminal justice system and undermines respect for the rule of law. We expect the Government to seek justice, not to fan the flames of fear and prejudice.”<sup>116</sup>

Not only is racial character evidence contrary to justice and fairness, it violates evidence law. However, racial character evidence is rarely, if ever, addressed under evidence law. A person’s race, itself, is not relevant to prove guilt, liability, or witness credibility, and thus should not be considered by a factfinder for that purpose. However, jurors too often consider a defendant’s race as evidence for these impermissible purposes. For instance, during jury deliberations in *Peña-Rodriguez v. Colorado*—a trial of a man charged with sexual assault and harassment—a juror stated, “I think [Defendant] did it because he’s Mexican and Mexican men take whatever they want,” and in the juror’s experience as a former law enforcement officer, “Mexican men had a bravado that caused them to believe they

113. *See id.* at 81.

114. *Calhoun v. United States*, Nos. SA-14-CA-155, SA-08-CR-351, 2014 WL 2723188, at \*3 (W.D. Tex. June 16, 2014).

115. One study from 2000 reported that white adolescents between the ages of twelve and seventeen are more than one-third more likely to have sold illegal drugs than black youths. MICHELLE ALEXANDER, *THE NEW JIM CROW* 99 (2012) (citing U.S. DEPT OF HEALTH, NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE, 1999 71, tbl.G (2000)).

116. *Calhoun v. United States*, 133 S. Ct. 1136, 1138 (2013) (denying petition for writ of certiorari); *see Carodine, supra* note 10, at 689 (discussing Justice Sotomayor’s decision to write an opinion accompanying the denial of certiorari).

could do whatever they wanted with women.”<sup>117</sup> Thus, the juror used the defendant’s race as a proxy for character: since the defendant is Mexican, he was more likely to have committed the offenses charged. The juror also stated that he did not believe the defendant’s alibi witness, who was Hispanic, was credible because he was “an illegal.”<sup>118</sup> Here, the juror concluded that the alibi witness (a lawful permanent resident of the United States) was not credible because he was Hispanic.<sup>119</sup> Race itself was considered proof of defendant’s guilt and his alibi witness’s truthfulness.

Under Federal Rule of Evidence 401, 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>120</sup> That someone is of a particular race, by itself,<sup>121</sup> does not make it more or less likely that they committed a crime or tort or that they will be truthful or untruthful on the witness stand. Certain racial groups are not more prone to engage in illegal, reckless, or untruthful behavior than others. Racial character evidence is, therefore, irrelevant and inadmissible.<sup>122</sup>

Racial character evidence is impermissible under other evidence rules as well. Admissibility determinations focus on the purpose for which an item of evidence is utilized. In the case of racial character evidence, race is used as a stand-in trait for good or bad character. Racial prejudice and groundless stereotypes persuade jurors to believe that people of color have a character propensity to engage in violent or illicit activity or to lie. Racial preferences convince jurors that white persons are peaceful, law-abiding, and honest. Whether relied upon for positive or negative traits, character propensity evidence is generally prohibited under evidence rules.<sup>123</sup>

Specifically, Federal Rule of Evidence 404(a) (and similar state rules) provides that “[e]vidence of a person’s character or

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

118. *Id.*

119. *Id.*

120. FED. R. EVID. 401(a); *see also* FED. R. EVID. 401(b).

121. There are some limited instances where race might be relevant. For example, if the perpetrator’s identity is at issue and an eyewitness’s description of the perpetrator included race, evidence of a defendant’s race might be relevant to show that he or she matched the description of the suspect in that respect.

122. FED. R. EVID. 402 (“Irrelevant evidence is not admissible.”).

123. FED. R. EVID. 404.

character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.”<sup>124</sup> Rule 404(b) states 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>125</sup> This means 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 was violent. Similarly, if not more emphatically, a defendant’s or victim’s racial traits should not be relied upon to determine that he or she is inclined to criminality or violence. Likewise, a witness’s race should not be the basis to conclude that he or she is truthful or untruthful. And a victim’s race should never be considered in determining whether he or she was the first aggressor or nonviolent.

Though racial character evidence is inadmissible, it is often considered by juries and can be outcome determinative in criminal cases.<sup>126</sup> This is particularly evident in “stand-your-ground”<sup>127</sup> cases where defendants charged with murder assert self-defense. The *Dunn* case is a prime example.<sup>128</sup> The evidence against Dunn was significant. Aside from Dunn’s own testimony that the victim Jordan Davis stood and pointed a rifle barrel at him, there was no evidence that Davis or his friends had firearms. The three other teenagers in the vehicle testified that they were not carrying weapons, and the police did not find firearms at the scene.<sup>129</sup> The medical examiner who performed

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

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

126. See, e.g., Carodine, *supra* note 10, at 688–90 (describing one juror’s negative perception of a black witness in the Trayvon Martin murder trial).

127. As of 2014, thirty-three states had “stand-your-ground” laws by either statute or judicial decision. AM. BAR ASSOC. NAT’L TASK FORCE ON STAND YOUR GROUND LAWS, FINAL REPORT AND RECOMMENDATIONS 10 (2015), [http://www.americanbar.org/content/dam/aba/images/diversity/SYG\\_Report\\_Book.pdf](http://www.americanbar.org/content/dam/aba/images/diversity/SYG_Report_Book.pdf).

128. In this case, Dunn did not claim “stand-your-ground” immunity; he relied on a claim of self-defense. In Florida, self-defense encapsulates the right to stand your ground, to not retreat, and to use deadly force if you reasonably believe it is necessary to prevent death or severe bodily harm. See *infra* note 135. The jury instruction in the first trial included the following: “The danger facing M[ichael] D[unn] need not have been actual . . . the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of [deadly] force.” Jury Instructions at 27, State v. Dunn, No. 162012CF011572 (Fla. Cir. Ct. Feb. 12, 2014), 2014 WL 655357.

129. Pia Malbran & Noreen O’Donnell, *Michael Dunn, in Just Released*



Davis's autopsy testified "that it was 'unlikely' . . . Davis was standing when he was shot"; his wounds indicated that he was seated and leaning away from the shooter.<sup>130</sup> Dunn fired several bullets at the teens' vehicle and drove away with his fiancé.<sup>131</sup> After the shooting, Dunn and his fiancé spent the rest of the day and night in a hotel room, ordered pizza, and drove to their home a few hours away the next day.<sup>132</sup> At trial, Dunn's fiancé testified that despite the many hours Dunn spent alone with her after the shooting and before his arrest, Dunn never once claimed that Davis had been armed.<sup>133</sup>

Despite abundant evidence against Dunn, and although the jury found him guilty on three counts of attempted second-degree murder of the other teenagers, the jury deadlocked on the charge of the first-degree murder of Davis.<sup>134</sup> As the jury was instructed, under Florida's stand-your-ground law, Dunn was entitled to use deadly force against a perceived deadly threat without first attempting to retreat.<sup>135</sup> However, aside from Dunn's self-serving testimony, the only possible "evidence" that Davis threatened Dunn with a gun was that Davis was a young black male. The character presumption about black men and boys in our society is that they are dangerous, violent, and menacing.<sup>136</sup> Thus, the jury in the first trial determined that it

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*Phone Calls, Describes Himself as Victim After Killing Teenager*, CBS NEWS (Feb. 17, 2014), <http://www.cbsnews.com/news/michael-dunn-described-himself-as-victim-victor-after-killing-teenager-in-argument-over-music>.

130. Alvarez, *supra* note 104.

131. Initial Brief of Appellant at 12–13, *Dunn v. State*, No. 1D14-4924 (Fla. Dist. Ct. App. Aug. 11, 2015).

132. *Id.* at 18, 21.

133. Muskal, *supra* note 106.

134. *Id.*

135. See FLA. STAT. § 776.012(2) (2014) ("A person is justified in using or threatening to use deadly force if he or she reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony. A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground if the person using or threatening to use the deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be.").

136. See Justin Murray, *Reimagining Criminal Prosecution: Toward a Color-Conscious Professional Ethic for Prosecutors*, 49 AM. CRIM. L. REV. 1541, 1560 (2012) (describing a study in which police officers were read a fact pattern of a shoplifting or assault crime committed by a hypothetical adolescent whose race is not specified; officers exposed to words associated with black people judged the adolescent as being "more hostile, more adult-like and

was legitimate for a forty-five-year-old white male to feel offended by the volume of hip hop music emanating from the black teenagers' vehicle and personally threatened by a seventeen-year-old black male. The racial character evidence of the three surviving black teenagers who testified was that they were not to be believed, while the racial character evidence of the white defendant was that he was truthful.

The use of character evidence to prove a witness's good character for truthfulness is specifically prohibited by evidence rules. Federal Rule of Evidence 608(a) provides that "evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked."<sup>137</sup> If a witness's veracity is not challenged, evidence bolstering his or her credibility is inadmissible.<sup>138</sup> Dunn's credibility should not have been bolstered because it was never attacked. There should not be a racial exception to Rule 608(a) for whiteness. Though Dunn was eventually convicted of the first-degree murder of Jordan Davis in a second trial,<sup>139</sup> the first trial illustrates how armed-white-on-unarmed-black killings are often perceived in our society and brings to light the role of racial character evidence in stand-your-ground defense cases.

The *Dunn* case is not an anomaly. The scenario with the highest probability of being found a "justified" homicide, meaning a killing in self-defense, is when a white shooter kills a black victim.<sup>140</sup> In states that do not have a stand-your-ground law, a white person is 250% more likely to be deemed justified in killing a black person than killing another white person.<sup>141</sup> States with stand-your-ground laws reveal an even starker disparity. In these states, a white person is 354% more likely to be

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blameworthy, more likely to possess internal criminal motivation, and more likely to recidivate").

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

138. *Id.*; JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 47, at 72 (5th ed. 1999) ("[A]bsent an attack upon credibility, no bolstering evidence is allowed.").

139. Elisha Fieldstadt, *Michael Dunn Sentenced to Life Without Parole for Loud Music Killing*, NBC NEWS (Oct. 17, 2014), <http://www.nbcnews.com/news/us-news/michael-dunn-sentenced-life-without-parole-loud-music-killing-n228191>.

140. See John Roman & P. Mitchell Downey, *Stand Your Ground Laws and Miscarriages of Justice*, URBAN INST. (Mar. 29, 2012), <http://www.urban.org/urban-wire/stand-your-ground-laws-and-miscarriages-justice>.

141. Sarah Childress, *Is There Racial Bias in "Stand Your Ground" Laws?*, PBS (July 31, 2012), <http://www.pbs.org/wgbh/frontline/article/is-there-racial-bias-in-stand-your-ground-laws>.

deemed justified in killing a black person than killing a white person.<sup>142</sup> In a study focused specifically on Florida's stand-your-ground law, the data showed that defendants were twice as likely to be convicted if the victim was white instead of a person of color.<sup>143</sup> According to psychologists, research indicates that racial bias influences beliefs about who is considered a threat.<sup>144</sup> States with stand-your-ground laws offer formidable protections for individuals, particularly whites, who act violently when faced with perceived threats.

Despite Dunn's defense counsel's professed attempt to keep race out of the case and the jurors' claim that race was never discussed in their deliberations, the outcome of the first trial cries out for a conclusion that racial character evidence played a key role. As the stand-your-ground statistics indicate, a victim's blackness is evidence itself that the victim was dangerous and that deadly force was justified against him or her. When the defendant asserting a stand-your-ground defense is white, race is character evidence that he or she was justified in attacking the victim. When jurors see a black witness, they may perceive race as a form of character evidence that the witness is not credible. In contrast, a jury may characterize white witnesses as more credible simply by virtue of their whiteness.

This puts the prosecution in the position of having to not only prove the white defendant's guilt beyond a reasonable doubt, but to prove the victim of color's peacefulness: that the victim of color did not deserve to die. The latter cannot be established merely by the facts of the case (such as showing that the victim was unarmed and did not threaten or assault the defendant). The prosecution must also introduce sufficient evidence to overcome racial stereotypes about how black and brown people are inherently dangerous and threatening. This is an example of how evidentiary burdens are not equal on racial lines.

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142. *Id.*

143. Nicole Ackermann et al., *Race, Law, and Health: Examination of 'Stand Your Ground' and Defendant Convictions in Florida*, 142 SOC. SCI. & MED. 194, 199 (2015).

144. See Rebecca Voelker, *Psychologists Laud ABA's Move To Oppose Stand Your Ground Laws*, MONITOR ON PSYCHOL., May 2015, at 13.

## B. FLIGHT AND RACIALIZED REALITY EVIDENCE

## 1. Doctrine of Flight

It is a common scene in movies and evidence law case-books<sup>145</sup>: A burglar alarm sounds or shots ring out. A police officer sees a man near the scene. The man takes one look at the officer and runs. At trial, the prosecutor introduces evidence of the man's flight to prove his guilt for the burglary or shooting. The government's reasoning that evidence of the man's flight is relevant is as old as the Bible: "The wicked flee when no man pursueth."<sup>146</sup>

At first glance, the argument supporting the admission of flight evidence appears simple: only the guilty run. The defendant ran from the police or scene, so the prosecution offers his flight as circumstantial evidence of his guilt. A closer look, however, reveals that flight is often a complex evidentiary issue. Where people of color flee from police, a critical race inquiry reveals structural racial bias entrenched in the evidentiary doctrine of flight. "Black or brown flight" from police is frequently a product of systemic racism. People of color, particularly men, often avoid interaction with police officers because they fear being racially profiled, brutalized, or even killed. However, defendants of color face significant evidentiary barriers to introducing evidence of the systemic racism that motivated their flight and would demonstrate that their retreat does not indicate guilt.

Courts have determined that many kinds of conduct constitute flight from a law enforcement officer, like walking away from an officer or pulling away when an officer puts his or her hand on one's shoulder.<sup>147</sup> The probative value of flight "as circumstantial evidence of guilt depends upon the degree of confidence [that] four inferences can be drawn: '(1) from the defend-

145. See, e.g., GEORGE FISHER, EVIDENCE 63–65 (3d ed. 2013) (presenting multiple fact pattern problems involving people running from the scene of a crime).

146. *Proverbs* 28:1 (King James); see *California v. Hodari D.*, 499 U.S. 621, 623 n.1 (1991); Charles L. Hobson, *Flight and Terry: Providing the Necessary Bright Line*, 3 MD. J. CONTEMP. LEGAL ISSUES 119, 123 (1992).

147. See, e.g., *Trusty v. State*, 508 A.2d 1018, 1019–20 (Md. Ct. Spec. App. 1986) (considering a case where an officer placed his hand on the suspect's arm, and the suspect subsequently pulled away), *aff'd in part and rev'd in part*, 521 A.2d 749 (Md. 1987); *People v. Howard*, 408 N.E.2d 908, 911 (N.Y. 1980) (considering a case where a suspect changed directions and quickened pace when confronted with an officer).

ant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged."<sup>148</sup>

This chain of inferences can be broken at any of the four steps. At the first step, the defendant's conduct might not have actually been flight at all. For instance, the defendant might have just been jogging at the wrong place at the wrong time. Under step two—inferring flight to indicate consciousness of guilt—a person may indeed flee from police but for innocent reasons. The defendant may have been afraid of being falsely accused or asked to be a witness, or he or she may want to avoid a dangerous or potentially time-consuming situation.<sup>149</sup> Others may not want to be seen with a police officer for fear that they may be perceived as complicit with law enforcement, or want to clear the way for police to focus their efforts on finding the true offender. Many courts find that "[w]here the defendant possesses an innocent explanation that does not risk prejudicing the jury against him, it would be expected that the defendant would present his purported reasons for his flight to the jury."<sup>150</sup>

However, there are times when the explanation for flight is not so innocuous. Step three—inferring that consciousness of guilt indicates consciousness of guilt for the crime charged—is often the most problematic and is where evidentiary inquiry usually focuses. Some people may be innocent of the criminal activity afoot but may flee because they are guilty of a separate offense, such as public intoxication or possessing an illegal drug.<sup>151</sup> Individuals who flee because they are guilty of a different offense are prejudiced because they must testify or otherwise supply evidence of their less-than-innocent ulterior motive

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148. KENNETH BROUN ET AL., MCCORMICK ON EVIDENCE § 263, at 458 (6th ed. 2006) (quoting *United States v. Myers*, 550 F.2d 1036, 1049 (5th Cir. 1977)).

149. See *Illinois v. Wardlow*, 528 U.S. 119, 128–31 (2000) (Stevens, J., dissenting); *Alberty v. United States*, 162 U.S. 499, 511 (1896) ("[I]t is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses.").

150. *Thompson v. State*, 901 A.2d 208, 222 (Md. 2006).

151. See, e.g., *Commonwealth v. Johnson*, 910 A.2d 60, 65–66 (Pa. Super. Ct. 2006) (involving a defendant charged with homicide who claimed he ran from police because he was in possession of marijuana).

for flight. In these circumstances, depending upon the nature of the explanation, the probative value of their flight might be substantially outweighed by a danger of unfair prejudice, in which case it may be excluded at the trial judge's discretion.<sup>152</sup>

Irrespective of the nature of the explanation, requiring defendants to testify about what motivated their flight is particularly prejudicial if they have a criminal record. Under Federal Rule of Evidence 609 and state equivalents of this rule, once a defendant or other witness takes the stand to testify, she or he opens her- or himself up to character impeachment by the prosecutor, who may seek to introduce evidence of the defendant's prior criminal convictions to attack his credibility.<sup>153</sup> Specifically, in many instances, the prosecutor argues that the defendant's testimony is untrustworthy because he or she was previously convicted of a crime in a prior unrelated case. Studies show that jurors tend to hear prior-conviction evidence and infer criminal propensity rather than poor credibility,<sup>154</sup> regardless of instructions not to do so.<sup>155</sup> In fact, it is well known that juries tend to convict based on a defendant's prior record.<sup>156</sup> Prior convictions are extremely prejudicial,<sup>157</sup> yet a criminal de-

152. See FED. R. EVID. 403; *Myers*, 550 F.2d at 1046.

153. FED. R. EVID. 609.

154. Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision To Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1371, 1373, 1381-83 (2009) (presenting the results of an empirical study finding that defendants are less likely to testify if they have a criminal record; when a defendant with a criminal record testifies the jury is forty-three percent more likely to learn of the criminal record; and in cases where the prosecution's evidence is weak, the jury's knowledge of the defendant's criminal history is significantly associated with conviction, sometimes more than doubling the probability of conviction).

155. See Dale W. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 753-55 (1959) (showing that jurors may not understand limiting instructions easily and that jurors may ignore them even if they understand them); A.N. Doob & H.M. Kirshenbaum, *Some Empirical Evidence on the Effect of S. 12 of the Canada Evidence Act upon an Accused*, 15 CRIM. L.Q. 88, 96 (1972) (concluding that prior-conviction evidence is often used impermissibly, regardless of a judge's limiting instruction); Stanley Sue et al., *Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma*, 3 J. APPLIED SOC. PSYCHOL. 345, 351-53 (1973) (finding that when there is little useful evidence, jurors often use evidence the judge instructs them not to consider).

156. Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1, 3 (1999) ("It is widely accepted that in all likelihood a jury will consider the evidence for improper purposes.").

157. See Margaret Meriwether Cordray, *Evidence Rule 806 and the Prob-*

fendant may not have much choice but to testify about them when trying to explain an innocent reason why he or she fled from police. This is particularly concerning when the defendant is a person of color, since Rule 609 has a disproportionate effect on racial minorities.

## 2. Racial Implications of Flight

Rule 609 has been subject to a great deal of criticism,<sup>158</sup> but like all Federal Rules of Evidence, we customarily assume it operates in a race-neutral manner.<sup>159</sup> However, by applying CRT, scholars have exposed the racially biased operation of Rule 609.<sup>160</sup> African Americans, Latinos, and Native Americans are disproportionately subject to Rule 609 because of racial profiling in police stops, over-policing in minority neighborhoods, the war on drugs, prosecutorial bias, racially disproportionate sentencing, and mass incarceration.<sup>161</sup> Montré Carodine aptly argues that “the prior conviction impeachment rule gives evidentiary value to race through its reliance on a criminal justice system that imposes the ‘Black tax,’ an unjustified disad-

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*lem of Impeaching the Nontestifying Declarant*, 56 OHIO ST. L.J. 495, 498–99 (1995) (“Rule 609 of the Federal Rules of Evidence provides one of the most potent, and potentially prejudicial, methods of impeachment . . . . In a criminal case, when the defendant is impeached with his prior convictions, it is widely recognized that the defendant faces a unique, and often devastating, form of prejudice.”).

158. A primary criticism of Rule 609 is that allowing a defendant’s prior convictions to be admissible against him essentially allows an attack on his character. H. Richard Uviller, *Evidence of Character To Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 868 (1982) (“[T]he impeachment rubric is a hoax, merely a cover for the admission of evidence bearing on propensity—which is what the rule’s defenders are probably seeking.”); see also Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 294 n.11 (2008); Montré D. Carodine, *“The Mis-Characterization of the Negro”: A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521 (2009).

159. See Carodine, *supra* note 158, at 536–37.

160. *Id.* at 526; I. Bennett Capers, *Crime, Legitimacy, Our Criminal Network, and The Wire*, 8 OHIO ST. J. CRIM. L. 459, 465–67 (2011); see also Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563, 576 (2014); Anna Roberts, *Reclaiming the Importance of the Defendant’s Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 860–73 (2016).

161. ALEXANDER, *supra* note 115, at 59–139 (discussing in depth the role played by the War on Drugs in the “systemic mass incarceration of people of color”); Carodine, *supra* note 158, at 535–36.

vantage to Blacks, and granting the ‘White credit,’ an undeserved benefit to Whites.”<sup>162</sup>

Further, using Rule 609 against a defendant of color encourages fact-finders to rely implicitly on racial character evidence to conclude that the defendant is not credible because he or she has a criminal record.<sup>163</sup> Specifically, “as most Americans associate Blacks with crime, revealing a Black defendant’s prior convictions under Rule 609 reinforces widely held stereotypes about Blacks and encourages jurors to engage in *reasonable* racism.”<sup>164</sup> Racial bias in the criminal justice system, coupled with Rule 609, leads to convictions based on the prior records of defendants of color. This leads to “repeat offender” status, which “keep[s] Blacks ensnared in the criminal system, perpetuating the criminalization of a staggering percentage of the Black population.”<sup>165</sup> This analysis of the black experience also rings true for Latinos and Native Americans.

An issue not yet explored is the unfairness of putting defendants of color in the position of having to testify to explain their reasons for flight from authorities when the motivation to run was related to systemic racism. Philando Castile’s experience illustrates the reasons many men of color fear and take every effort, including flight, to avoid contact with the police. Castile was a thirty-two-year-old black man living and working in the Minneapolis-St. Paul metro area.<sup>166</sup> In the last thirteen years of his life, he was stopped by police *forty-nine times*, ostensibly for minor traffic violations.<sup>167</sup> At times, he did not have car insurance.<sup>168</sup> This led to the revocation of his driver’s license, which in turn led to fines for driving without a valid license—a cycle of citations and fines that many low-income peo-

162. Carodine, *supra* note 158, at 521.

163. *Id.* at 536.

164. *Id.* (emphasis added).

165. *Id.* at 526.

166. Sharon LaFraniere & Mitch Smith, *Philando Castile Was Pulled over 49 Times in 13 Years, Often for Minor Infractions*, N.Y. TIMES (July 16, 2016), [https://www.nytimes.com/2016/07/08/us/study-supports-suspicion-that-police-use-of-force-is-more-likely-for-blacks.html?\\_r=0](https://www.nytimes.com/2016/07/08/us/study-supports-suspicion-that-police-use-of-force-is-more-likely-for-blacks.html?_r=0); see also Mark Berman, *Minnesota Officer Charged with Manslaughter for Shooting Philando Castile During Incident Streamed on Facebook*, WASH. POST (Nov. 16, 2016), [https://www.washingtonpost.com/news/post-nation/wp/2016/11/16/prosecutors-to-announce-update-on-investigation-into-shooting-of-philando-castile/?utm\\_term=.9a63f3d9d99c](https://www.washingtonpost.com/news/post-nation/wp/2016/11/16/prosecutors-to-announce-update-on-investigation-into-shooting-of-philando-castile/?utm_term=.9a63f3d9d99c).

167. *Id.*

168. *Id.*



ple of color experience.<sup>169</sup> On July 6, 2016, while he was driving with his girlfriend and her preschool-aged daughter, police stopped him, allegedly for a cracked taillight.<sup>170</sup> As Castile reached for his identification—as instructed—the officer shot him dead.<sup>171</sup> Castile’s girlfriend streamed a video of the aftermath on social media that sparked #BlackLivesMatter protests across the nation against racially targeted police violence.<sup>172</sup>

In addition to heightened domestic awareness, there has been increased awareness internationally about United States police violence against racial minorities. Two days after Castile’s death, the Ministry of Foreign Affairs of the Bahamas issued a travel advisory to its citizens, who are predominately of Afro-Bahamian descent, concerning the “shootings of young black males by police officers” and advised all Bahamians, especially young males, to exercise “extreme caution” in their interaction with police in the United States.<sup>173</sup> Other countries, including the United Arab Emirates, Bahrain, and New Zealand, issued similar warnings about travel to the United States.<sup>174</sup> While consciousness of police violence against racial minorities might be new to some Americans, Americans of color have long recognized the dangers posed by interacting with the police.

Racially targeted police violence is far from a new phenomenon. As former Seattle Police Chief Norm Stamper noted, police brutality in this country originated with slave patrols.<sup>175</sup> President Barack Obama acknowledged that the roots of racially motivated police shootings “date back not just decades” but

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169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. Press Release, Bah. Ministry of Foreign Affairs, Ministry of Foreign Affairs and Immigration Issues Travel Advisory for Bahamians Traveling to United States of America (July 8, 2016), <http://mofa.gov.bs/ministry-of-foreign-affairs-and-immigration-issues-travel-advisory-for-bahamians-traveling-to-united-states-of-america>.

174. Jackie Northam, *U.S. Often Issues Travel Warnings, but Lately the Tables Are Turned*, NAT’L PUB. RADIO (July 14, 2016), <http://www.npr.org/sections/parallels/2016/07/14/485877515/u-s-often-issues-travel-warnings-but-lately-the-tables-are-turned>.

175. NORM STAMPER, *TO PROTECT AND SERVE: HOW TO FIX AMERICA’S POLICE* 15, 22 (2016); *Ex-Seattle Police Chief Condemns Systemic Police Racism Dating Back to Slave Patrols*, DEMOCRACY NOW! (July 14, 2016), [https://www.democracynow.org/2016/7/14/ex\\_seattle\\_police\\_chief\\_condemns\\_systemic](https://www.democracynow.org/2016/7/14/ex_seattle_police_chief_condemns_systemic).

“centuries.”<sup>176</sup> Not long ago, police enforced discriminatory slave codes and Jim Crow laws and turned a blind eye to mob violence and lynchings against blacks, all of which contribute to racial minorities’ history of distrusting the police.<sup>177</sup> Today, African Americans are 3.6 times more likely to be subject to use-of-force by police<sup>178</sup> and 2.5 times more likely to be shot and killed by police than are whites.<sup>179</sup> Similarly, Latinos are killed by police in disproportionate numbers.<sup>180</sup> And, although often overlooked by the media, Native Americans are the group most likely to be killed by police,<sup>181</sup> as they are 3.1 times more likely to be killed by police than whites.<sup>182</sup>

African Americans, Latinos, and Native Americans are often stopped and searched by police simply because of their race.<sup>183</sup> A stop and frisk can easily lead to arrest. An arrest rec-

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176. President Barack Obama, Remarks by the President After White House Convening on Building Community Trust (July 13, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/07/13/remarks-president-after-white-house-convening-building-community-trust>.

177. Mia Carpiello, *Striking a Sincere Balance: A Reasonable Black Person Standard for “Location Plus Evasion” Terry Stops*, 6 MICH. J. RACE & L. 355, 362 (2001).

178. Timothy Williams, *Study Supports Suspicion That Police are More Likely To Use Force on Blacks*, N.Y. TIMES (July 7, 2016), <https://www.nytimes.com/2016/07/08/us/study-supports-suspicion-that-police-use-of-force-is-more-likely-for-blacks.html>.

179. Wesley Lowery, *Aren’t More White People than Black People Killed by Police? Yes, but No*, WASH. POST (July 11, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/07/11/arent-more-white-people-than-black-people-killed-by-police-yes-but-no>.

180. See *The Counted: People Killed by Police in the US*, THE GUARDIAN, <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-map-us-police-killings> (last visited Apr. 20, 2017); see also Kenya Downs, *Why Aren’t More People Talking About Latinos Killed by Police?*, PBS (July 14, 2016), <http://www.pbs.org/newshour/rundown/black-men-werent-unarmed-people-killed-police-last-week>.

181. Stephanie Woodard, *The Police Killings No One Is Talking About*, IN THESE TIMES (Oct. 17, 2016), [http://inthesetimes.com/features/native\\_american\\_police\\_killings\\_native\\_lives\\_matter.html](http://inthesetimes.com/features/native_american_police_killings_native_lives_matter.html). Native Americans are also more likely to die in police custody and jail, or by other “death by legal intervention.” *Id.*

182. *Id.*

183. See Vikram Dodd, *Police up to 28 Times More Likely To Stop and Search Black People—Study*, THE GUARDIAN (June 11, 2012), <https://www.theguardian.com/uk/2012/jun/12/police-stop-and-search-black-people> (reporting that police are “up to 28 times more likely to use stop-and-search powers” against blacks than whites); *Stop-and-Frisk Data*, N.Y. C.L. UNION, <https://www.nyclu.org/content/stop-and-frisk-data> (last visited Apr. 20, 2017) (reporting that in 2014, eighty-two percent of New Yorkers stopped by police on the street were “totally innocent” but fifty-three percent of those stopped were

ord comes with serious consequences, as it may negatively impact efforts to obtain housing and employment,<sup>184</sup> since both landlords and employers increasingly check criminal backgrounds.<sup>185</sup> In addition to the tangible effects of arrest is the serious risk of harming the person's dignity. People are demeaned when they are wrongfully assumed to be guilty of a crime, stopped, and searched because of their race.<sup>186</sup>

Commentators have described black and Latino communities as de facto police states where heavy police presence and intrusion pervades and criminalizes many aspects of daily life.<sup>187</sup> Behaviors and activities that would not be subject to police intervention in white communities are targeted in black and Latino neighborhoods.<sup>188</sup> For instance, people of color are more likely than whites to be arrested for low-level offenses for

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black compared to only twelve percent who were white; in 2015, eighty percent of all New Yorkers stopped were innocent but fifty-four percent were black).

184. See Robert Brame et al., *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 60 CRIME & DELINQ. 471, 472 (2014) ("There is substantial research showing that arrested youth are not only more likely to experience immediate negative consequences such as contact with the justice system, school failure and dropout, and family difficulties, but these problems are likely to reverberate long down the life course in terms of additional arrests, job instability, lower wages, longer bouts with unemployment, more relationship troubles, and long-term health problems including premature death.").

185. See MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMSELLEM, NAT'L EMP'T LAW PROJECT, 65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 1 (2011), [http://www.nelp.org/content/uploads/2015/03/65\\_Million\\_Need\\_Not\\_Apply.pdf](http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf) (reporting that ninety percent of companies in a study conducted background checks on prospective employees). See generally David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 LAW & SOC. INQUIRY 5 (2008).

186. David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 679 (1994) ("Even stops and frisks that do not result in charges carry a cost, however, albeit one that remains largely invisible: *Large numbers of people are searched and seized, and treated like criminals, when they do not deserve to be.*"); Kevin R. Johnson, *The Case for African American and Latina/o Cooperation in Challenging Racial Profiling in Law Enforcement*, 55 FLA. L. REV. 341, 348 (2003) ("Dignitary harms to Latinas/os lawfully in the United States, including embarrassment, humiliation, and other attacks on their membership in U.S. society, result from the unjustified interrogation of their citizenship status.").

187. See Harris, *supra* note 186, at 677 (discussing how jurisprudence that allows more liberal stop-and-frisks in inner-city areas creates an "open season" on minorities).

188. *Id.* at 660 (noting that "location plus evasion" case law allowing for more liberal stop-and-frisks in high crime areas creates a separate justice system for whites from blacks, as these "locations" are usually minority neighborhoods).

which greater police discretion is accorded, such as loitering, being in a public park after closing, or drinking alcohol in public.<sup>189</sup> Further, people of color are often lower income and less able to pay fines or miss work to appear in court. This results in a disproportionate number of people of color being on probation or having warrants pending for low-level offenses.<sup>190</sup> Having an outstanding warrant for something as harmless as unpaid parking tickets can motivate a person to avoid the police. Additionally, people of color and those living in poverty are less likely to possess government-issued identification,<sup>191</sup> making it more likely that they will be cited, taken into custody, or, in the case of some immigrant Latinos, accused of living undocumented.

For many Latinos, the threat of immigration enforcement is an additional looming layer of police presence that may motivate them to run even when innocent of any crime. The Latino experience of “brown flight” is akin to that of the black experience, as Latinos are similarly fearful of police because of over-policing, racial profiling, and police violence. While the media reports on their experiences less frequently,<sup>192</sup> Latinos, like African Americans, are brutalized and killed by police at a higher rate than whites.<sup>193</sup> Latinos, however, are uniquely disadvan-

189. AM. CIVIL LIBERTIES UNION OF N.J., SELECTIVE POLICING: RACIALLY DISPARATE ENFORCEMENT OF LOW-LEVEL OFFENSES IN NEW JERSEY 12 (2015), [https://www.aclunj.org/files/7214/5070/6701/2015\\_12\\_21\\_aclunj\\_select\\_enf.pdf](https://www.aclunj.org/files/7214/5070/6701/2015_12_21_aclunj_select_enf.pdf); see also Al Baker, *Brooklyn Program Erasing Warrants for Low-Level Offenses*, N.Y. TIMES (Oct. 7, 2015), <https://www.nytimes.com/2015/10/08/nyregion/in-brooklyn-an-effort-to-erase-warrants-for-low-level-offenses.html>.

190. See *supra* note 189.

191. According to one study, twenty-five percent of blacks do not possess the kind of photo identification required by strict voter ID laws. See BRENNAN CTR. FOR JUST., N.Y.U. SCH. OF L., CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 3 (2006), [http://www.brennancenter.org/sites/default/files/legacy/d/download\\_file\\_39242.pdf](http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf).

192. See generally Roque Planas, *Why the Media Pays Less Attention to Police Killings of Latinos*, HUFFINGTON POST (Feb. 24, 2015), [http://www.huffingtonpost.com/2015/02/24/police-killings-latinos\\_n\\_6739448.html](http://www.huffingtonpost.com/2015/02/24/police-killings-latinos_n_6739448.html); Rick Rojas & Samantha Schmidt, *Amid Protests over Police Shootings of Black Men, Latinos Note a Disparity*, N.Y. TIMES (July 14, 2016), <https://www.nytimes.com/2016/07/15/us/amid-protests-over-police-shootings-of-black-men-latinos-note-a-disparity.html>; Nicole Santa Cruz et al., *Why the Deaths of Latinos at the Hands of Police Haven't Drawn as Much Attention*, L.A. TIMES (July 18, 2015), <http://www.latimes.com/local/crime/la-me-0718-latino-police-20150718-story.html>.

193. In 2015, twenty-five percent of all Hispanics and Latinos killed by police were unarmed. Jon Swaine et al., *Black Americans Killed by Police Twice*

taged. They must also combat issues of perceived foreignness in policing, irrespective of whether they are native-born Americans or immigrants.<sup>194</sup>

After the enactment of the Support Our Law Enforcement and Safe Neighborhoods Act—better known as S.B. 1070<sup>195</sup> in Arizona in 2010 and similar laws in other states<sup>196</sup>—some local police are required to attempt to ascertain the immigration status of anyone detained if “reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.”<sup>197</sup> In practice, “reasonable suspicion” usually means “Mexican appearance.”<sup>198</sup> Such “show-me-your-papers” laws invite racial profiling despite official prohibitions to the contrary. Latinos are targeted for being “illegal” based on their race, Spanish-language usage, or Hispanic accent, notwithstanding that one-third of the United States’ land mass used to be Mexico<sup>199</sup> and that the United States is currently the world’s second largest Spanish-speaking country.<sup>200</sup> Also, undocumented immigrants are not the only Latinos who may have reason to avoid law enforcement. United States citizens, legal permanent residents, and other lawfully present Latinos are frequently detained simply because they are perceived to be undocumented

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as *Likely To Be Unarmed as White People*, THE GUARDIAN (June 1, 2015), <https://www.theguardian.com/us-news/2015/jun/01/black-americans-killed-by-police-analysis>. Additionally, Hispanics are killed by police at a rate thirty percent above the average and 1.9 times the rate of whites. Mike Males, *Who Are Police Killing?*, CTR. ON JUV. & CRIM. JUST. (Aug. 26, 2014), <http://www.cjcj.org/news/8113>.

194. See Richard Delgado & Jean Stefancic, *The Racial Double Helix: Watson, Crick, and Brown v. Board of Education (Our No-Bell Prize Award Speech)*, 47 HOW. L.J. 473, 489–90 (2004).

195. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

196. Five more states passed laws authorizing state-level immigration regulation less than two years after S.B. 1070’s passage. These five states are Alabama, Georgia, Indiana, South Carolina, and Utah. A. ELENA LACAYO, NAT’L COUNCIL OF LA RAZA, *THE WRONG APPROACH: STATE ANTI-IMMIGRATION LEGISLATION IN 2011*, at 6 (2012).

197. ARIZ. REV. STAT. ANN. § 11-1051(B) (2012).

198. See Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1037 (2010).

199. Jasmine B. Gonzales Rose, *Language Disenfranchisement in Juries: A Call for Constitutional Remediation*, 65 HASTINGS L.J. 811, 857 (2014).

200. Stephen Burgen, *U.S. Now Has More Spanish Speakers than Spain—Only Mexico Has More*, THE GUARDIAN (June 29, 2015), <https://www.theguardian.com/us-news/2015/jun/29/us-second-biggest-spanish-speaking-country>.

immigrants.<sup>201</sup> Additionally, because some Latinos may come from mixed-immigration status families or friendship circles, they may avoid police in an effort to protect their loved ones.<sup>202</sup>

History and social science<sup>203</sup> suggest black and brown flight is often more likely to stem from fear and self-preservation than from guilt. Because of high levels of racial profiling, as well as racially targeted police harassment and brutality, flight from police by people of color is often rational. Fleeing from the police in many African American, Latino, and Native American communities has arguably become the norm in some communities.<sup>204</sup> For many people of color, flight is a reflexive response to a police encounter on the street.<sup>205</sup> History and experience have

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201. César Cuauhtémoc García Hernández, *La Migra in the Mirror: Immigration Enforcement and Racial Profiling on the Texas Border*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 167, 194 (2009) ("Citizens of this country are also being detained by immigration officials; on occasion, they are even deported."); Anthony E. Mucchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, 8 HARV. LATINO L. REV. 1, 21 (2005) ("Conducting traffic stops of Latinos due to officers' preconceived notions about the immigrant status of motorists and passengers sends a strong message to legal Hispanic residents that they do not belong in this country.").

202. According to a 2008 study, fifty-seven percent of Hispanics reported that they were concerned that they themselves, a family member, or a close friend would be deported. Mark Hugo Lopez & Susan Minushkin, *Hispanics See Their Situation in U.S. Deteriorating; Oppose Key Immigration Enforcement Measures*, PEW RES. CTR. (Sept. 18, 2008), <http://www.pewhispanic.org/2008/09/18/2008-national-survey-of-latinos-hispanics-see-their-situation-in-us-deteriorating-oppose-key-immigration-enforcement-measures>.

203. See Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 751–52 (2000) (citing and discussing ELIOT SPITZER, THE NEW YORK CITY POLICE DEPARTMENT'S "STOP & FRISK" PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL (1999), [http://www.oag.state.ny.us/sites/default/files/pdfs/bureaus/civil\\_rights/stp\\_frsk.pdf](http://www.oag.state.ny.us/sites/default/files/pdfs/bureaus/civil_rights/stp_frsk.pdf)).

204. See *Illinois v. Wardlow*, 528 U.S. 119, 132–33 (2000) (Stevens, J., dissenting) ("Among some citizens, particularly minorities . . . there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous . . . . Moreover, these concerns and fears are known to the police officers themselves, and are validated by law enforcement investigations into their own practices."); Harris, *supra* note 187, at 680 ("Many African-American males can recount an instance in which police stopped and questioned them or someone they knew for no reason, even physically abusing or degrading them in the process.").

205. See Amy D. Ronner, *Fleeing While Black: The Fourth Amendment Apartheid*, 32 COLUM. HUM. RTS. L. REV. 383, 397 (2001) ("Such efforts to evade police are not evidence of guilt, but rather are reasonable (and perhaps reflex) reactions by a culture with a history of being victimized by the law enforcement regime.").

taught people of color that the police cannot be trusted and that avoiding them is usually the best option.<sup>206</sup> Parents of color teach their children about “safe” behavior around police, which may include “keep[ing] their hands visible[,] . . . ask[ing] permission to make any move with hands or body,” and, most salient here, running from them.<sup>207</sup>

### 3. Disparate Admissibility of Racialized Reality Evidence

In determining whether a defendant of color’s flight is probative of his or her guilt, a key assumption is often overlooked. It is presupposed that innocent people do not run from the police but instead voluntarily and readily submit to police questioning and detention. However, flight from authorities is probative of consciousness of guilt only if fleeing is abnormal. In other words, flight is relevant to prove guilt only if it deviates from the typical behavior of normal, reasonable people in the community. As explained above, in many African American, Latino, and Native American communities, flight is standard custom. Assuming that black and brown flight is atypical and thus deviant is not merely erroneous; it raises significant racial justice and evidentiary concerns.

The assumption that innocent people do not actively avoid or outright flee from the police and immigration authorities is based on white beliefs and norms. For multiple reasons, it is unsurprising that white society holds this belief. First, whites trust the police more than other racial groups.<sup>208</sup> This makes sense; whites are the group least likely to be racially profiled or

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206. See John Eligon, *Running from Police Is the Norm, Some in Baltimore Say*, N.Y. TIMES (May 10, 2015), <https://www.nytimes.com/2015/05/11/us/running-from-police-is-the-norm-some-in-baltimore-say.html>; Will Jawando, *What Makes Black Men Run from Police?*, ROOT (Aug. 27, 2015), <http://www.theroot.com/what-makes-black-men-run-from-the-police-1790860928>; Neeraja Viswanathan, *Why Black People Running from the Police Makes Perfect Sense*, IN THESE TIMES (Apr. 28, 2015), <http://inthesetimes.com/article/17882/why-black-people-running-from-the-police-makes-perfect-sense>.

207. Kai EL’Zabar, *Why Do Black Men Run from Police?*, CHI. DEFENDER (May 22, 2015), <https://chicagodefender.com/2015/05/22/why-do-black-men-run-from-police> (referencing a man who teaches his sons not to wear sandals so they are ready to run from the police if necessary).

208. Bruce Drake, *Divide Between Blacks and Whites on Police Runs Deep*, PEW RES. CTR. (Apr. 28, 2015), <http://www.pewresearch.org/fact-tank/2015/04/28/blacks-whites-police>; Mark Hugo Lopez & Gretchen Livingston, *Hispanics and the Criminal Justice System: Low Confidence, High Exposure*, PEW RES. CTR. (Apr. 7, 2009), <http://www.pewhispanic.org/2009/04/07/hispanics-and-the-criminal-justice-system>.

otherwise targeted because of their race.<sup>209</sup> Moreover, because police are over-representatively white in proportion to the general population, whites are more likely to share the same racial background as the police than any other group.<sup>210</sup> Most importantly, whites enjoy more preferential treatment from police officers than other racial groups; for instance, they are less likely to be victims of force by the police<sup>211</sup> or to be arrested for offenses even when they are statistically more likely to engage in the underlying prohibited conduct.<sup>212</sup> Because whites generally trust, identify with, and receive preferential treatment from the police, it is clear why white experiences, norms, and beliefs signal and conclude that people do not run from the police unless they are guilty.

It is important to recognize that in determining the admissibility of flight evidence, the presupposition that only the guilty run from law enforcement is not commonsense reasoning. It is a fact that must be proved by admissible evidence. In most cases, this would require a qualified expert or lay witness who could testify that flight from police is abnormal in the pertinent community. However, it is not the practice of trial judges to require this type of evidence because the assumption that flight is abnormal is white “racialized reality evidence.” Customarily, white racialized reality evidence receives “implicit ju-

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209. According to one study in Los Angeles, 37.6% more blacks and Latinos are stopped by the police than whites. Ian Ayres, *Racial Profiling in L.A.: The Numbers Don't Lie*, L.A. TIMES (Oct. 23, 2008), <http://articles.latimes.com/2008/oct/23/opinion/oe-ayres23>. Latinos who are stopped are forty-three percent more likely, and blacks who are stopped are 127% more likely, to be frisked than are whites who are stopped. *Id.*

210. On average, there are thirty percent more white police officers than white residents in the communities they serve. 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>. According to the most recent comprehensive data, minorities comprise only twenty-five percent of police forces. *Id.*

211. See *supra* notes 178–81.

212. We usually think about racial disparities in terms of minorities being statistically disadvantaged and ignore the parallel that whites statistically benefit. For example, according to one study, blacks make up 6.2% of marijuana users compared to whites who make up 84.6%, yet blacks constitute 36.4% of those arrested for marijuana possession. Cassia Spohn, *Race, Crime, and Punishment in the Twentieth and Twenty-First Centuries*, 44 CRIME & JUST. 49, 69 (2015). Similarly, blacks make up 15.6% of crack cocaine users, but they make up 63.1% of those arrested for its possession compared to 26.3% of whites. *Id.*



dicial notice.”<sup>213</sup> It is automatically admitted at trial without evidentiary scrutiny.

The conceptualization of racialized reality evidence is significant because it identifies a type of persuasive evidence that receives racially disparate admissibility treatment but is habitually overlooked by jurists and lawyers. By racialized reality evidence, I mean evidence of the lived experience of a person that is directly shaped by the racially stratified system in which he or she lives. Racialized reality is how one experiences our nation’s current racial caste system as a benefit or detriment. Racialization is not simply something experienced by racial minorities, with the racial majority living a raceless existence. As racism has a purpose of conferring a benefit on the privileged group or groups, racial privilege is always the corollary of racial subordination. And because racial differentiation and racism permeate every aspect of daily life,<sup>214</sup> there is rarely a race-neutral reality. Rather, people’s perception of the world around them depends largely on the position they occupy in society’s racial hierarchy. This is true equally for racially subordinated and racially privileged people.

Racialized reality is different from cultural perspective. Cultural perspective originates internally within a cultural group, while racialized reality is imposed by the external racial structure in which we live. The white belief and norm that fleeing from authorities is abnormal is not owed to whites being more trusting culturally, respectful of authority, or law-abiding than other groups; it is a product of the privileged racial status whites experience in the United States. The corresponding racialized reality of many African Americans and Latinos—i.e., that police cannot be trusted and may even be dangerous and should be avoided—similarly does not stem from their cultures. Instead, it is a direct result of a subordinated racial status and is the racialized reality of many African Americans and Latinos.

Evidence of racialized reality is not cultural evidence and should not be subject to the same distrust that cultural evidence receives. Cultural evidence is evidence of a person’s cultural customs or beliefs. It is most frequently offered by criminal defendants to eliminate or mitigate their intent (or *mens rea*) to commit the charged offense. For instance, in *New York*

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213. The concept of “implicit judicial notice” is explained *infra* Part III.A.

214. See DELGADO & STEFANCIC, *supra* note 36, at 7.

*v. Chen*,<sup>215</sup> a Chinese-born man charged with murdering his wife with a hammer called an expert witness to testify that his actions were a culturally normal reaction to learning that his wife committed adultery. Similarly, in *California v. Kimura*,<sup>216</sup> a Japanese-born woman offered evidence of the practice of parent-child suicide in Japan after her children died when she tried to drown herself and them in the ocean following her husband's admission of infidelity.<sup>217</sup> Cultural evidence has also been raised in rape cases where the defendant attempts to prove that, within his cultural context, he believed intercourse was consensual or otherwise culturally appropriate.<sup>218</sup>

The primary criticisms of cultural evidence are that it negatively stereotypes defendants' cultures and that it is used to oppress vulnerable populations, namely women and children.<sup>219</sup> Though cultural evidence may be used appropriately to contextualize minority perspectives and combat white normativity,<sup>220</sup> in its most high-profile use as a so-called "cultural defense," non-white cultures are "othered" and cast as barbaric and misogynistic.

In contrast, the theorization of racialized reality evidence is not based on cultural beliefs; it is evidence of how the racial caste system we live in affects people's daily lives and shapes their perspectives. The use of racialized reality evidence, therefore, does not stereotype anyone's culture.<sup>221</sup> Racial groups sub-

215. *People v. Chen*, No. 87-7774 (N.Y. Sup. Ct., Dec. 2, 1988).

216. *People v. Kimura*, No. A-091133 (L.A. Super. Ct. Nov. 21, 1985).

217. *Id.*

218. *People v. Moua*, No. 315972-0 (Fresno Cnty. Super. Ct., Feb. 7, 1985) (citing that defendant claimed that his kidnapping and forced intercourse with a Lao woman he planned to marry was consistent with the Hmong practice of "xij poj niam," or marriage-by-capture); see Janet C. Hoeffel, *Deconstructing the Cultural Evidence Debate*, 17 U. FLA. J.L. & PUB. POL'Y 303, 315 n.69, 316 n.76 (2006) (discussing *People v. Moua* and two other cases in which Hmong defendants used cultural evidence to attempt to mitigate their crimes).

219. Hoeffel, *supra* note 218, at 304.

220. See discussion *infra* Part III.B; see also Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36, 36 (1995) ("Multiculturalists . . . advocate use of cultural information to counteract the injustice of applying the dominant culture's legal standards to defendants from other cultures.").

221. As in other critical race theory endeavors, it is important to avoid racial essentialism in the theorization of racialized reality evidence. Racial essentialism is "the belief that there is a monolithic 'Black Experience,' or 'Chicano Experience.'" Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588 (1990). Rather, we should be vigilant in rec-

ordinated by structural racism are not considered inherently weak or maladjusted, and racial groups benefitting from structural racism are not seen as intrinsically intolerant or oppressive. Rather than pointing a finger at an internal cultural cause, racialized reality evidence recognizes structural racism as an external cause of distrust and a hindrance to communities of color, as well as a source of attitudes of entitlement and superiority by the racial majority. This approach emphasizes and blames the unjust system of structural racism that we live under and looks accordingly to systemic reform rather than focusing on individual prejudice.

The presumption that fleeing from authorities is abnormal and deviant is evidence of white racialized reality and raises white normativity and transparency concerns. As mentioned previously, white normativity and transparency are the phenomena where one's whiteness is overlooked because it is the societal norm or standard-bearer, compared to other races.<sup>222</sup> It is a problem in the criminal justice system when we consider only evidence from a "white" perspective, such as flight indicating guilt, because most judges, attorneys, and jurors do not realize that this is white racialized reality evidence that places non-whites, whose experiences differ, at a direct disadvantage.

#### 4. Relevance and Probative Value of Black and Brown Flight

In addition to racial justice concerns, black and brown flight raises evidentiary—specifically, relevance and prejudice—concerns. In instances where a defendant of color's flight was a reaction to systemic racism rather than a consciousness of guilt, evidence of flight would not be relevant without proof that fleeing from the police is abnormal. Further, even if the flight evidence was relevant, its probative value is particularly low and could be substantially outweighed by the risk of unfair prejudice, thereby rendering it inadmissible.<sup>223</sup>

The introduction of black and brown flight as evidence of guilt presents a conditional relevance problem. Federal Rule of Evidence 104(b) governs conditional relevance and states that "[w]hen the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding

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ognizing intersectionality in peoples' experiences. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

222. See *supra* notes 53–55 and accompanying text.

223. See FED. R. EVID. 403.

that the fact does exist.”<sup>224</sup> Though the phrasing of Rule 104(b) is opaque, the basic logic behind it is clear. Consider a simple hypothetical: A wife is on trial for the murder of her spouse’s mistress. The prosecution seeks to introduce evidence that the spouse was having an affair with the victim to show a motive of jealousy. Evidence of the affair is only relevant to prove jealousy if the wife knew about the affair. The wife’s knowledge of the affair is a preliminary fact that needs to be proven at trial for evidence of the affair to be relevant. A piece of evidence (the affair) is deemed conditionally relevant if its relevance is conditioned upon proof of a predicate fact (the wife’s knowledge of the affair).<sup>225</sup> If the proponent of the evidence cannot prove the predicate fact with admissible evidence, the conditionally relevant evidence is inadmissible.<sup>226</sup>

In the case of black or brown flight, the relevance of a defendant’s flight depends on the prosecution proving that flight is atypical. The abnormality of flight is a preliminary fact that must be proven to make the proffered evidence of flight relevant. The prosecution has the burden of proving this predicate fact. If the prosecution cannot supply sufficient admissible evidence to support the abnormality of flight in the pertinent community or instance, the flight evidence is irrelevant and should not be admitted. However, in practice, since the predicate fact that flight is abnormal is white racialized reality evidence, courts do not require it to be formally introduced in the form of actual evidence that receives scrutiny. Instead, the predicate fact receives implicit judicial notice.

Judicial notice is an evidentiary doctrine under which judges may recognize and admit a fact into evidence because it is too well-known or authoritative to be disputed. Federal Rule of Evidence 201(b) provides that a “court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources

224. FED. R. EVID. 104(b).

225. FED. R. EVID. 104(b) advisory committee’s note.

226. 2 JONES ON EVIDENCE § 11:19 (7th ed. 2016); *see also* Huddleston v. United States, 485 U.S. 681 (1988) (holding a predicate fact is sufficiently established if there is adequate evidence for a reasonable jury to find by a preponderance of the evidence that the fact exists); Dale A. Nance, *Conditional Relevance Reinterpreted*, 70 B.U. L. REV. 447, 450 (1990) (“The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted.”).

whose accuracy cannot reasonably be questioned.”<sup>227</sup> A court “may take judicial notice on its own; or . . . must take judicial notice if a party requests it and the court is supplied with the necessary information.”<sup>228</sup> The concept of “*implicit* judicial notice,” shows how evidence of white racialized reality is admitted into evidence without substantive proof. Due to white normativity, the predicate fact of the abnormality of flight is deemed outside the realm of reasonable dispute because it is readily, but incorrectly, assumed to be true from white experience and beliefs. Whiteness itself becomes an authority whose accuracy is not questioned.

This type of implicit judicial notice is improper. Evidence should not be admitted automatically simply because it reflects white norms. Defense counsel should object, and the evidence should be barred by the court. However, due to white normativity and transparency, opposing counsel fails to raise proper relevancy objections or provide counterevidence of their clients’ racialized realities.<sup>229</sup> This is a disservice to defendants and parties of color. In our example of flight, defense counsel should assert a relevance objection which, if successful, would place the burden on the government to submit evidence (such as expert witness testimony) that flight is abnormal in the given case. Further, even if black or brown flight is relevant, its probative value of proving guilt is remarkably low. Recently, in *Commonwealth v. Warren*, a ground-breaking opinion determining whether an investigatory stop was justified by reasonable suspicion, the Supreme Judicial Court of Massachusetts found:

[F]light is not necessarily probative of a suspect’s state of mind or consciousness of guilt. Rather, the finding that black males in Boston are disproportionately and repeatedly targeted for [field interrogation observation] encounters suggests a reason for flight totally unrelated to consciousness of guilt. Such an individual, when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity.<sup>230</sup>

Federal Rule of Evidence 403 and equivocal state rules provide that “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair

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227. FED. R. EVID. 201(b).

228. FED. R. EVID. 201(c).

229. For further discussion of objections, see *infra* Part III.

230. *Commonwealth v. Warren*, 58 N.E.3d 333, 342 (Mass. 2016).

prejudice.”<sup>231</sup> Here, the low probative value of black and brown flight is substantially outweighed by the danger of racialized white normative views that only the guilty run from police, as well as prejudicial barriers to introducing counterevidence of minority racialized reality.

##### 5. Barriers to Minority Racialized Reality Evidence

Not only does white racialized reality evidence habitually receive implicit judicial notice without objection from opposing counsel, defendants of color face prejudicial barriers to introducing counterevidence of their own racialized reality. Defendants of color could most readily explain their racialized reality by taking the stand to speak about their personal experience. But this action might expose them to Rule 609 prior-conviction impeachment, a rule with a pronounced racially disparate impact.<sup>232</sup> Hence, it is likely that some defendants of color will not want to take the stand to explain their reason for fleeing.

Another option would be to call a competent lay witness from the defendant’s community to speak about minority flight. Such testimony could be considered by the judge pursuant to Federal Rule of Evidence 104(a)<sup>233</sup> to determine whether evidence of flight should be submitted to the jury or the witness could testify at trial to rebut the prosecution’s evidence that flight is probative of guilt. However, if the lay witness testified at trial, it is likely such testimony would be met with an improper lay opinion objection. But as I explain below, this type of lay opinion should be admissible under Federal Rule of Evidence 701.<sup>234</sup> Other times, the defense might consider a defendant’s or lay-opinion-witness’s explanation insufficiently persuasive or effective. In either circumstance, an expert witness would be needed to present evidence of the racialized reality of people of color from the defendant’s community. Obtaining such an expert witness is, however, hindered by the considerable obstacle of cost.

231. FED. R. EVID. 403.

232. See *supra* notes 153–60 and accompanying text.

233. FED. R. EVID. 104(a) (“The court must decide any preliminary question about whether . . . evidence is admissible.”). Here the trial judge could consider lay opinion about flight in defendant’s community to determine whether the *Myers* factors were met. See *United States v. Myers*, 550 F.2d 1035, 1049 (5th Cir. 1977); BROWN ET AL., *supra* note 148.

234. See *infra* text accompanying notes 345–55.

In most cases, securing an expert witness is prohibitively expensive for a criminal defendant. The average hourly fee for expert witness testimony is \$488, or \$322 for nonmedical expert testimony.<sup>235</sup> Because racial minorities are disproportionately indigent,<sup>236</sup> many defendants of color are represented by a public defender. Expert witnesses are typically paid through the public defenders' budgets,<sup>237</sup> but these budgets are generally too small to acquire expert witnesses for the volume of cases public defenders handle.<sup>238</sup> The Bureau of Justice Assistance found that third-party expenses, like expert-witness fees, are one of the "main financial barriers to effective access to the trial court."<sup>239</sup> Thus, it is likely that an indigent minority defendant would not be able to afford an expert witness to testify about the racialized reality of people of color in his or her community. Further, because there is a lack of racial diversity among qualified expert witnesses, it is likely that a defendant of color could only submit evidence of his racialized reality through a white or other "insider" voices.<sup>240</sup>

235. Joe O'Neill, *Expert Witness Fees: An Infographic*, EXPERT INST. (Sept. 23, 2016), <https://www.theexpertinstitute.com/expert-witness-fees>. The average hourly fee for case review is \$351 and \$459 per hour for a deposition. *Id.*

236. In 2012, 9.7% of non-Hispanic whites were living in poverty, compared to 27.2% of blacks and 25.6% of Hispanics. U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2012, at 13–15 (2013), <https://www.census.gov/prod/2013pubs/p60-245.pdf>.

237. See CAROL J. DEFRAANCES & MARIKA F. X. LITRAS, U.S. DEP'T OF JUST., INDIGENT DEFENSE SERVICES IN LARGE COUNTIES, 1999, at 4 (2000), <http://www.bjs.gov/content/pub/pdf/idslc99.pdf> ("Eighty percent or more of the public defender programs indicated their expenditures included funding for expert, investigator, interpreter, and transcript services.").

238. Rita A. Fry, Gideon at Forty: *The Promise Comes with a Price Tag*, NLADA CORNERSTONE, Winter 2002–03, at 2 ("Indigent defense needs increased funding to keep pace with the prosecution's use of technical evidence.").

239. NAT'L CTR. FOR STATE COURTS, U.S. DEP'T OF JUSTICE, TRIAL COURT PERFORMANCE STANDARDS WITH COMMENTARY 1, 9 (1997), <https://www.ncjrs.gov/pdffiles1/161570.pdf>.

240. Because the qualifications to serve as an expert witness do not depend on a certain amount of experience or the possession of a particular degree, it is difficult to obtain an accurate set of demographic data for race of expert witnesses. See, e.g., *Santana Marine Serv., Inc. v. McHale*, 346 F.2d 147, 148 (5th Cir. 1965). It is safe to say that Ph.D.-holders are certainly qualified to serve as expert witnesses in their fields, so we can consider racial breakdowns of Ph.D.-holders to be relevant in trying to ascertain the racial breakdowns of expert witnesses. According to one study of Ph.D. completion over twelve academic years between 1992 and 2004, six percent of individuals working on a Ph.D. were black and three-to-four percent were Hispanic. COUNCIL OF GRADUATE SCH., PH.D. COMPLETION AND ATTRITION: ANALYSIS OF BASELINE DE-

## C. CROSS-RACIAL WITNESS IDENTIFICATIONS AND BIAS

In the summer of 1984, a black man raped Jennifer Thompson, a white college student.<sup>241</sup> Driven by a tenacious will to survive, Thompson remained focused during the assault and memorized her attacker's face, body, and voice.<sup>242</sup> She escaped, gave the police a detailed description of her attacker, and later identified Ronald Cotton as her rapist in a photo array, lineup, and at trial.<sup>243</sup> Thompson was convinced she had found her rapist; so was the jury.<sup>244</sup> Cotton spent nearly eleven years in prison, until DNA evidence revealed that he was innocent and another man was guilty of this and similar sexual assaults.<sup>245</sup> This story is remarkable, but not because a white witness misidentified a black man. Sadly, cross-racial identification errors are so commonplace that they cannot be considered unusual or exceptional.<sup>246</sup> The story is remarkable because, with grace and mercy, Cotton forgave his accuser; they became good friends, wrote a book together,<sup>247</sup> and now speak publicly about the shortcomings of eyewitness testimony.<sup>248</sup>

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MOGRAPHIC DATA FROM THE PH.D. COMPLETION PROJECT, EXECUTIVE SUMMARY 1, 1 (2008), [http://www.phdcompletion.org/information/executive\\_summary\\_demographics\\_book\\_ii.pdf](http://www.phdcompletion.org/information/executive_summary_demographics_book_ii.pdf). A more recent study shows a slight increase in minority Ph.D.-holders, reporting that blacks made up 7.4% and Hispanics comprise 5.8% of Ph.D.-holders in the 2009–10 academic year. *Doctor's Degrees Conferred by Postsecondary Institutions, by Race/Ethnicity and Sex of Student: Selected Years, 1976–77 Through 2014–15*, NAT'L CTR. FOR EDUC. STATS., [https://nces.ed.gov/programs/digest/d16/tables/dt16\\_324.20.asp](https://nces.ed.gov/programs/digest/d16/tables/dt16_324.20.asp) (last visited Apr. 20, 2017). Generally, these statistics reflect a lack of diversity among Ph.D.-holders, which may negatively affect the pool of minority experts available for a defendant seeking to introduce racialized reality evidence.

241. Cynthia E. Jones, *"I Am Ronald Cotton": Teaching Wrongful Convictions in a Criminal Law Class*, 10 OHIO ST. J. CRIM. L. 609, 609 (2013) (citing the documentary *What Jennifer Saw* (PBS television broadcast Feb. 25, 1997), <http://www.pbs.org/wgbh/pages/frontline/shows/dna/interviews/-thompson.html>).

242. *What Jennifer Saw*, *supra* note 241.

243. Jones, *supra* note 241.

244. *What Jennifer Saw*, *supra* note 241.

245. *Id.*

246. See, e.g., Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 935–36 (1984) (discussing the unjust conviction of William Jackson, an innocent black man, for rape on the basis of an incorrect cross-racial identification, and the fact that this was "neither a unique occurrence nor random misfortune").

247. JENNIFER THOMPSON-CANNINO & RONALD COTTON, *PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION* (2009).

248. *Id.* at 278–81; Jones, *supra* note 241, at 609 n.1.



Cross-racial witness identifications are another example of the dual-race evidentiary system. The relative ease of entering cross-racial identifications by white witnesses into evidence stands in stark contrast to the weighty barriers imposed upon defendants of color when they attempt to counter this evidence with well established social science that challenges the reliability of, and reveals the racial bias embedded in, such identifications.

Witness identifications are an especially important kind of evidence to submit to a critical race analysis because they are particularly determinative in finding guilt and considered so reliable that they are afforded hearsay exemption status.<sup>249</sup> Witness identifications are among the most influential items of evidence that jurors rely upon in determining if a defendant is guilty of a crime. Overwhelming research demonstrates that jurors tend to believe eyewitness testimony above all else, even in the face of significant doubt.<sup>250</sup> The persuasiveness of eyewitness identifications is compounded when the eyewitness is white because of the racial character evidence of whiteness, where white witnesses are deemed more credible and trustworthy than people of other races.<sup>251</sup> The accuracy and reliability of eyewitness identifications are, therefore, paramount. Scholars have frequently recognized that eyewitness identifications can

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249. If a “declarant testifies and is subject to cross-examination about a prior statement, and the statement . . . identifies a person as someone the declarant perceived earlier” the statement is deemed non-hearsay. FED. R. EVID. 801(d)(1).

250. See, e.g., *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (“[T]here is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says ‘That’s the one!’” (citations omitted) (quoting E. LOFTUS, *EYEWITNESS TESTIMONY* 19 (1979))); *Manson v. Brathwaite*, 432 U.S. 98, 120 (1977) (Marshall, J., dissenting) (“[J]uries unfortunately are often unduly receptive to [identification] . . . evidence . . . .”); Hon. D. Duff McKee, *Challenge to Eyewitness Identification Through Expert Testimony*, in *AMERICAN JURISPRUDENCE PROOF OF FACTS* 1, 8§ (3d ed. 1996) (“Eyewitness testimony may be the least reliable, and yet the most compelling.”); NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 194 (2007) (“Judges and legal scholars have recognized . . . for over a century . . . that jurors frequently accord eyewitness identification [evidence] too much weight.”).

251. See *supra* Part II.A.

be unreliable.<sup>252</sup> However, cross-racial identifications are particularly untrustworthy.<sup>253</sup>

Cross-racial identification is the process by which an eyewitness of one race identifies a criminal suspect of another race.<sup>254</sup> In criminal investigations where the offender's identity is at issue, typically an eyewitness is asked to make a pretrial identification of an apprehended suspect through a lineup, showup, or photo array.<sup>255</sup> After a positive identification, the suspect is charged and brought to trial, where the eyewitness can provide an in-court identification.<sup>256</sup> The prosecution can also have the eyewitness testify about the prior identification or call a third party present at the prior identification procedure to testify about the pretrial identification.<sup>257</sup> A witness's in-court statement about her pretrial identification meets the basic definition of hearsay, as it is an out-of-court statement offered for its truth.<sup>258</sup>

However, a declarant-witness's prior statement identifying the defendant as someone previously perceived or identified by the witness is generally exempted from the hearsay rule and admissible at trial.<sup>259</sup> Though they are hearsay within the definition of Federal Rule of Evidence 801(c), prior identifications are deemed more reliable than in-court identifications because the prior identification occurred closer to the event in question and is still fresh in the witness's mind.<sup>260</sup> Additionally, prior identifications are less likely to be the product of an improper influence, like a bribe, threat, or pressure to identify the defendant in the courtroom as the guilty party.<sup>261</sup>

252. Taki V. Flevaris & Ellie F. Chapman, *Cross-Racial Misidentification: A Call to Action in Washington State and Beyond*, 38 SEATTLE U. L. REV. 861, 866–67 (2015).

253. *Id.* at 870–71.

254. See John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207, 211 (2001).

255. James Lang, Note, *Hearsay and Relevancy Obstacles to the Admission of Composite Sketches in Criminal Trials*, 64 B.U. L. REV. 1101, 1101 (1984).

256. *Id.*

257. *Id.*; Gilbert M. Rein, “That’s the Guy!”: *Federal Rule of Evidence 801(d)(1)(C) and Out-of-Court Statements of Identification*, 34 CARDOZO L. REV. 1539, 1543–44 (2013).

258. FED. R. EVID. 801(c).

259. FED. R. EVID. 801(d)(1)(C).

260. 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 801.23 (Mark S. Brodin ed., 2d ed. 2016).

261. *Id.*

Cross-race bias (also referred to as other-race effect, other-race bias, or own-race bias) is the inability of people to accurately recognize and identify people of other races.<sup>262</sup> Considerable research demonstrates that most people tend to have a cross-race bias; witnesses can fairly accurately identify members of their own race, but they are considerably impaired when identifying members of another race.<sup>263</sup> Cross-race bias has been documented to affect whites more than blacks.<sup>264</sup> In other words, white witnesses are particularly unable to identify non-white people accurately, while blacks are much more adept at identifying white suspects.<sup>265</sup> This was the case for Jennifer Thompson. She believes that cross-race bias played a role in her misidentification of Cotton as her rapist.<sup>266</sup> Even today, she courageously admits, “[b]ecause of my public speaking, I’m now in contact with more races than most white women I know, . . . but I don’t think my ability to discriminate among black faces has gotten any better.”<sup>267</sup>

CRT invites us to question why white witnesses are the group least likely to identify people of other races accurately. There is no indication that white people are less observant, thoughtful, able to remember details, or physically or intellectually unable to observe, perceive, and recall physical features and other identifying details. Rather, science shows that people of color, especially blacks, actually look the same to white people. “All you people look the same” is a well-known racial epi-

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262. BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 104 (1995), <https://www.ncjrs.gov/pdffiles1/Digitization/159775NCJRS.pdf>; Gary L. Wells & Elizabeth A. Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 PSYCHOL. PUB. POL’Y & L. 230, 230 (2001).

263. CUTLER & PENROD, *supra* note 262; Rutledge, *supra* note 254, at 104.

264. See, e.g., Johnson, *supra* note 246, at 939–41; Rutledge, *supra* note 254, at 211. Four studies found that black eyewitnesses do not have impairment when cross-racially identifying, as they identified white and black subjects with the same degree of accuracy. Johnson, *supra* note 246, at 940. However, five more studies found that black eyewitnesses do experience some cross-race bias. *Id.*

265. See, e.g., Johnson, *supra* note 246, at 939–41; Rutledge, *supra* note 254, at 211.

266. Mark Roth, *Looking Across the Racial Divide: How Eyewitness Testimony Can Cause Problems*, PITT. POST-GAZETTE (Dec. 26, 2010), <http://www.post-gazette.com/news/science/2010/12/26/Looking-across-the-racial-divide-How-eyewitness-testimony-can-cause-problems/stories/201012260195>.

267. *Id.*

thet. It appears that this racialized phenomenon actually can be proved through science.<sup>268</sup>

Psychologists generally attribute cross-race bias to two causes: racial segregation and automatic categorization of out-group members.<sup>269</sup> “Perceptual-expertise models of the [cross]-race bias suggest that low levels of contact with different-race faces result in a lack of expertise in the perceptual encoding of these faces, and it is this poor encoding that leads to worse recognition of different-race faces compared to same-race faces.”<sup>270</sup> “[T]he social-categorization models of the [cross]-race bias suggest that, because of reduced levels of contact with different-race faces, [people] have learned to categorize different-race individuals as out-group members, and thus to pay attention only to shared, group-level features when encoding their faces.”<sup>271</sup> Thus, due to widespread racial isolation in places of residence, schools, and life generally, people are unable to distinguish racial outsiders accurately and find that members of a racial group look the same.

Some have interpreted the social-psychology explanation behind cross-race bias as proof that this bias is not racist. “It is not bias or bigotry . . . that makes it difficult for people to distinguish between people of another race. It is the lack of early and meaningful exposure to other groups.”<sup>272</sup> This explanation may negate conscious racial bias, but it ignores unconscious racial bias and how structural racism works as a system to subordinate people of color.

Whites are the most segregated race of any racial group.<sup>273</sup> It is, therefore, not surprising that they are the group most

268. See Siri Carpenter, *Why Do ‘They All Look Alike’?*, 31 MONITOR ON PSYCHOL., Dec. 2000, at 44.

269. Kirin F. Hilliar et al., *Now Everyone Looks the Same: Alcohol Intoxication Reduces the Own-Race Bias in Face Recognition*, 34 LAW & HUM. BEHAV. 367, 368–69 (2010).

270. *Id.* at 368.

271. *Id.* at 369.

272. Rachel L. Swarns, *The Science Behind ‘They All Look Alike to Me,’* N.Y. TIMES (Sept. 20, 2015), <https://www.nytimes.com/2015/09/20/nyregion/the-science-behind-they-all-look-alike-to-me.html>.

273. White social networks are ninety-one percent white, and only one percent black and one percent Hispanic. Remarkably, seventy-five percent of whites have entirely white social networks. In contrast, black Americans’ social-network racial homogeneity is lower at sixty-five percent, and Hispanics’ is even lower at forty-six percent. Robert P. Jones, *Self-Segregation: Why It’s So Hard for Whites To Understand Ferguson*, THE ATLANTIC (Aug. 21, 2014), <https://www.theatlantic.com/national/archive/2014/08/self-segregation-why-its>

likely to have cross-race bias. However, this is only half the story. Racist laws, policies, and personal preferences have caused racial isolation. Factors contributing to today's racial isolation for whites include racial segregation in schools, racial redlining in housing, "white flight," racial discrimination in employment, and personal choices about which races to socialize with and marry.<sup>274</sup> It may be true that the cross-race bias effect stems from a lack of familiarity with different races, but it should be recognized that this is a result of racial preference. Throughout United States history, whites as a group have consistently chosen to isolate themselves racially and collectively received benefits from doing so, ensuring that they have the greatest access to superior schools, housing, employment, and financial and social capital.<sup>275</sup>

In addition to racial segregation, psychologists tell us that cross-race bias is caused by the automatic categorization of out-group members.<sup>276</sup> CRT scholarship on the social construction of race and purpose of racial differentiation provide insights into the cause of this phenomenon.<sup>277</sup> Racial classifications are a product of society, not biology, science, or natural classification.<sup>278</sup> From an early age, children learn markers of racial assignment—skin color, hair texture, and certain facial features—and classify people based upon these physical attributes.<sup>279</sup> Socially constructed racial differences have taken center stage for how people recognize each other. Rather than seeing different-race persons as unique individuals, they are viewed first and foremost through their out-group race assignment.

The social construction of race does not end at categorizing people; it also imposes moral and character traits on racial

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-hard-for-whites-to-understand-ferguson/378928.

274. See generally George C. Galster, *Polarization, Place, and Race*, 71 N.C. L. REV. 1421 (1993) (referencing relative socioeconomic class, employment opportunities, poor public education systems, and centralized housing in metropolitan areas to explain the segregation of black neighborhoods in U.S. cities).

275. See generally Mark Beaulieu & Tracey Continelli, *Benefits of Segregation for White Communities: A Review of the Literature and Directions for Future Research*, 15 J. AFR. AM. STUD. 487 (2011).

276. Hilliar et al., *supra* note 269.

277. See Haney López, *supra* note 44, at 27–28; see also *supra* Part I.B.2.

278. Haney López, *supra* note 44, at 11–14, 27–28, 56 n.209.

279. See generally DEBRA VAN AUSDALE & JOE R. FEAGIN, *THE FIRST R: HOW CHILDREN LEARN RACE AND RACISM* (2001).

groups.<sup>280</sup> Thus, complexion, hair texture, and facial characteristics attached with blackness become associated with untrustworthiness and criminality.<sup>281</sup> Similarly, linguistic and cultural attributes are racialized and assigned character traits.<sup>282</sup> Speaking Spanish or having a Hispanic accent become racial identifiers to characterize a person as Latino.<sup>283</sup> Those same traits are then associated with qualities like being uneducated, dirty, and prone to violence.<sup>284</sup> It should come as no surprise, then, that when a witness—particularly a white witness—perceives a person of color, he or she often does not look closer to discern the individual’s extensive unique features.<sup>285</sup> This leads to misidentifications. Further, there is a risk that the witness will impose negative assumptions about the race he or she perceives: not only do “they” all look the same, “they” all look like criminals and wrongdoers. This contributes further to misidentifications because innocent people of color who happen to be near the scene of a crime are often mistakenly assumed to be the culprits.

Cross-race bias places black, Latino, and other defendants of color at a distinct disadvantage in the courtroom. The United States criminal justice system is plagued with a long history of minorities being wrongfully convicted, particularly based on misidentification. According to the Innocence Project, sixty-two percent of the 349 individuals who received post-conviction DNA exonerations in the United States since 1989 were black, and seven percent were Latino.<sup>286</sup> The Innocence

280. IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 14–17 (1996).

281. Jasmine B. Gonzales Rose, *Race Inequity Fifty Years Later: Language Rights Under the Civil Rights Act of 1964*, 6 ALA. C.R. & C.L. L. REV. 167, 173 (2014).

282. *Id.*

283. *Id.*

284. *Id.* at 172–73.

285. See Harvey Gee, *Eyewitness Testimony and Cross-Racial Identification*, 35 NEW ENG. L. REV. 835, 838 n.16 (2001) (reviewing ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* (Harvard Univ. Press 1996) (1979)) (“[W]ith regard to white recognition of African American faces, the researchers noted that whites tended to ‘deploy their attention more widely over black faces,’ and did not focus on features that would be probative of identification of a particular African-American face.”) (citing Hadyn D. Ellis et al., *Descriptions of White and Black Faces by White and Black Subjects*, 10 INT’L J. PSYCHOL. 119, 122–23 (1975)).

286. *DNA Exonerations in the United States*, INNOCENCE PROJECT, <http://www.innocenceproject.org/dna-exonerations-in-the-united-states> (last visited Apr. 20, 2017).

Project has further discovered that eyewitness misidentification testimony is the leading cause of the wrongful convictions, with seventy-one percent of the exonerated cases involving incorrect identifications, of which at least forty-two percent of the eyewitnesses were of a different race than the defendant.<sup>287</sup> The risk of cross-race misidentification is greatest where the victim is white and the defendant is black.<sup>288</sup> Despite this fact, studies suggest that white witnesses are generally perceived as more reliable than black witnesses.<sup>289</sup> This is another context in which racial character evidence harms defendants of color.

The unreliability of cross-racial witness identifications also implicates hearsay rules. A witness's testimony about his or her own prior statement is generally inadmissible hearsay, but identification of a person the witness perceived earlier is considered exempt from the hearsay rule.<sup>290</sup> Prior identification statements are permitted because of their assumed accuracy, reliability, and necessity.<sup>291</sup> When jurors are blinded by implicit racial preferences and automatically believe white witnesses in instances of cross-racial identification, notwithstanding that they are statistically the most untrustworthy racialized group to give such testimony, the evidence becomes unreliable. This subverts the intention and policy of the hearsay exemption. If a white witness were to testify that "all blacks look alike," the statement would greatly diminish the weight of the testimony<sup>292</sup> because it would demonstrate acute risks of unreliability and bias. Though witnesses generally do not make these overt statements, this is the reality behind many cross-race identifications. The dangers posed by cross-race bias need to be revealed at trial.

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287. *Id.* It is worth noting that many more than forty-two percent of the identifications were cross-racial, as the Innocence Project is limited in the race data available for eyewitnesses. *Id.*

288. Gee, *supra* note 285, at 840.

289. Siegfried Ludwig Sporer, *The Cross-Race Effect*, 7 PSYCHOL. PUB. POL'Y & L. 170, 192 (2001).

290. FED. R. EVID. 801(d)(1)(C).

291. Stephen A. Saltzburg, *Rethinking the Rationale(s) for Hearsay Exceptions*, 84 FORDHAM L. REV. 1485, 1488 (2016) (explaining that the three rationales for the hearsay exceptions are reliability, necessity, and adequate foundation).

292. See *People v. Bayless*, 425 N.E.2d 1192, 1195 (Ill. App. Ct. 1981) ("In like manner the victim's statement to a defense counsel investigator that all blacks look alike to him . . . goes to the weight of his testimony.").

Cross-race bias is often unconscious and not understood by lay persons on the jury.<sup>293</sup> One of the most effective ways to combat the failings of cross-racial eyewitness identification is through expert-witness testimony about its shortcomings, so the jury can better assign the appropriate weight to such evidence.<sup>294</sup> However, courts have been inconsistent in allowing expert witnesses to testify about cross-race bias.<sup>295</sup> Moreover, similar to our discussion of flight, even when expert testimony is permitted, the cost is prohibitive to most low-income defendants who are represented by a public defender.<sup>296</sup>

Eyewitness testimony is often flawed, but when the defendant and the eyewitness are of the same race, these flaws are less likely to result in a wrongful conviction.<sup>297</sup> When the defendant is a person of color and the witness is white, however, the evidentiary rules supporting eyewitness identifications as accurate create a distinct disadvantage for the defendant. Unless juries and judges are aware of cross-race bias, people of color will continue to be wrongfully convicted as a result of inaccurate cross-racial identifications.

293. Flevaris & Chapman, *supra* note 252, at 871 (“[R]esearch shows that most jurors are either misinformed about, or unaware of, the distinct inaccuracy of cross-racial identification . . .” (citing Tanja Rapus Benton et al., *Eyewitness Memory Is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 APPLIED COGNITIVE PSYCHOL. 115, 125 (2006))).

294. See generally *United States v. Smithers*, 212 F.3d 306 (6th Cir. 2000) (providing a detailed history about how the use of expert witnesses has changed over four decades); Shirley K. Duffy, *Using an Expert To Evaluate Eyewitness Identification Evidence*, 83 N.Y. ST. B.J. 41 (2011); William David Gross, *The Unfortunate Faith: A Solution to the Unwarranted Reliance Upon Eyewitness Testimony*, 5 TEX. WESLEYAN L. REV. 307 (1999).

295. Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2006 FED. CTS. L. REV. 3, 39 (2006) (noting that while the overwhelming majority of courts exclude this kind of expert testimony, the reasons cited for doing so are very inconsistent, including that it would usurp the jury’s role as the determiner of credibility, the testimony would not assist the trier of fact, it would mislead the jury, and in conjunction with jury instructions it would address the substance of the proffered testimony).

296. See *supra* notes 235–239 and accompanying text. As previously discussed, the expense factor makes it unlikely that an indigent minority defendant would be able to bring in an expert witness to discuss the unreliability of cross-racial identifications.

297. Flevaris & Chapman, *supra* note 252, at 866–67.



### III. A CRITICAL RACE RECONSTRUCTION OF EVIDENCE LAW

Having explored examples of the modern-day dual-race evidentiary system, the final Part of this Article examines its structural causes and effects, and then provides initial suggestions for reform. Section A compares the twenty-first century and eighteenth-to-nineteenth century dual-race evidentiary systems. It identifies a similar root cause: white superiority and normativity. Currently, assumptions about white superiority and normativity mean that implicit judicial notice is taken of white racialized reality evidence without any request by its proponent, objection by the opponent, or evidentiary scrutiny by the court. The dual-race system of evidence benefits whites collectively and harms people of color.

Section B explores how critical race evidentiary analysis can help judges be impartial and fair in their admissibility determinations and can prepare litigators to effectively identify and object to racial inequity. One of the most important objections is found in Federal Rule of Evidence 403, and its state counterparts, which can be raised when prejudice substantially outweighs the probative value of a piece of evidence. This Section advances a new interpretation of Rule 403 which would recognize racism, in its explicit and implicit manifestations, as prejudice within the meaning of the rule. It further advocates for evidentiary pathways to be made for people of color to share their racialized experiences and expose systemic racism at trial.

#### A. STRUCTURAL CAUSES AND EFFECTS OF THE DUAL-RACE SYSTEM

A century-and-a-half ago, the United States Supreme Court heard a horrific murder case hinging on the ability of people of color to testify as witnesses.<sup>298</sup> Prompted by nothing but racial hatred, two white men brutally murdered multiple generations of an African American family, including a ninety-year-old blind grandmother.<sup>299</sup> Because the crime occurred while the family slept in their cabin, the only witnesses were family members—all of whom were black.<sup>300</sup> The offenders' convictions depended on the testimony of two witnesses, including

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298. *Blyew v. United States*, 80 U.S. 581 (1871).

299. *Id.* at 585, 589.

300. *Id.* at 584–85.

a dying declaration by one of the victims, which identified the defendants as the perpetrators.<sup>301</sup> However, the governing state of Kentucky had a statute that dictated: “[A] slave, negro, or Indian, shall be a competent witness in the case of the commonwealth for or against a slave, negro, or Indian, or in a civil case to which only negroes or Indians are parties, *but in no other case.*”<sup>302</sup> Thus, the sole eyewitnesses were deemed incompetent to testify and the convictions were in error, so the murderers went free.<sup>303</sup>

Today, the idea that a person could be overtly prevented from testifying solely on the basis of his or her race is abhorrent. Our evidence laws are free of any direct reference to race. However, even now certain types of evidence receive racially disparate admissibility treatment. Evidence of white racialized reality is fast-tracked to the jury without evidentiary scrutiny or objection; while evidence of the racialized reality of people of color is subject to arduous evidentiary hurdles. Reminiscent of the former race-based witness competency rules, there is still a racial-silencing effect when it comes to people of color testifying or otherwise introducing evidence about their experiences of systemic racism.

Admittedly, the twenty-first century dual-race evidentiary system is different from that of the eighteenth and nineteenth centuries in several respects. The old rules were delineated in statutes or judicial decrees and explicitly barred particular racial groups from testifying against whites.<sup>304</sup> Today, there are no explicit race-based witness competency rules, which is not surprising since such explicit disparate treatment would not pass constitutional scrutiny.<sup>305</sup> However, both systems are fundamentally similar in that they are based on notions of whites being superior in reason, character, and behavior; and because they afford whites preferential treatment under the law of evidence.

Modernly, the dual-race system is rooted in both white superiority and normativity,<sup>306</sup> where white racialized reality is unconsciously accepted as the norm and institutional racism is unnoticed by the majority of judges, attorneys, and jurors. This

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301. *Id.* at 585.

302. *Id.* at 592.

303. *Id.* at 593.

304. *See supra* Part I.A.

305. *See* U.S. CONST. amend. XIV.

306. WILLIAMS, *supra* note 53.

is not surprising since whites are overrepresented and people of color are underrepresented on the bench,<sup>307</sup> bar,<sup>308</sup> and in the jury box<sup>309</sup> in proportion to their numbers in the general population. Even people of color might adhere to white normativity in the sphere of the courtroom since it is a “white space” where courtroom participants are expected to “perform whiteness” irrespective of their racial or cultural backgrounds.<sup>310</sup>

Assumptions by judges, attorneys, and jurors that the white experience is the norm means that implicit judicial notice of white racialized reality is often taken without request, objection, or evidentiary scrutiny. Attorneys fail to recognize when white racialized reality is not simply commonsense reasoning and must be proved through admissible evidence. Consequently, opposing counsel fails to object even though the evidence might be irrelevant, unfairly prejudicial, presented in an improper evidentiary form, or otherwise inadmissible.<sup>311</sup> Similarly, blinded by white normativity, judges do not recognize when white racialized evidence is introduced and should be subject to evidentiary scrutiny. Moreover, juries often do not represent

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307. In federal trial courts, 25.6% of active district court judges and 10.5% of senior district court judges are non-white. BARRY J. MCMILLION, CONG. RESEARCH SERV., U.S. CIRCUIT AND DISTRICT COURT JUDGES: PROFILE OF SELECT CHARACTERISTICS 22 (2014), <https://www.fas.org/sgp/crs/misc/R43426.pdf>. In state trial courts, approximately thirteen percent of judges are people of color. ABA Standing Comm. on Judicial Indep., *National Database on Judicial Diversity in State Courts*, <http://apps.americanbar.org/abanet/jd/display/national.cfm> (last updated June 2010).

308. Approximately eleven percent of lawyers are people of color, despite the fact that people of color constitute approximately 38.5% of the population. AM. BAR ASS'N, LAWYER DEMOGRAPHICS, [http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer\\_demographics\\_2012\\_revised.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2012_revised.authcheckdam.pdf). Whites make up approximately eighty-nine percent of attorneys although they are only 61.5% of the population. *Id.*

309. See Ashish S. Joshi & Christina T. Kline, *Lack of Jury Diversity: A National Problem with Individual Consequences*, AM. B. ASS'N (2015), [http://www.americanbar.org/groups/litigation/committees/diversity-inclusion/news\\_analysis/articles\\_2015/lack-of-jury-diversity-national-problem-individual-consequences.html](http://www.americanbar.org/groups/litigation/committees/diversity-inclusion/news_analysis/articles_2015/lack-of-jury-diversity-national-problem-individual-consequences.html).

310. See Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992) (discussing Baltimore rent-court proceedings and how black tenants tried to mimic the expected white norms, or behavior and speech patterns in the courtroom); Amanda Carlin, *The Courtroom as White Space: Racial Performance as Noncredibility*, 63 UCLA L. REV. 450, 471, 477–84 (2016) (conducting a case study of the George Zimmerman trial and noting that jurors' credibility determinations are more negative when minority witnesses do not “perform whiteness”).

311. See FED. R. EVID. 401, 403.

the communities they come from, meaning juries are deprived of the “common-sense judgment of the community,” including understanding the racialized realities of diverse people.<sup>312</sup>

The dual-race evidentiary system benefits whites in several ways. By allowing implicit judicial notice of white norms and racialized beliefs, white experience is affirmed and legitimized. Since evidence of white racialized reality is admitted without evidentiary scrutiny, there is no expense associated with establishing this evidence. If, for instance, opposing counsel made a proper objection and the prosecution was required to prove that flight from authorities was abnormal in a community and thus relevant to prove consciousness of guilt, this would require expenditures for attorney research and securing testimony, including potential expert witness expenses. Implicit judicial notice of this evidence also means that there is no question whether the evidence will be admitted, which helps with litigation planning and strategy. In civil litigation, a white party litigating against a party of color has a direct advantage. In criminal prosecutions, whites are indirectly benefited by a defendant of color’s subordination. While most white people do not rejoice in the disproportionate conviction, sentencing, and incarceration of people of color, these events reaffirm white superiority and preferential treatment in society.<sup>313</sup>

312. See *Lockhart v. McCree*, 476 U.S. 162, 175 (1986) (observing that the exclusion of certain groups from juries can raise “at least the possibility that the composition of juries would be arbitrarily skewed in such a way as to deny criminal defendants the benefit of the common-sense judgment of the community”); *Duncan v. Louisiana*, 391 U.S. 145, 156–57 (1968) (reasoning that a jury should provide a defendant with “common-sense judgment” through “community participation” of his peers in his determination of guilt).

313. Many employers will not hire individuals with felony convictions, and the fact that blacks are disproportionately incarcerated means that whites do not have to compete for these limited resources. While eighty-to-ninety percent of polled employers would hire “former welfare recipients, workers with little recent work experience or lengthy unemployment, and other stigmatizing characteristics,” only forty percent said they would definitely or probably hire job applicants with criminal records in 2010. JOHN SCHMITT & KRIS WARNER, CTR. FOR ECON. & POL’Y RESEARCH, EX-OFFENDERS AND THE LABOR MARKET 10 (2010), <http://cepr.net/documents/publications/ex-offenders-2010-11.pdf>. Similarly, individuals with felony convictions are more often denied public housing and welfare benefits. Rebecca Beitsch, *States Rethink Restrictions on Food Stamps, Welfare for Drug Felons*, PEW CHARITABLE TRUSTS (July 30, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/07/30/states-rethink-restrictions-on-food-stamps-welfare-for-drug-felons>. This is a direct benefit to impoverished whites who also need access to these benefits. “A 1996 federal law prohibits felons with drug convictions from obtaining food stamps or welfare unless individual states choose to waive these

The dual-race evidentiary system harms people of color in a variety of ways. Where black, Latino, or other people of color's experience differs from white experience, it is considered illegitimate unless proved through evidence. Proving black or brown racialized reality poses significant risks and expenses. It may require an expensive expert witness or having the defendant testify, implicating Rule 609-prior conviction risks, since people of color disproportionately have prior convictions.<sup>314</sup> It cannot be anticipated whether racialized reality evidence of people of color will be admitted. Further, while the perspectives of whites are accepted, the racialized experiences of people of color are silenced. This is particularly concerning when evidence tainted with structural racism, such as cross-racial identifications, is admitted easily and difficult to contradict. Moreover, due to the precedential principle of *stare decisis* and the practice of publishing judicial opinions, implicit judicial notice of white racialized reality is self-perpetuating. Case law is a kind of history-making. Just as the narratives and perspectives of people of color have been kept out of history books,<sup>315</sup> these narratives and perspectives are kept out of legal history. This perpetuates white narratives where white beliefs and norms are taken as normal and racism appears to no longer exist.

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restrictions." *Id.* (referencing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 21 U.S.C. § 862a (2012)). As of 2015, twenty-four states have a partial ban on welfare for felony drug convictions and twelve still have a full ban. *Id.* Similarly, twenty-four states have a partial ban on food stamps for felony drug convictions and six still have a full ban. *Id.* Federal financial aid for college is also restricted when applicants have convictions, opening more spaces for white students since many minority ex-felons cannot afford to attend college without a student loan. Students are ineligible for federal loans if they have been incarcerated for a drug offense. Betsy Mayotte, *Drug Convictions Can Send Financial Aid up in Smoke*, U.S. NEWS (Apr. 15, 2015), <http://www.usnews.com/education/blogs/student-loan-ranger/2015/04/15/drug-convictions-can-send-financial-aid-up-in-smoke>; see also ALEXANDER, *supra* note 115, at 2 (explaining that a felony conviction legalizes "the old forms of discrimination"—employment and housing discrimination, as well as the denial of the right to vote, educational opportunities, food stamps, and jury service).

314. See ALEXANDER, *supra* note 115, at 8 ("[N]o other country in the world incarcerates such an astonishing percentage of its racial or ethnic minorities."); Carodine, *supra* note 158, at 535–36.

315. See HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 685 (2005).

## B. CRITICAL EVIDENTIARY OBJECTIONS AND PRAXIS

The purpose of evidence law is to achieve the fair and efficient administration of each proceeding, “ascertain[] the truth,” and “secure[] a just determination.”<sup>316</sup> Despite honorable intentions, evidence law is too often employed (or ignored) in ways that replicate and perpetuate the racial injustice prevalent in our society. The courtroom should be a refuge from societal prejudice and systemic inequalities, a place where all are entitled to equal justice under the law. But too frequently, unfortunately, this is not the case. As explored in the context of stand-your-ground defense cases and cross-racial witness identifications, due to implicit racial bias, fact-finders too often use the race of witnesses as a proxy for character. Whiteness is *de facto* evidence of good character while blackness and brownness are *de facto* evidence of bad character. This implicit bias needs to be addressed explicitly by attorneys and judges.

A critical race awareness and analysis of evidence law and practice by the bar and bench, in addition to the academy, might increase justice in our legal system. CRT is not simply a law professor’s pastime; it has practical application in litigation. For evidence purposes, CRT can train litigators to identify and object to racism effectively, and it can help judges become more impartial and fair when making evidence determinations. Hence, continuing legal education seminars on the basic principles of CRT should be offered more widely, rather than confined to the academic setting.

Today, much racism is inconspicuous and unconscious, meaning racial unfairness goes undetected and unaddressed. Improprieties fall beneath trial judges’ radar, and attorneys fail to make proper objections. Instead of being complicit in racial injustice, jurists and attorneys can choose to consider the effect of racialization and racism critically in the sphere of evidence law. Critical race analytical tools can be used to evaluate the admissibility of evidence if we remember the purpose, pervasiveness, and permanence of racism; the way racial privilege acts as a direct corollary of racial subordination; and the need for perspectives of people of color. Though racism has become

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316. FED. R. EVID. 102 (“These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.”).

more subtle and sophisticated, it is ever-present and in need of continual remediation.

It is also particularly important to look out for white normativity and transparency problems. The first step is to recognize that assertions of white racialized reality may be more than mere argument; they may actually be evidence. The lawyer may be improperly assuming facts not yet in evidence. In such circumstances, it is imperative that opposing counsel objects and demands that the court subject the proffered evidence to the full rigors of evidence law. As mentioned above in the discussion of black and brown flight, relevance objections may be particularly critical here.<sup>317</sup> Evidence should not be implicitly judicially noticed simply because it reflects the beliefs, norms, or otherwise racialized reality of the majority racial group.

In these circumstances, one of the most important objections is that of unfair prejudice. Federal Rule of Evidence 403 gives federal judges discretion<sup>318</sup> to exclude otherwise relevant evidence when its “probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, waste of time, or needlessly presenting cumulative evidence.”<sup>319</sup> Most state courts have rules similar, if not identical, to Rule 403.<sup>320</sup> Among the most significant and often-raised dangers listed in Rule 403 and its state counterparts is the risk of “unfair prejudice.”<sup>321</sup> The term “unfair prejudice” means “an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.”<sup>322</sup>

Unfair prejudice describes two kinds of dangers: emotionalism and limited-use evidence employed for an impermissible purpose.<sup>323</sup> It is often asserted that “[t]he greatest danger included in the notion of ‘unfair prejudice’ is the injection of pow-

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317. The evidence might still be admissible as conditionally relevant, but the condition precedent (proof of the racialized reality) must be introduced in proper form or the evidence cannot be considered by the fact-finder. *See supra* notes 224–28 and accompanying text.

318. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 4:12 (4th ed. 2009). The Federal Rules of Evidence provide for “extraordinary breadth of discretion” and the decision to admit or exclude evidence under Rule 403 can only be reversed for abuse. *Id.*

319. FED. R. EVID. 403.

320. *See* JONES, *supra* note 226, § 11:10.

321. *Id.* § 11:14.

322. FED. R. EVID. 403 advisory committee’s note.

323. MUELLER & KIRKPATRICK, *supra* note 318, § 4:13.

erful emotional elements, brought by proof that is unnecessarily graphic or overwhelming in depicting cruelty, suffering, pain, sorrow, or outrageous or offensive conduct.”<sup>324</sup> Classic examples of this kind of evidence are bloody or otherwise gruesome photographs, videos, or evidence that can be “best characterized as sensational or shocking; provok[ing] hostility or revulsion; arous[ing] punitive impulses; or appeal[ing] to emotion in ways that seem likely to overpower reason.”<sup>325</sup>

The second kind of unfair prejudice is misuse of limited-use evidence by the trier of fact. This is where evidence would be properly admissible for one issue, purpose, or against one party, but the jury mistakenly and impermissibly considers the evidence for a different issue, purpose, or party, despite an instruction to the contrary.<sup>326</sup> For instance, evidence of a criminal defendant’s prior bad acts is generally not admissible to prove the defendant’s propensity to commit the charged crime, but this evidence might be admissible for another purpose, like showing knowledge.<sup>327</sup>

This traditional understanding and use of Rule 403 is inadequate because it overlooks racial prejudice and racism.<sup>328</sup> The common-language meaning of prejudice is “an irrational attitude of hostility directed against an individual, a group, a race, or their supposed characteristics.”<sup>329</sup> In the Rule 403 context, the vernacular meaning of prejudice has been largely ignored. However, the dangers posed by racial prejudice and racism are wholly consistent with the “risk of unfair prejudice,” as contemplated under Rule 403. Evidence presents a threat of unfair prejudice when it has a potential to influence the jury to decide the case on an improper basis.<sup>330</sup> It is hard to imagine a

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324. *Id.*

325. *Id.*

326. *Id.*

327. FED. R. EVID. 404.

328. It also overlooks other traditional kinds of prejudice such as sexism and heteronormativity/homophobia.

329. *Prejudice*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003); see also *Prejudice*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/prejudice> (last visited Apr. 21, 2017) (providing a common-language definition of “prejudice” specifically for English language learners: “[A]n unfair feeling of dislike for a person or group because of race, sex, religion, etc.”).

330. FED. R. EVID. 403 advisory committee’s note; *Old Chief v. United States*, 519 U.S. 172, 180 (1997).



more improper basis for a jury to decide a case upon than race or racism.

The risk of unfair prejudice is of particular concern in criminal cases, where:

Unfair prejudice results from an aspect of the evidence . . . which makes conviction more likely because it provokes an emotional response in the jury or otherwise tends to affect adversely the jury's attitude toward the defendant wholly apart from its judgment as to his guilt or innocence of the crime charged.<sup>331</sup>

Racial prejudice, including conscious, unconscious, individual, and institutional forms of racism, would likely tend to adversely affect jurors' attitudes toward defendants of color. Due to the prevalence of racism in our society, the prejudice it poses is as much—if not more—of a danger than the more-commonly discussed risks under Rule 403, such as gruesome images or offensive conduct. Racism, in all its forms, is a manifestly improper basis that poses a substantial danger of prejudice within the meaning of Rule 403.

It is unsurprising that systemic racism has been overlooked under Rule 403. In large part, this is because lay and legal definitions of racism are construed narrowly to include only individual race-based animus, rather than the more pervasive existence and danger of white supremacy that has both intentional and unintentional, and conscious and unconscious, aspects and manifestations. As Charles Lawrence explains, "Because racism is so deeply ingrained in our culture, it is likely to be transmitted by tacit understandings."<sup>332</sup> Thus, it is difficult to eradicate or even recognize.<sup>333</sup> The most dangerous racial prejudice is not an overt call to racial hatred, which most people would find repugnant; it is subtler, invidious racism that persuades while going unrecognized.<sup>334</sup> To determine whether the danger of unfair prejudice substantially outweighs the probative value of evidence, all forms of racism advanced by an item of evidence should be weighed against its probative value.

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331. United States v. Bailleaux, 685 F.2d 1105, 1111 (9th Cir. 1982).

332. Charles Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987).

333. *Id.*

334. See Scott Wilson & Sari Horwitz, *Holder, Confronting Issue of Race Once More, Says 'Subtle' Threats to Equality 'Cut Deeper'*, WASH. POST (May 17, 2014), [https://www.washingtonpost.com/national/holder-confronting-issue-of-race-once-more-says-subtle-threats-to-equality-cut-deeper/2014/05/17/66e63482-dd57-11e3-b745-87d39690c5c0\\_story.html](https://www.washingtonpost.com/national/holder-confronting-issue-of-race-once-more-says-subtle-threats-to-equality-cut-deeper/2014/05/17/66e63482-dd57-11e3-b745-87d39690c5c0_story.html).

Establishing that a piece of evidence poses a risk of racial prejudice is not the end of a Rule 403 analysis. Relevant evidence cannot be excluded under Rule 403 unless the danger of unfair prejudice *substantially* outweighs its probative value. Thus, the unfair prejudice of introducing an item of evidence must be weighed against its probative value. The relative probative value of an item of evidence is not determined in a vacuum. It is well established that when evidence poses a risk of prejudice, the trial court should look at whether other evidence exists that is at least equally probative for the same issue but less prejudicial.<sup>335</sup> A proponent of an item of evidence need not submit the least prejudicial piece of evidence, but the existence of an equally probative but less prejudicial alternative can reduce the probative value of the evidence being introduced.<sup>336</sup> If the probative value is decreased to such a degree that the danger of unfair prejudice substantially outweighs it, the trial court has discretion to exclude the evidence.

When no admissible alternatives to an item of evidence exist, this also impacts the Rule 403 analysis. Traditionally, a lack of alternatives makes the evidence more necessary.<sup>337</sup> The more a piece of evidence is necessary, the more probative it is considered.<sup>338</sup> While this logic is generally sound, it is questionable when the only item of evidence to prove a point poses a significant risk of racial prejudice, particularly in the criminal context. It is inherently unfair to base a defendant's guilt even in part on racist evidence.

It is also well established that a trial court must look at the evidence that exists in the entire record to weigh the probative value versus the danger of unfair prejudice.<sup>339</sup> However, when evidence poses the risk of racial prejudice, this traditional analysis is inadequate because it fails to consider the ability (or lack of ability) to bring counterevidence. In a Rule 403 analysis, particularly in a criminal case, when there is a risk of racial prejudice, the court should also consider the party's ability to

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335. See *Old Chief*, 519 U.S. at 183–84.

336. *Id.*

337. See FED. R. EVID. 403 advisory committee's notes (providing that when a court considers "whether to exclude on grounds of unfair prejudice," the "availability of other means of proof may . . . be an appropriate factor").

338. See *JONES*, *supra* note 226, § 17:11 (noting that when an item of evidence becomes more necessary on a particular issue, it is "therefore more probative").

339. *Old Chief*, 519 U.S. at 183.

introduce evidence to oppose the racial prejudice. Some courts have hinted at such an approach by considering a criminal defendant's financial availability to oppose the government's evidence.

For example, in *Commonwealth v. Serge*, the Supreme Court of Pennsylvania reviewed the trial court's decision to admit the commonwealth's computer generated animated (CGA) film depicting its version of the defendant's murder of his wife.<sup>340</sup> It was the first CGA demonstrative evidence ever admitted in a criminal trial, and it purportedly cost the commonwealth between \$10,000 and \$20,000 to produce.<sup>341</sup> In reviewing the trial court's Pennsylvania Rule 403 ruling that the probative value of the film was not substantially outweighed by the danger of unfair prejudice, five of six justices agreed that the defendant's inability to afford his own CGA film or an expert's rebuttal could be properly considered in balancing unfair prejudice against probative value.<sup>342</sup> Additionally, according to one informal study of United States district and magistrate judges from 2007, seven out of fifteen judges indicated they would consider the parties' economic circumstances when "deciding the admissibility or use of computer-generated presentations."<sup>343</sup> In criminal cases where the prejudice posed relates to racial concerns and not merely financial means, considering the defendant's ability to counter the government's evidence is even more critical.

To begin to eliminate the dual-race evidentiary system, lawyers and judges should approach evidence arguments and determinations with critical race awareness and inquiry, assert proper objections, and demand that the racialized reality of all races be treated equally under the law of evidence. Judges and attorneys must take proactive steps to make it more feasible for people of color to share their racialized experiences and to expose systemic racism in litigation. To permit this end, lay and expert witnesses must be allowed to testify on topics of systemic racism more liberally.

For instance, when relevant, witnesses of color should be permitted to testify about their lived experiences of racial strat-

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340. 896 A.2d 1170 (Pa. 2006).

341. *Id.* at 1189 (Castille, J., concurring).

342. *Id.* at 1190; *id.* at 1188 (Cappy, C.J., concurring).

343. Victor G. Savikas & David L. Silverman, *Making the Poverty Objection*, NAT'L L.J., July 26, 1999, at C6.

ification without exclusion as impermissible opinion evidence.<sup>344</sup> An example might be a criminal defendant calling a witness to counter the government's evidence of flight. A lay witness from the defendant's community, if qualified, should be granted leave to testify about how flight by people of color from police is the norm in that community. Such testimony would be relevant because it has a tendency to show that running from authorities is normal and thus not particularly probative of the defendant's consciousness of guilt. This evidence could be used to prevent the government's use of flight evidence or to at least rebut its probativeness. Federal Rule of Evidence 701 allows lay opinions, providing 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; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.<sup>345</sup>

Rule 701's first requirement is closely related to the personal knowledge requirement of Federal Rule of Evidence 602.<sup>346</sup> Like all witnesses (except experts certified under Rule 702), a witness offering a lay opinion must have personal knowledge about the community and how residents generally interact with law enforcement. A witness from the defendant's community could testify and form an opinion based upon his or her personal firsthand observations of people of color avoiding and fleeing from authorities in that area because of distrust or fear of the police. The fact that a witness's opinion that black or brown flight is the norm in their community might be based, at least in part, on what the witness heard from others does not make it hearsay.<sup>347</sup> As these firsthand observations are based on experiences from everyday life rather than scientific, technical, or other specialized knowledge, Rule 701(c) would be satisfied.

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344. See FED. R. EVID. 701.

345. *Id.*

346. See FED. R. EVID. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

347. MUELLER & KIRKPATRICK, *supra* note 318, § 7:3 ("Knowledge is social . . . [,] one's social interactions and the knowledge that grows out of these interactions, including what one hears from others and says to them. Although these interactions, and the knowledge that grows out of them, may to some extent reflect what one says and has heard, the personal knowledge requirement can be satisfied. Indeed, sometimes the subject of lay opinion testimony necessarily conveys what others have said.").

Further, because of the racial segregation or centralization of most neighborhoods,<sup>348</sup> it is likely that the witness would be a person of color. As the person-of-color thesis posits, minorities are particularly well-equipped to understand the lived experiences of institutional racism. With respect to subsection (b) of Rule 701, this testimony would be helpful to determine if flight is customary in the community and thus whether the defendant's flight is probative of his or her consciousness of guilt. As juries are usually not truly representative of the communities from which they are derived, particularly in terms of race, jurors would not ordinarily be familiar with this information. More importantly, the testimony would bring a racial-minority perspective into the courtroom and work to counteract white normativity and transparency problems that are rampant in today's criminal justice system.

Likewise, expert witnesses<sup>349</sup> must be allowed to testify about systemic racism more liberally. Consider cross-racial identifications. Experts on the inadequacy of eyewitness testimony are desperately needed since "[e]yewitness misidentification is the leading cause of wrongful convictions in the United States,"<sup>350</sup> and a large percentage of eyewitness misidentifications involve cross-racial identifications.<sup>351</sup> Cross-racial identifications are particularly unreliable when a white eyewitness identifies a black suspect.<sup>352</sup> Traditionally, courts have been hostile to expert testimony on the unreliability of eyewitness testimony.<sup>353</sup> However, expert witness testimony is more effec-

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348. Galster, *supra* note 274, at 1431 ("[V]irtually all of our major metropolitan areas where large numbers of minorities live are highly segregated."). Additionally, communities consisting mostly of minorities are the communities most likely to be subject to police brutality. *See supra* notes 187–188 and accompanying text.

349. FED. R. EVID. 702.

350. Lauren Tallent, *Through the Lens of Federal Evidence Rule 403: An Examination of Eyewitness Identification Expert Testimony Admissibility in the Federal Circuit Courts*, 68 WASH. & LEE L. REV. 765, 769 (2011).

351. According to the Innocence Project, nearly one-third of all wrongful convictions overturned by DNA testing involved cross-racial identification. *Cross-Racial Identification and Jury Instruction*, INNOCENCE PROJECT (May 20, 2008), <http://www.innocenceproject.org/cross-racial-identification-and-jury-instruction>.

352. Specifically, "a Black innocent suspect has a [fifty-six percent] greater chance of being misidentified by a White eyewitness than by a Black eyewitness." Tallent, *supra* note 350, at 770 n.38 (citing Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 79 (2008); Fradella, *supra* note 295, at 14).

353. Fradella, *supra* note 295, at 4.

tive than its alternatives, such as jury instructions.<sup>354</sup> Both lay and expert witness testimony on racialized reality evidence of people of color could amplify the often-silenced voices at trial.

### CONCLUSION

Litigation is often compared to battle. At trial, evidence rules and doctrines are the metaphorical swords that allow evidence to be entered into the record and the shields that exclude evidence. The manner in which evidence law is applied determines the facts that are considered in deciding who wins and loses. For trials to be fair, it is imperative that evidence law applies equally to everyone irrespective of their race. Historically and presently, evidence law has been applied in ways that structurally disadvantage people of color and advantage whites. Continuing legal education on implicit racial bias and preferences—particularly on recognizing white normativity and transparency; proper objections; and increased evidentiary pathways for expert witnesses and people of color to share their experiences of minority racialized reality and systemic racism—would increase racial equity in the courtroom.

But racism will still persist in our evidence law. Structural racism is an unrelenting impediment to full justice that requires continual resistance. Fortunately, we have an intellectual armory at our fingertips: the work of generations of CRT scholars waiting to be applied to the law of evidence.

The ideas and examples I provide in this Article are merely a starting point. I hope they inspire a new and robust critical race theory of evidence.

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354. Tallent, *supra* note 350, at 776–77.