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A Wee Bit Racist: What are the Rules of Evidence, Alex?

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I. INTRODUCTION

We often concentrate our legal reform efforts against racism in the so-called *substantive law*[1] and neglect procedural regulations such as evidentiary rules which surreptitiously bond white supremacy. Seldom do people think about how our probative rules privilege whiteness and penalize nonwhiteness. Most people, if confronted with the racist nature of our evidentiary system,[2] would be as surprised as Oprah appeared during her March 7, 2021 interview with Meghan Markle when she supposedly learned that the British Royal Family is racist.[3]

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1. See, e.g., Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); L. Song Richardson, Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626 (2013); Atiba R. Ellis*, Race, Class, and Structural Discrimination: On Vulnerability Within the Political Process*, 28 J. CIV. RTS. & ECON. DEV. 33 (2015); Rose Cuison Villazor, *Problematizing the Protection of Culture and the Insular Cases*, 131 HARV. L. REV. F. 127 (2018); Michael Gentithes*, Suspicionless Witness Stops: The New Racial Profiling*, 55 HARV. C.R.-C.L. L. REV. 491 (2020); Jonathan Weinberg, *The Racial Roots of the Federal Administrative State,* ADMIN. & REG. L. NEWS, Summer 2020, at 15; Richard Thompson Ford, *Affirmative-Action Jurisprudence Reflects American Racial Animosity but Is Also Unhappy in Its Own Special Way*, 10/30/2020 U. CHI. L. REV. ONLINE 110 (2020); Sara Tofighbakhsh, , *Racial Gerrymandering After Rucho v. Common Cause: Untangling Race and Party*, 120 COLUM. L. REV. 1885 (2020).

2. Throughout the paper, the terms evidentiary and probative system refer to the rules of evidence, the case law interpreting them, as well as the unregulated forensic practices of all legal operators (*i.e.*, judges, attorneys, and jurors).

3. During the interview about Meghan Markle's time as a senior member of the British Royal Family, Oprah asked the Duchess of Sussex about the reason behind the Crown not bestowing to Archie (her first-born with Prince Harry) a title. Although the official explanation for Prince Harry's son not to have a royal title is a letter from George V that declared that the great-grandchildren of the monarch would no longer be princes or princesses, except for the eldest son of the eldest son of the Prince of Wales, Caroline Davies, *Was Meghan's Son Archie*

Oprah's viral reaction, which has been turned into all sorts of memes,[4] epitomizes our understanding of racial injustice within our evidentiary system. Like Oprah, most of us are so accustomed to performing whiteness in white spaces (e.g., mainstream media, academia, and the courts) that we forget it is indeed a performance. As a result, we end up believing in the myth that the system is racially neutral just as Oprah seems to have believed that the current British Crown could not be blatantly racist. However, just like *The New Yorker* writer Professor Jelani Cobb tweeted about Oprah's and the public reaction to Markle´s interview, "[w]e can't be shocked that the crown that presided over a global colonial slave system might be a wee bit racist . . . ."[5] Likewise, we cannot be shocked that a

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Denied the Title 'Prince' Because He's Mixed Race, THE GUARDIAN (March 8, 2021), https://www.theguardian.com/uk-news/2021/mar/08/why-meghan-harry-son-archie-denied-title-prince-mixed-race [https://perma.cc/6UAF-VFNF]. Markle hinted there were race considerations in the decision to follow strictly the royal decree and not even offer security to the newborn royal, Sun Reporter, *MARK MY WORDS Meghan Markle Oprah Interview: Read the Full Transcript of Duchess and Prince Harry's Bombshell Confessions*, THE SUN (Mar 8, 2021) (Updated, Mar 9, 2021), https://www.thesun.co.uk/news/14277841/meghan-markle-oprah-interview-full-transcript/ [https://perma.cc/BRT5-PX2H]. The puzzling exchange in which Oprah's question sought an alternative discriminatory reason for the decision but ended up with an overly surprised Oprah when Markle's answer so explicitly described the racism of the Crown is reproduced below.

> Oprah: Why do you think that is? Do you think it's because of his race?
>
> Meghan: (Sighs)
>
> Oprah: And I know that's a loaded question, but. . .
>
> > Meghan: But I can give you an honest answer. In those months when I was pregnant, all around this same time. . . so we have in tandem the conversation of "He won't be given security, he's not going to be given a title" and also concerns and conversations about how dark his skin might be when he's born.

Id.

Oprah responded surprised by uttering "What? . . . Who. . . who is having that conversation with you? . . . There is a conversation. . . Hold on. Hold up. Hold up. Stop right now." *Id.*

4. Elizabeth Logan, *Oprah Winfrey Has Seen Those Memes From the Meghan and Harry Interview Thanks to Ava DuVernay!*, GLAMOUR (March 15, 2021), https://www.glamour.com/story/oprah-winfrey-has-seen-those-memes-from-the-meghan-and-harry-interview [ttps://perma.cc/EKP8-636T].

5. Jelani Cobb (@jelani9), TWITTER (March 7, 2021, 9:42 P.M.), https://twitter.com/jelani9/status/1368738974500585474 [https://perma.cc/G88N-SD7F].

system built on racism and misogyny[6] is still *a wee bit* of a white supremacist tool.

In this essay, I will argue, using a Critical Race Theory (CRT) lens,[7] that despite the race neutrality of the rules of evidence, our legal probative system facilitates the admissibility of racialized evidence which obscures its truth-finding goals and adversely affects people of color (POC). I will first discuss the historical roots of our current racialized evidence practices and proffer an analytical framework to unmask white supremacy in our evidentiary system. In the sections that follow, I will identify using the three core principles of the proposed CRT framework (credibility injustice, white normativity and transparency, and contestation of racialized evidence and its backlash) how racialized evidence is admitted in trials and entry points for possible reforms. To show the interdependency of societal norms and rules of evidence, I discuss how these racialized evidentiary practices are present in everyday interactions by looking at the fallout between the Duchess of Sussex and the British

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6. Regarding the misogynist history and practice of the evidence system *see generally*, Aníbal Rosario Lebrón, *Evidence's #MeToo Moment*, 74 U. MIAMI L. REV. 1 (2019) (unfolding how the credibility discounting of victims of gender and sex based violence that is premised on patriarchal and heteronormative notions is reinforced by our evidentiary system through the use of character for untruthfulness evidence); Julia Simon-Kerr, Note*, Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment*, 117 YALE L.J. 1854 (2008) [hereinafter Simon-Kerr, *Unchaste and Incredible*] (discussing how the association between chastity and credibility has remained in our evidence system as courts continued to insist that a victim's sexual history has some relevancy to credibility and in the treatment of moral turpitude law and prostitution as bearing on the credibility of a witness); Julia Simon-Kerr*, Credibility by Proxy*, 85 GEO. WASH. L. REV. 152 (2017) [hereinafter Simon-Kerr, *Credibility by Proxy*] (arguing how the purpose of impeachment rules is in reality to identify which people "have the culturally recognized moral integrity or honor to be worthy of belief in court").

7. As Professor Kimberlé Williams Crenshaw has explained CRT

> is a way of seeing, attending to, accounting for, tracing and analyzing the ways that race is produced, the ways that racial inequality is facilitated, and the ways that our history has created these inequalities that now can be almost effortlessly reproduced unless we attend to the existence of these inequalities.

Jacey Fortin, *Critical Race Theory: A Brief History*, N.Y. TIMES, (July 27, 2021), https://www.nytimes.com/article/what-is-critical-race-theory.html. [https://perma.cc/7ZZ4-X9V8].

Crown. Finally, I offer some viable solutions to be studied further in the future.

II. EVIDENCE THROUGH A CRT LENS

The United States evidentiary system was built on white-competency rules.[8] In other words, white people were deemed competent to testify while POC were not. Consequently, Blacks and other POC were barred from participating as witnesses in judicial proceedings.[9] In certain periods and jurisdictions (e.g., during slavery), it was a complete bar.[10] In others, it was a partial bar that included the inability to testify against and, sometimes even, in favor of a white person but not necessarily against other non-white people.[11] A system that promoted this discount of POC's credibility in the courts cannot suddenly become racially just or neutral simply because those blatantly racist rules were abolished.

This system, predicated on the privilege of white narratives and the dehumanization and exploitation of non-white people, fostered, and amplified racial injustice beyond the courts. In its symbiotic relationship with societal norms, the white competency rules have aided in the normalization of society's discounting of non-white voices; made white bodies, stories, and culture the standard; and entrenched racialized notions about credibility and proof. This normalization enables the everyday re-introduction of racial prejudices in court through the evidentiary practices of legal actors (*i.e.*, judges, attorneys, jurors, witnesses, and parties) even though white competency rules have long been abolished. As Professor Jasmine Gonzales Rose has noted, "[d]espite honorable intentions, evidence law is too often employed (or ignored) in ways that replicate and perpetuate the racial injustice prevalent in our society."[12] White supremacy remains present in every aspect of the legal process, even in

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8. Thomas D. Morris, *Slaves and the Rules of Evidence in Criminal Trials - Symposium on the Law of Slavery: Criminal and Civil Law of Slavery*, 68 CHI.-KENT L. REV. 1209, 1209-11 (1993); Amanda Carlin, Comment, *The Courtroom as White Space: Racial Performance as Noncredibility,* 63 UCLA L. REV. 450, 454-58 (2016); Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2245-48 (2017) [hereinafter Gonzales Rose, Toward a CRT Theory of Evidence].

9. Morris, *supra* note 8 at 1209; Carlin, *supra* note 8 at 454-55; Gonzales Rose, *Toward a CRT Theory of Evidence*, *supra* note 8 at 2245-46.

10. *Id.*

11. Morris, *supra* note 8 at 1210-11; Carlin, *supra* note 8 at 455-58; Gonzales Rose, *Toward a CRT Theory of Evidence*, *supra* note 8 at 2246-48.

12. Gonzales Rose, *Toward a CRT Theory of Evidence*, *supra* note 8 at 2302.

ways that are still imperceptible for those of us who are aware of its racist history.

To dissect this symbiosis between rules of evidence and societal norms, I will use a CRT lens. Using this lens, I have designated three main categories or motifs of evidentiary racial injustice that can help us unmask white supremacy in our probative system. These three motifs are (1) *credibility injustice*, (2) *white normativity and transparency*, and (3) *contestation of racialized evidence and its backlash*.[13] The first motif examines how evidence rules and our probative practices preserve white supremacy by bestowing upon white actors a credibility surplus and POC a credibility deficit. The motif of white normativity and transparency, on the other hand, explains how evidentiary standards are based on a white worldview that leads legal operators to adjudicate facts along racialized lines without the whiteness of this practice being questioned or made visible. The third motif, the contestation of racialized evidence and its backlash, accounts for what happens when legal players challenge racialized evidence and attempt to introduce nonwhite narratives as truth.

These motifs are found scattered in the work of evidence scholars who have explored entrenched racist practices in stand-your-ground defenses,[14] impeachment by prior convictions,[15] flight from racially targeted police

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13. Professor Gonzales Rose has proposed a similar analytical framework based on CRT. She designates her framework as the *seven P's* of Critical Race Theory (CRT) inquiry. *Id.* at 2249. The seven P's of her framework are the following: (1) the power behind racialization, (2) the purpose of racism, (3) the property of whiteness, (4) privilege, (5) the pervasiveness of racism, (6) the permanence of racism, and (7) the perspectives of people of color. *Id.* The first three *P's* (the power behind racialization, the purpose of racism, and the property of whiteness) correspond with the motif of credibility injustice that invites us to examine how the rules are "applied to preserve existing racial power structures" through credibility imbalances. *Id.* at 2250-51, 2254-55. The next three *P's* (privilege, the pervasiveness of racism, and the permanence of racism) help us identify how white normativity becomes the prevailing worldview without its whiteness being questioned and they correspond with the second motif of white normativity and transparency. *Id.* at 2252, 2255-57. Last, the seventh P, the perspectives of people of color, show how nonwhite narratives are introduced in the judicial process and validated as forms of truth and evidence and it corresponds with the last motif that explores the contestation of racialized evidence practices and its backlash. *Id.* at 2258.

14. *Id.* at 2261-68.

15. Montré D. Carodine, *"the Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521 (2009).

profiling,[16] cross-racial witness identifications,[17] jury disenfranchisement,[18] and unregulated or functional evidence.[19] In this article, I analyze instead these motifs systematically to identify places for reform in our probative system that will promote racial justice.

I propose looking at the motifs through the following points of entry: (1) Precipitating Incident or Investigative Stage (accounts of the events and the litigants);[20] (2) Jury Selection (understood beyond how racially representative juries are); (3) Evidence Presentation (including all types of evidence, not just testimonial); (4) Credibility Impeachments; (5) Functional Evidence (evidence that is not regulated but used by jurors such as gender, class, race, idiolect, and clothing);[21] (6) Judge's Rulings; (7) Attorneys' Arguments (not only during statements to the jury but also while discussing objections or other legal matters such as *voir dire*); (8) Triers of Fact's Adjudications (jury deliberations and judges' determinations of facts); and (9) Post-Trial Remedies.[22] Taking this approach will facilitate determining what remedial reforms would be more effective and how they should be accomplished. However, any legal

16. Gonzales Rose, *Toward a CRT Theory of Evidence*, *supra* note 8 at 2269-88; Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AM. U. L. REV. 1513 (2018).

17. Gonzales Rose, *Toward a CRT Theory of Evidence*, *supra* note 8 at 2289-98; Taki V. Flevaris & Ellie F. Chapman, *Cross-Racial Misidentification: A Call to Action in Washington State and Beyond*, 38 Seattle U. L. REV. 861 (2015); Peter Petraro, *The Admissibility of Expert Psychological Testimony on the Unreliability of Cross-Racial Identifications*, 47 No. 5 CRIM. LAW BULLETIN ART 1 (2011); Aaron H. Chiu, Comment, *"We Can't Tell Them Apart": When and How the Court Should Educate Jurors on the Potential Inaccuracies of Cross-Racial Identifications*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 415 (2007).

18. Jasmine B. Gonzales Rose, *Color-Blind but Not Color-Deaf: Accent Discrimination in Jury Selection*, 44 N.Y.U. L & SOC. CHANGE 309 (2020).

19. Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867 (2018).

20. The reason to include pre-litigation events in an evidentiary reform will become clearer when the paper discusses in tandem the motifs and access points. But suffice to say that it is in part connected to the white competency rules and how testimonies and narratives are developed during the precipitating event and how they can be later used during a trial.

21. Capers, *supra* note 19 at 871.

22. This list is not meant to be exhaustive. There might be more points of entry, but I consider these the backbone of the evidentiary system. I will not use all these entry points in the analysis in this essay, but it is worth including them to provide readers with various points of reference to think more about the arguments being raised in the article.

reforms that come from using this analytical tool should be executed in tandem with complementary efforts to eradicate racism at large. Legal reforms without a corresponding substantial social change will not fully subvert white supremacy as racial injustice practices will still percolate throughout the system.[23]

III. ADMITTING RACE INTO EVIDENCE

The aforementioned motifs are not only observed in our evidence rules and practices but can also be identified in Meghan Markle's interview with Oprah. In this section, I will discuss these motifs as they are manifested in the various access points previously identified alongside how they can be observed in Markle's interview and public reactions to it. With this rhetoric device, I hope to show the interdependency between evidence rules and societal norms. Specifically, I intend to show how they feed on each other long after the history of their relationship has been obscured by limited legal reforms.

A. Credibility Injustice

The first motif, credibility injustice, ultimately traces back to the indelible history of white competency rules. These rules served to socially fix testimonial injustice, a phenomenon that occurs when an individual or group experiences either a credibility surplus or a credibility deficit based on prejudice.[24] The practice of white competency rules created a credibility deficit for POC while bestowing upon white people a credibility surplus. In other words, witnesses are less trusted because of their race

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23. The public education system is the best example of the perils of attempting to subvert white supremacy only through legal reforms. The United States education system remains, even after *Brown v. Board of Education*, 347 U.S. 483 (1954), segregated and racially unjust. Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795 (1996); Gary Orfield & Erica Frankenberg, *Increasingly Segregated and Unequal Schools as Courts Reverse Policy*, EDUCATIONAL ADMINISTRATION QUARTERLY 2014, VOL. 50(5) 718–734 (2014). Part of the stagnation in racial equality in education is due to the persistence of racist practices and ideas that were present when *Brown* was decided. As Kiri Davis' documentary shows by recreating the famous doll experiment of the 1940's by psychologist Dr. Kenneth Clark that served to pave the way to decision in *Brown*. 4 Truth and Justice, *Kiri Davis: A Girl Like Me* (2005), YOUTUBE (April 16, 2007) https://youtu.be/z0BxFRu_SOw [https://perma.cc/X86Q-QQRZ].

24. Miranda Fricker, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 17 (1st ed. 2007).

while others experienced the exact opposite for being white. This credibility imbalance is so entrenched that the competency rules are no longer needed to preserve white supremacy. Thus, the abolition of white competency rules has done nothing to correct credibility injustice. Triers of fact continue to make the same credibility adjudications they used to make when the white competency rules still existed.

1. A Duchess' Credibility Deficit

A good example of this dynamic is seen in the manner the Crown managed the controversies surrounding Markle's interview. Queen Elizabeth II took advantage of this credibility imbalance to deflect racist accusations against the Royal Family. Several days after Oprah's interview, the Crown put out the following statement:

> The issues raised, particularly that of race, are concerning. While some recollections may vary, they are taken very seriously and will be addressed by the family privately.[25]

This statement cunningly deflects the charge of racism by turning it into a matter of conflicting testimony. The strategy is to bank on the testimonial surplus of the Queen and Markle's deficit by planting the seed about diverging recollections. If recollections vary it is because at least one of the declarants is lying. With that implication, the Crown subtly attests that, despite the Crown's history of colonialism, the Black woman (Markle),[26] not the white person (the Queen), must be the one mistaken, the one lying. The statement only works as damage control if the Crown were counting on the public to be guided by this testimonial imbalance. Accordingly, no matter how common and plausible Markle's account of what it is like to be mixed-race or the first POC in a predominantly white

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25. Buckingham Palace statement on Harry and Meghan interview, AP NEWS, (March 9, 2021), https://apnews.com/article/buckingham-palace-statement-harry-meghan-oprah-interview-0a3c32ab79f800c54c346fe82a2e8404 [https://perma.cc/CHT8-C8RM].

26. Lisa A. Crooms, *Speaking Partial Truths and Preserving Power: Deconstructing White Supremacy, Patriarchy, and the Rape Corroboration Rule in the Interest of Black Liberation*, 40 HOW. L.J. 459, 474–75 (1997) (discussing the credibility discount of black women in rape cases); Julia Simon-Kerr, *Credibility by Proxy*, *supra* note 6 at 190–92, 200–01 (discussing how impeachment rules enforce cultural conceptions of who is worthy of belief in the context of race and gender).

group,[27] the Crown encouraged the public to discount Markle's account by tapping into the long history of testimonial injustice.

2. Investigating Credibility Injustice

Credibility injustice has been well documented during trials.[28] Yet, trials are not the only place we should look if we are trying to understand how testimonial imbalances contribute to the admissibility of racialized evidence. If we analyze the credibility injustice motif from the access point of the precipitating incident, we will understand how POC's credibility deficit is perpetuated by the Rules of Evidence in impeachment with previous acts of untruthfulness and prior convictions, hearsay exceptions, and expert evidence.

a. False Rape Allegations

Testimonial injustice has been well documented along both race and gender lines during trials. [29] For example, women enjoy a credibility surplus in cases that involve rape accusations against men of color.[30] Consider, the *Scottsboro Boys* and the *Central Park Five* cases, both of

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27. *See* Martin Michaels, *Interracial Relationships Still Subject to Discrimination*, MINT PRESS NEWS (Sept. 6, 2013), http://www.mintpress news.com/interracial-relationships-still-subject-todiscrimination/168463 [https:// perma.cc/V2CF-2WRV] (discussing how although interracial couples are be becoming much more common discrimination continues to follow interracial families); Elizabeth M. Toledo, Note, *When Loving Is Not Enough*, 104 CAL. L. REV. 769, 790 (2016) (examining how interracial couples are still discriminated); Good Morning Britain*, Piers and Alex Clash Over Prince Harry and Meghan's Accusations of Racism | Good Morning Britain*, YOUTUBE (March 9, 2021) https://youtu.be/sG9rX6Ifzhw [https://perma.cc/3UE3-R3NM] (Alex Beresford discussing his experience in an interracial family).

28. Rosario Lebrón, *supra* note 6; Simon-Kerr, *Unchaste and Incredible*, *supra* note 6*;* Simon-Kerr, Credibility by Proxy *supra* note 6.

29. Rosario Lebrón, *supra* note 6; Simon-Kerr, *Unchaste and Incredible*, supra note 8*;* Simon-Kerr, *Credibility by Proxy supra* note 6.

30. In no way should this discussion be understood as implying that men of color do not sexually assault women. As Tarana Burke has stated, "We have to be able to hold two truths at the same time or more than one truth." The Daily Show with Trevor Noah, *Tarana Burke on What Me Too Is Really About - Extended Interview | The Daily Show*, YouTube (June 4, 2018), https://youtu.be/GfJ3 bIAQOKg [https://perma.cc/M95N-XRSN] (speaking on the true history of Black men being falsely accused and the fact that Black men commit sexual violence against women, especially Black women).

which involved false accusations of Black teenagers gang-raping white victims.[31] In both cases, the officers discarded the defendants' stories of innocence because of their credibility deficit due to their race. This deficit was enhanced by the myth that men of color (especially Black men) are "animalistic, sexually unrestrained, inherently criminal, and ultimately bent on rape."[32] This myth was created to promote white supremacy based on superior morality and intellect as well as on credibility imbalances.

This credibility injustice and perceived superiority lead to racialized evidentiary practices not only at trial but from the very beginning of the investigation. For instance, in the case of the *Scottsboro Boys*, the race credibility deficit trumped the victims' gender credibility deficit. Because of this, the women experienced a surplus that led investigators to believe them even when there were reasons to doubt their testimony.[33] In this way, POC defendants get into court based largely on their credibility deficit. This deficit widens during the trial if the defendant decides to testify to prove his innocence. Due to impeachment rules that allow attorneys to bring prior instances of untruthful behavior[34] that are not relevant and have been shown to not be predictors of truthful testimony,[35] prosecutors can

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31. Sharon L. Davies, *The Reality of False Confessions - Lessons of the Central Park Jogger Case*, 30 N.Y.U. REV. L. & SOC. CHANGE 209, 211-12 (2006); N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1316-17 (2004); Faust Rossi, *The Scottsboro Trials: A Legal Lynching,* CORNELL LAW FACULTY PUBLICATIONS PAPER 948, 1, 1-5 (2002), http://scholarship.law.cornell.edu/facpub/948 [https://perma.cc/3SPK-AMEM]; Douglas O. Linder, THE TRIALS OF "THE SCOTTSBORO BOYS," http://law2.umkc.edu/faculty/projects/FTrials/scottsboro/SB_acct.html [https://perma.cc/F4M5-DEUE]. In the case of the *Scottsboro Boys*' accusation, the alleged gang rape of two white girls by nine black teenagers was denounced by the alleged victims. Rossi, *supra*. In the case of the Central Park Five, it was the police who decided about who the rapists of the Central Park jogger were. Duru, *supra*; Davies, *supra*. Both cases, however, illustrate how race plays a role in credibility determinations not only in a trial but since the investigation stage, which has important consequences in the admissibility of evidence.

32. Duru, *supra* note 31 at 1320.

33. Rossi, *supra* note 31 at 1-5.

34. For example, a witness can be impeached with evidence of their character for untruthfulness through reputation or opinion testimony, prior specific act, and prior criminal acts. *See*, *e.g.*, FED. R. EVID. 608-609.

35. Carodine, *supra* note 15 at 553-59; Rosario Lebrón, *supra* note 6 at 60-63; Donald H. Zeigler, Harmonizing Rules 609 and 608(b) of the Federal Rules of Evidence, 2003 UTAH L. REV. 635, 646–47 (2003) Charles H. Kanter & Richard Page, *Impeaching and Rehabilitating a Witness with Character*

further build on the credibility deficit until they completely discredit defendants. Defendants, aware of this sometimes, resign themselves to their fate.

For example, in the case of the *Central Park Five*, the credibility injustice led to false and forced police confessions.[36] Some of the teenagers admitted to the rape itself, while others admitted to some involvement in the crime.[37] In addition to the coercive techniques (including mental and physical abuse) used to induce these confessions,[38] a reason these teenagers falsely admitted to criminal activity is likely that they were well aware of the fact that nobody would believe in their innocence due to their credibility deficit.[39]

The Central Park Five's confessions proved extremely damning even though the evidence indicated that the rape was committed by only one person.[40] Confessions have lasting evidentiary effects. Besides factfinders generally regarding confessions to be dispositive, even when they are coerced or conflict with the rest of the evidence, not much can be done under the Rules of Evidence once one has been produced.

Confessions enter evidence under hearsay rules.[41] If a defendant decides to testify to explain why he confessed falsely, he admits to a previous act of untruthfulness. This self-impeaching admission will only fuel the factfinders' credibility biases and give opposing attorneys ample ammunition for cross-examination and closing arguments to further obscure a bad, racialized investigation. All of this is prejudicial enough for

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Evidence: Reputation, Opinion, Specific Acts and Prior Convictions, 9 U.C.D. L. REV. 319, 324 (1976).

36. Duru, *supra* note 32 at 1316-17; Davies, *supra* note 31 at 215-16.

37. Duru, *supra* note 32 at 1316-17; Davies, *supra* note 31 at 215-16.

38. Davies, *supra* note 32 at 218.

39. Many victims of sexual assault exhibit the same kind of resignation. They assume that they are not going to be believed and their credibility is going to be put on trial. For that reason, they decline to proceed with accusations against their aggressors to prevent further revictimization by not being believed. Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1359-60 (2005); Diana Friedland, *27 Years of "Truth-in-Evidence": The Expectations and Consequences of Proposition 8's Most Controversial Provision*, 14 BERKELEY J. CRIM. L. 1, 27 (2009); Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 28 (2017); Rosario Lebrón, *supra* note 6 at 51.

40. Duru, *supra* note 32 at 1318-19.

41. Confessions would be admitted under the party opponent hearsay exception. For example, Rule 801 of the Federal Rules of Evidence. The exception covers the party's own statements or any statements that were authorized or adopted by the party as well as some certain statements made by a co-conspirator.

defendants without previous convictions.[42] It is even worse for defendants who do have previous convictions, which many American male POC have solely because of racialized mass incarceration, as it skews their testimonial deficit even further.[43]

b. False 9-1-1 Accusations

The same issues of malicious accusations predicated on race, absence of pre-trial checkpoints for excluding racialized evidence, and lack of rules to contextualize or impeach racialized evidence during a trial occur in non-sexual-violence cases (e.g., harassment, nuisances, child abuse, and child neglect cases). The recent Central Park birdwatching incident, which involved a confrontation between a white woman (Amy Cooper) and a Black man (Christian Cooper) exemplifies well these probative issues that credibility imbalances create even from investigative stages that are not corrected but accentuated during a trial.[44]

Amy was walking her unleashed dog.[45] Christian, who was birdwatching, politely asked Amy to comply with the law and leash her dog. When Amy refused, Christian tried to leash the dog himself, at which point Amy yelled, "Don't you touch my dog!" and threatened to call the police and tell them that an African American man was threatening her.[46] When Christian insisted on her complying with the law, she placed a call to 9-1-1, pretending to be scared, and delivering on her previous threat of alleging that Christian was threatening her life.[47] Fortunately, Christian

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42. Prior convictions are a subset of previous or specific acts of untruthfulness use to impeach the credibility of a witness. Depending on the jurisdiction, it might be automatically admissible, include more than crime *in falsi*, or differ on how long a conviction is acceptable for impeachment or whether it is subject to an unfair prejudice analysis. Zeigler, *supra* note 35 at 646-47.

43. Carodine, *supra* note 15 at 525.

44. Amir Vera & Laura Ly, *White Woman Who Called Police on a Black Man Bird-Watching in Central Park Has Been Fired*, CNN (May 26, 2020), https://edition.cnn.com/2020/05/26/us/central-park-video-dog-video-african-american-trnd/index.html [https://perma.cc/L3SM-88LG].

45. *Id.*

46. Good Morning America Woman Sentenced to Community Service After Lie about Central Park Attack (Oct. 15, 2020), https://youtu.be/4ib1U3iNwsQ [https://perma.cc/NU5W-9DWW].

47. Matthew Impelli, *NYC Mayor Condemns White Woman Calling Cops on Black Man in Central Park as "Racism, Plain and Simple,"* NEWSWEEK (May 26, 2020), https://www.newsweek.com/nyc-mayor-condemns-white-woman-calling-cops-black-man-central-park-racism-plain-simple-1506516 [https://perma.cc/N2ZC-EDA3].

recorded the event with his cellphone. Nonetheless, Amy placed a second call alleging that he tried to assault her when Christian was not recording.

Christian's recording was dispositive evidence showing how Amy was relying on her credibility surplus as a white woman relative to his credibility deficit as a Black man.[48] Had there been no video, given this credibility imbalance, the police probably would have at least arrested Christian, if not brutalized or killed him.[49]

Because of the recording, Amy was eventually charged with false reporting,[50] but prosecutors dismissed the charge after she completed a therapeutic program consisting of five sessions on instruction about racial biases.[51] Ironically, no one thought Amy needed racial-bias training, given that she was well aware of them and how to exploit them in the legal system. As radio commentator and equity advocate, Adrienne Lawrence tweeted, "Her malicious weaponization of racial bias proves that she's well-aware of it and knows how it works. She needed punishment, not coddling."[52]

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48. *Id.*

49. *To Name a Few of the Most Recent Victims: Eric Garner, Atatiana Jefferson, Aura Rosser, Michael Brown, Tamir Rice, Philando Castile, Breonna Taylor, and George Floyd.* Alia Chughtai, *Know Their Names Black People Killed by the Police in the US*, AL JAZEERA, https://interactive.aljazeera.com/aje/2020/know-their-names/index.html [https://perma.cc/L8X6-PKVH]; *George Floyd: Timeline of black deaths and protests*, BBC NEWS (April 22, 2021), https://www.bbc.com/news/world-us-canada-52905408 [https://perma.cc/B5S4-PPAZ].

50. Jonah E. Bromwich, *Amy Cooper, Who Falsely Accused Black Bird-Watcher, Has Charge Dismissed*, N.Y. TIMES (Feb. 16, 2021), https://www.nytimes.com/2021/02/16/nyregion/amy-cooper-charges-dismissed.html [https://perma.cc/X2JX-797C].

51. *Id.* The discussion about the state's improper response to Amy Cooper's case is not a commentary on the desirability of implementing restorative justice responses in this type of case. Bringing restorative justice in cases of racial harms could have great benefits. *See*, *e.g.*, Johanna Turner, *Race, Gender and Restorative Justice: Ten Gifts of a Critical Race Feminist Approach*, 23 RICH. PUB. INT. L. REV. 267 (2020) (discussing the value of critical race feminist restorative justice as an alternative response to sexual and racial harms). However, five sessions on instruction bias are not restorative justice. There is no engagement with the victim and recognizing the harms made to him, there is also no change in racial views after five therapy or instruction sessions.

52. Adrienne Lawrence (@AdrienneLaw), TWITTER (Feb. 16, 2021, 1:08 P.M.), https://twitter.com/AdrienneLaw/status/1361724217952137216 [https://perma.cc/RP5V-5AQH].

Beyond the lack of consequences and the frequent slaps on the wrist that white litigants and self-designated victims receive for making false accusations and introducing racialized evidence in court, the Central Park birdwatching incident exposes the lack of checkpoints in our system for this type of evidence. If it were not for Christian's video, Amy's statements would enjoy the protection of hearsay exception rules such as *present sense impression*,[53] *excited utterance*,[54] and *then-existing mental, emotional, or physical condition*.[55] And if Amy's statements had been, unlike, in this case, non-testimonial[56]—for example, if Amy had recorded herself and uploaded the recording to her social media—then, under *Crawford*[57] and its progeny,[58] they would have been admissible even if Amy had been unavailable to testify or unwilling to cooperate,[59] and even though the evidence would not have satisfied a minimum threshold of reliability.[60] More importantly, defense attorneys would not have been able to exclude this racialized evidence unless they could have met the

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53. "A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it." FED. R. EVID. 803 (1).

54. "A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." *Id.*

55. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will. *Id.*

56. A non-testimonial statement is one "procured with a primary purpose of creating an out-of-court substitute for trial testimony." Ohio v. Clark, 576 U.S. 237, 245 (2015).

57. Crawford v. Washington, 541 U.S. 36 (2004) (reformulating the admissibility standard for hearsay statements in criminal cases by holding that, under the Confrontation Clause of the Sixth Amendment, prior testimonial statements of witnesses who have since become unavailable may not be admitted without cross-examination).

58. Davis v. Washington, 547 U.S. 813 (2006); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Michigan v. Bryant, 562 U.S. 344 (2011); Bullcoming v. New Mexico, 564 U.S. 647 (2011); *Clark*, 576 U.S. at 245.

59. Jeffrey Bellin, *Applying Crawford's Confrontation Right in A Digital Age*, 45 TEX. TECH L. REV. 33, 34 (2012) (explaining how "few electronic utterances appear to fall within the Court's definition of 'testimonial.'").

60. Whorton v. Bockting, 549 U.S. 406, 420 (2007) (explaining how after *Crawford* the Confrontation Clause does not require the exclusion of non-testimonial statements even if they lack any indicia of reliability).

often unattainable standard of proving the statements to be extremely prejudicial or confusing to jurors.[61]

c. Racialized Medical Accusations

Similarly, albeit more subtly because the scientific community enjoys the imprimatur of objectivity and neutrality, notwithstanding its participation in white normativity and transparency, medical testimony and records also partake in credibility injustice. Consider, for example, neglect accusations that come under the guise of medical expertise.

> Research shows that black and Hispanic pediatric emergency room patients with minor head trauma are two to four times more likely to be evaluated and then reported (as suspected abusive head trauma) when compared with white, non-Hispanic patients. Once there are suspicions of abuse, black children are more likely to receive invasive testing like full body X-rays.[62]

Again, we see the probative issues racial credibility injustice creates even from the investigative stages. Medical professionals suspect child abuse and discount nonwhite parents' accounts involving injured children at a much higher rate than they do white parents with injured children under similar circumstances. As a result, parents who are POC are charged with abuse and neglect and separated from their children at a much higher rate than their white counterparts. These false accusations and removal of children from their homes are not only emotionally devastating, but they

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61. Under rules like 403 of the Federal Rules of Evidence, attorneys can ask for the exclusion of that evidence by arguing that the racialized nature of the evidence is ineffective towards aiding in the determination of truth, is unfairly prejudicial, leads to confusion of the issues, and misleads the jury. However, the attorney will be accused of trying to introduce race into the trial and discounting the reliability of statements made concurrently to the events. In addition, courts would probably consider the argument to be a stretch of the rules.

62. Jessica Horan-Block, *A Child Bumps Her Head. What Happens Next Depends on Race*, N.Y. TIMES (Aug. 24, 2019), https://www.nytimes.com/2019/08/24/opinion/sunday/child-injuries-race.html [https://perma.cc/Q7A3-SSRS]. *See* Kent P. Hymel, Antoinette L. Laskey, Kathryn R. Crowell, Ming Wang, Veronica Armijo-Garcia, Terra N. Frazier, Kelly S. Tieves KS, Robin Foster, Kerri Weeks, *Pediatric Brain Injury Research Network (PediBIRN) Investigators. Racial and Ethnic Disparities and Bias in the Evaluation and Reporting of Abusive Head Trauma,* 198 J. PEDIATR. 137 (2018); C.W. Paine & J.N. Wood, *Skeletal surveys in young, injured children: A systematic review*, 76 CHILD ABUSE NEGL. 237.

also typically end up depleting non-white parents of financial resources, as they are forced to pay attorney's fees, hefty expert-witness fees, and court costs in an effort to disprove racialized fabricated accusations and keep their families intact.

Supposedly neutral accusers typically suffer no consequences for inflicting these emotional and financial costs on POC through their racialized expert opinions. In addition, the records produced by doctors are used to impeach the credibility of POC parents and support their credibility deficit during the trial. Moreover, this evidence is unchecked in terms of racial bias.

If attorneys were to bring evidence of the racialized nature of doctors' reports during the trial, they would probably be accused of injecting race into an otherwise race-neutral process (just as Rachel Jeantel was accused of introducing race into the second-degree-murder trial of George Zimmerman).[63] Defense attorneys, then, are compelled to challenge the racialized evidence, and not with race-conscious studies indicating that the great disparities in the medical determination of abuse are based on implicit biases and the lack of "consistent application of evidence-based decision rules and practice guidelines."[64] Rather, they are forced to retain expensive experts who are tasked with somehow disproving a negative—namely, that the defendants did not commit abuse or neglect.[65]

d. Biased Forensic Evidence

Credibility injustice in pre-trial expert testimony and its consequences is also distinguishable in forensic evidence. Research demonstrates how extraneous information (i.e., non-medical information) can result in cognitive biases in forensic pathology decision-making.[66] Recently, in the trial against Derek Michael Chauvin for the murder of George Floyd, Dr. Lindsey Thomas explained to the nation how forensic pathologists determine whether an individual was murdered, suffered an accident, or died from natural causes by looking at information extraneous to the autopsy of the body, such as the multiple videos of Chauvin suffocating

63. Yamiche Alcindor, *Trayvon Martin's friend: Encounter was racially charged*, USA TODAY (June 27, 2013), https://www.usatoday.com/story/news/nation/2013/06/27/trayvon-martin-sanford-zimmerman-florida-race/2462403/ [https://perma.cc/PDR2-DFDM].

64. Hymel et al., *supra* note 62 at 142.

65. Horan-Block, *supra* note 62.

66. Itiel Dror, Judy Melinek, Jonathan L. Arden, et al., *Cognitive Bias in Forensic Pathology Decisions*, 66 J FORENSIC SCI. 1751 (2021) [hereinafter Dror et al., *Cognitive Bias*].

Floyd for 9 minutes and 29 seconds.[67] The doctor confirmed the results of the State's autopsy, which concluded that "the mechanism of Mr. Floyd's death was 'asphyxia or low oxygen,' a conclusion she said she reached primarily [not through the medical evidence but] through review of video footage of Mr. Floyd's final minutes. [68] She stated that the medical evidence from the autopsy "was helpful for ruling things out, including a heart attack,"[69] but not for concluding the cause of the death.

Unfortunately, when it comes to extraneous evidence, the majority of cases are not as clear-cut as Floyd's. And in those not so clear-cut cases, when forensic pathologists make determinations about the cause of death, their judgment can be significantly affected by context-dependent, medically irrelevant information, such as race.[70]

Consider, for example, the determinations of causes of death of children 6 years old or younger. Studies have shown that when forensic pathologists make decisions regarding whether the cause of death in those cases was an accident or a homicide, they base their determinations on the

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67. Law & Crime Network, *MN v. Derek Chauvin Trial Day 10 - Dr Lindsey Thomas - Forensic Pathologist*, YOUTUBE, https://youtu.be/dM2BJejdGwQ [https://perma.cc/3N7Z-DGHD];
The following are snippets from Dr. Thomas testimony.

> Dr. Thomas said that George Floyd died because "he was not able to get enough oxygen in to maintain his bodily functions." She said she came to that conclusion mainly from "evidence from the terminal events, the video evidence that show[s] Mr. Floyd in a position where he was unable to adequately breathe."

Drugs and Heart Disease Were 'Not Direct Causes' of Floyd's Death, Medical Examiner Says, N.Y. TIMES (April 9, 2021) https://www.nytimes.com/live/2021/04/09/us/derek-chauvin-trial#dr-lindsey-thomas-forensic-pathologist-takes-the-stand [https://perma.cc/WZ8K-DWJU].
"Dr. Thomas said she needed to watch the video to really determine what led to George Floyd's death." *Id.*

> Medical examiners will always tell you that they cannot tell everything from simply examining the body. They need to know the circumstances of the death. In this case, the video is medically relevant information — without it, Dr. Thomas is saying, you might not be able to determine how he died. *Id.*

68. Marie Fazio*, Dr. Lindsey Thomas, Forensic Pathologist, Takes the Stand*, N.Y. TIMES (April 9, 2021), https://www.nytimes.com/live/2021/04/09/us/derek-chauvin-trial#dr-lindsey-thomas-forensic-pathologist-takes-the-stand [https://perma.cc/U9XC-YGBJ].

69. *Id.*

70. Dror et al., *Cognitive Bias, supra* note 66 at 2, 6.

race of the deceased, [71] proxies for race such as the identity of the victim's caretaker (e.g., boyfriend or grandmother),[72] and confirmation biases based on racial stereotypical data about who usually commits homicides.[73] As a result of the racialized evidence used, forensic pathologists are, all else being equal, more likely to determine Black children's than white children's deaths to be homicides rather than accidents.[74]

3. Restoring Credibility

As we have seen, by applying the precipitating incident entry point analysis to the credibility injustice motif, statements and opinions made during the investigative stage have lasting effects on the admissibility of racialized evidence in trials. The credibility imbalance carries over to the trial and increases throughout the process with the use of impeachment techniques and the application of evidence rules. Given this unavoidable fact, we should enact new rules to minimize the injustice that typically results from credibility injustice.

First, we should minimize credibility impeachments based on previous acts of untruthfulness and prior convictions by abolishing these rules because of their unreliability and racial unfairness. As discussed in the case of false rape accusations, a POC defendant may be dragged into court because of the credibility deficit he experiences. That deficit can widen due to impeachment rules which allow attorneys to bring prior instances of untruthful behavior that are not relevant and have been shown to not be predictors of truthful testimony.[75] In addition, the racial testimonial imbalance can be increased by the use of prior convictions that disproportionately affect POC because of the racial disparities in mass incarceration. Likewise, because *good character* buildup cannot be demonstrated unless character is attacked,[76] the difference between the surplus of white witnesses and the deficit of POC parties becomes larger.

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71. *Id.* at 3.
72. *Id.*
73. *Id.* at 4.
74. *Id.* at 3.
75. Carodine, *supra* note 15 at 553-59; Rosario Lebrón, *supra* note 6 at 60-63; Zeigler, *supra* note 35 at 646–47; Charles H. Kanter & Richard Page, *Impeaching and Rehabilitating a Witness with Character Evidence: Reputation, Opinion, Specific Acts and Prior Convictions*, 9 U.C.D. L. REV. 319, 324 (1976).
76. The rules of evidence, in general, prohibit the use of character evidence to prove a witness' good character for truthfulness unless his character for truthfulness has been attacked. *See* FED. R. EVID. 608(a).

Second, we should limit the application of hearsay rules or provide the possibility to impeach such statements with implicit bias evidence even in cases where race is not explicitly at issue. We should not restrict the use of racial bias to cases only where race is being discussed, such as actions that allege discrimination.[77] We saw in the case of Christian Cooper and the confessions from the Central Park Five how false statements of wrongdoing can be introduced into evidence even when a defendant does not testify or the victim is aware of the falsehood of the statement and decides not to proceed with the charges. This evidence is admitted without any check on the truthfulness of the statements and without any possibility of a challenge to their racialized nature. Thus, it is imperative that attorneys and parties have recourse in those cases.

Third, we should implement new rules that counter credibility injustice promoted by scientific and medical testimony. Specifically, rules that help factfinders better discern whether expert testimony is based on the consistent and unracialized application of standardized rules and practices.[78] In other words, we should reform the standards for admission of expert opinion by making *Frye*[79] (for those jurisdictions that still follow it) and *Daubert*[80] standards more stringent and race-conscious.

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77. *See, e.g.,* Yu v. Idaho State Univ., 11 F.4th 1065 (9th Cir. 2021) (holding that hat evidence of implicit (or unconscious) bias against a member of a protected class can be probative of whether an entity has engaged in intentional discrimination in violation of Title VI of the Civil Rights Act of 1964). Other areas of the law in which implicit bias can be explicitly relevant are asylum on the basis of race prosecution and affirmative action claims.

78. *See* Hymel et al., *supra* note 62 at 142.

79. *Frye* v. *United States* made scientific expert opinion admissible if the basis for the opinion is based on generally accepted techniques by the relevant scientific community. 293 F. 1013 (D.C. Cir. 1923). This standard was later overruled in federal courts by the Supreme Court of the United States in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592–94 (1993). Most states have adopted Daubert; however, some states still follow the Frye standard. *Admissibility of Expert Testimony in All 50 State*s, https://www.mwl-law.com/wp-content/uploads/2018/02/ADMISSIBILITY-OF-EXPERT-TESTIMONY.pdf [https://perma.cc/LE3W-S6BV].

80. In *Daubert,* 509 U.S. 579, 592–94, the Supreme Court of the United States established a non-exhaustive list to determine if a scientific expert is qualified to testify. The following is a list of factors added to *Frye's* generally accepted standard: 1) the expert's technique or theory can be tested and assessed for reliability; 2) the technique or theory has been subject to peer review and publication; 3) the known or potential rate of error of the technique or theory; and 4) the existence and maintenance of standards and controls. *Id.* The United States Supreme Court extended the *Daubert* standard in 1999 to all expert testimony, not

Researchers have recommended that "[m]edically relevant information should be the primary driver of pathology decisions, supplemented by the less medically relevant when needed and justified. To achieve this, the forensic pathology community must explore and adopt procedures that minimize bias."[81]

Some of the procedures suggested are Linear Sequential Unmasking (LSU) and race-blind peer reviews.[82] LSU is a procedure that requires "examiners not only to first examine the trace evidence in isolation from the reference material, but also provides a balanced restriction on the changes that are permitted post-exposure to the reference material." In other words, non-medical information such as race, place of residence, or family composition that could lead to a race cognitive bias is withheld until an analysis is produced. [83] If needed for a determination, extraneous evidence is produced singly until a decision is reached.[84] If the rest of the non-medical information is released after the analysis has been concluded, no changes are permitted. [85] If changes are permitted, the initial observation should remain in the record along with the extraneous information released.[86] The researchers also recommended that "[t]o avoid that non-medical decisions be unintentionally disguised as medical, the forensic pathology reports and testimony must make it explicitly clear what is medical and what is not medical."[87]

Our rules of evidence should have the same requirements when admitting forensic or medical evidence. Scientific reports that did not undergo LSU or were not race-blind peer-reviewed should not be admitted into evidence. This would diminish the amount of racialized expert opinions that come into court. Reports must also include which medical and non-medical information was used for the conclusion. Even if this does not cure the issue that even medical information can be racialized as medical knowledge has been built upon the study of cis, white, male

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just scientific testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999).

81. Dror et al., *Cognitive Bias, supra* note 66 at 6.

82. *Id.*

83. Itiel E. Dror, William C. Thompson, Christian A. Meissner, Irv Kornfield, Dan Krane, Michael Saks, and Michael Risinger *Letter to the Editor— Context Management Toolbox: A Linear Sequential Unmasking (LSU) Approach for Minimizing Cognitive Bias*, 60 FORENSIC DECISION MAKING. J FORENSIC SCI. 1111 (2015).

84. *Id*.

85. *Id.*at 1115.

86. *Id.*

87. Dror et al., *Cognitive Bias, supra* note 66 at 1756.

bodies,[88] it still recognizes that race and other factors could be part of the decision of "unbiased" expert conclusions. This would allow race to be at the forefront and be used for impeachment purposes if needed without attorneys having to be fallaciously singled out for trying to "inject" race into the trial.

B. White Normativity & Transparency

Even if we can cure the system from admitting racialized evidence predicated on credibility injustice, race finds its way into court even more insidiously through the adjudication of facts based on white normativity. By moving from the investigative stage to the deliberation stage, we see that triers of fact base their adjudications on functional evidence such as demeanor, idiolect, and clothing.[89] This type of evidence, completely unregulated by the rules as Professor Capers has shown,[90] is fraught with racialized notions that augment credibility injustice and allow the introduction of race without any check or recourse.[91] This reality, however, is hidden by the phenomenon of white transparency.

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88. Arnold M. Epstein & John Z. Ayanian, *Racial Disparities in Medical Care*, 344(19) N. ENGL. J MED., 1471 (2001) (explaining how "racial disparities in medical care are particularly troubling for at least two reasons: the possibility that they reflect discrimination or racial bias on the part of physicians and their potentially deleterious effects on health outcomes."); "Clinical Trials Need More Diversity", Scientific American Sept. 1, 2018, https://www.scientificamerican .com/article/clinical-trials-have-far-too-little-racial-and-ethnic-diversity/(noting how participants in clinical trials for new drugs are, in some cases, 80-90% white); Mary-Jo Del Vecchio Good, Byron J. Good & Anne E. Becker, Unequal Treatment: Confronting Racial and Ethnic Disparities in UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE (Brian D. Smedley et al. 2003), https://www.ncbi.nlm.nih.gov/books/NBK220349/ [https://perma.cc/Z5XA-JQUC] (describing how critical perspectives in the study of medicine culture "has largely been ignored by most research to date or which has circumscribed cultural inquiry to the differences between patient and physicians 'beliefs.'").

89. Although demeanor is acknowledged in Evidence and Confrontation jurisprudence as a central pillar of adjudicating the truth and the credibility of a witness as well as in some statutes or rules, how triers of fact are supposed to use this evidence is left unregulated. Capers, *supra* note 19, at 869; Julia Simon-Kerr, *Unmasking Demeanor*, 88 GEO. WASH. L. REV. ARGUENDO 158, 163 (2020) [hereinafter Simon-Kerr, Unmasking Demeanor]. Moreover, the jurisprudence and the law presume there is a universality to the verbal and nonverbal cues that are not going to be interpreted in racialized ways.

90. Capers, *supra* note 19 at 871.

91. *Id.* at 880.

1. Racialized Functional Evidence

White normativity is the normalization/naturalization of white conduct, experiences, norms, worldviews, and praxes as the "standard by which all other racial groups find themselves measured" (individually, institutionally, and socially).[92] White transparency, on the other hand, refers to our tendency not to think about the white normalized rules, ideas, practices, behaviors, and experiences as white-specific.[93] If it were not for white transparency, we would be able to see that our judicial process is rarely exempt from race considerations and those adjudications are often made based on white normative standards such as demeanor.

An individual's verbal and nonverbal cues or demeanor are "considered part and parcel of how jurors [and judges] should evaluate witness testimony."[94] Our probative system rests on the assumption that verbal and nonverbal cues are universal and, thus, demeanor can aid in the determination of a witness's credibility. This notion is false.[95] In addition, the interpretative universality of these cues is fallacious as it rests on white norms.

While there are some commonalities across cultures and social groups in terms of the communicative meaning of body language, facial expressions, and intonation, social science researchers have abandoned the

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92. Deirdre M. Bowen, *Meeting Across the River: Why Affirmative Action Needs Race & Class Diversity*, 88 DENV. U. L. REV. 751, 757 n. 44 (2011).

93. 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).

94. Capers, *supra* note 19 at 880.

95. See Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007) (finding that participants remembered and misremembered legally relevant facts in racially biased ways); Dennis J. Devine & David E. Caughlin, *Do They Matter? A Meta-Analytic Investigation of Individual Characteristics and Guilt Judgments*, 20 PSYCHOL. PUB. POL'Y & L. 109, 124–25 (2014) (examining the extent to which characteristics of jurors and defendants are associated with juror judgments of guilt); M. Kimberly MacLin et al., *The Effect of Defendant Facial Expression on Mock Juror Decision-Making*: *The Power of Remorse*, 11 N. AM. J. PSYCHOL. 323, 329 (2009) (researchers manipulated the display of remorse and anger in defendant photographs and found that that a remorseful defendant resulted in more lenient verdicts compared to an angry defendant); Robert Forsterlee, Lynne Forsterlee, Irwin A. Horowitz & Ellen King, *The effects of defendant race, victim race, and juror gender on evidence processing in a murder trial*, 24 BEHAV. SCI. LAW, 179 (2006) (examining the effects of defendant race, victim race, and juror gender on sentencing and information processing in murder trials).

universality theory.[96] One of the current theories is that verbal and nonverbal cues are like dialects.[97] In other words, interpreting demeanor, like interpreting a person's speech, is a culturally dependent task. Even in the presence of a shared repertoire of cues or lexicon (in the case of speech), the meaning of the cues could be vastly different depending on the social group who is using them. Interpreting whether a person is angry, sad, scared, happy, or lying can, thus, lead to misinterpretations.[98] Yet, our evidentiary system operates under the premise that we live in a monocultural society (i.e., white culture) and we can determine the meaning of a witness' demeanor without any harmful or racialized effects.

Moreover, studies have found that because cues are culturally specific, people have an in-group advantage when interpreting them. [99] That means that if one is part of a group, one would be more successful at interpreting the cues from that group than a person who is not. For example, people who belong to groups in which it is the norm not to look in the eyes when speaking to someone would not interpret this as a sign that the person is lying, as is the white norm.

The conclusions of these studies would suggest that diversifying juries to include people who might be fluent in the witnesses' cues could remedy some of the problems associated with the reliance on demeanor and its privileged position in our probative system. However, white transparency affects not only white triers of fact but also nonwhite ones.

As Professor Gonzalez Rose has put it: "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."[100] For that reason, a diverse jury and jury pool or a diverse bench, albeit important additions which would hopefully facilitate the confrontation of whiteness in the courtroom, are not the ultimate solutions. Nonwhite judges and jurors have their hands tied in using race if it is not at issue or they risk being sanctioned or compromising the trial.

Moreover, beyond the fact that meanings of cues are culturally and socially construed, the question of whether the assumptions associated with the cues are accurate still remains. Recent psychological studies point

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96. Hillary A. Elfenbein & Nalini Ambady, *Universals and Cultural Differences in Recognizing Emotions*, 12(5) CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE, 159, 160. (2003).

97. *Id.* at 161-62.

98. *See id.*

99. *Id.* at 161.

100. Gonzalez Rose, *Toward a Critical Race Theory of Evidence*, *supra* note 8 at 2300.

to the existence of a *lie bias* by which it cannot be shown that we can detect lies by observing someone's behavior.[101] Even Joe Navarro, a former FBI behavioral analysis program agent, has acknowledged the "need to stop associating behaviors indicative of psychological discomfort with deception."[102] In his analysis of over two hundred DNA exonerations where convicted people on death row were exonerated, he concluded that 100% of the officers were not able to detect the truth when suspects claimed that they did not commit the crime.[103] In other words, all of the officers failed in their assumption that the defendant was lying based on nonverbal cues. Navarro also explains how he would ask jurors in federal cases about the basis for their determination that a witness was lying and they would reply that it was based on nonverbal cues that have no bearing on credibility.[104]

Notwithstanding the issue with the reliability of the demeanor evidence and its white normativity character, we continue to use it and, even more, privilege it in court. This, in combination with other functional evidence like race, creates further issues and contradictions with settled principles in Evidence law such as character evidence.

As Professor Mikah K. Thompson has explained:

> The implicit belief that African-Americans are inherently violent can be used as both a sword and a shield in a trial concerning a violent criminal act. Rather than offering inadmissible evidence of a Black defendant's character for violence, the government can instead offer evidence of the defendant's stereotypical Blackness, thereby playing upon the jurors' implicit biases to establish the guilt of the defendant. Likewise, a non-Black defendant need not offer evidence of a Black victim's violent character to support a claim of self-defense. Rather, the victim's stereotypical Blackness

101. Aldert Vrij, Maria Hartwig, & Pär Anders Granhag, *Reading Lies: Nonverbal Communication and Deception*, 70 ANN. REV. PSYCHOL. 295, 307–08 (2019).

102. Joe Navarro, *The End of Detecting Deception*, PSYCHOLOGY TODAY (July 15, 2018), https://www.psychologytoday.com/us/blog/spycatcher/201807/the-end-detecting-deception [hereinafter Navarro, Detecting Deception].

103. Joe Navarro, *Detecting Lies vs. Detecting Truth - Serious Implication* (Oct. 31, 2010), https://www.psychologytoday.com/us/blog/spycatcher/201010/detecting-lies-vs-detecting-truth-serious-implications [https://perma.cc/WN2E-XX7K].

104. *Id.* (discussing common myths about nonverbal behavior that produce misleading conclusions about a witness' credibility).

is sufficient character evidence.[105]

This play on blackness and character evidence is not only achieved by the displaying of the defendant's race in court but also by showing how much his demeanor varies from the white norm. Attorneys don't need a defendant to take the stand to make that display. The prosecution can bring the deviant demeanor from white norms through the testimony of witnesses that interacted with the defendant. Lawyers do so by forcing the defendant's reactions to objections or legal arguments that deviate from the white norm. Having the defendant in court allows jurors and attorneys to construct racialized proof based on a departure from white norms demeanor of the defendant.[106] And if the defendant takes the stand, attorneys display the deviant demeanor through a skillful −and perhaps, bullied −cross-examination meant to accentuate the race gap and alienate the defendant from the triers of fact. The same type of racialized strategy can be performed on non-party witnesses through cross-examination and objections.[107]

Yet, defense attorneys do not have at their disposal any mechanism to challenge this racialized practice as it is executed through the veil of white transparency. Even though demeanor is central to our evidentiary practices, the rules do not provide a way to formally challenge it. Moreover, a "trier of fact is not required to detail the witness's specific physical appearance or conduct that led to the credibility determination."[108] As such, race can be coded in multiple ways that hide its use and normalization.

A way to counteract such introduction of race prejudices into a trial would be to eliminate or attenuate the access to demeanor. The COVID-19 pandemic has provided us with an opportunity to see what that would look like. As a way to prevent the spread of the disease, witnesses and defendants have been required to wear masks in courts. This has reduced the amount of information related to demeanor available to triers of fact. Challenges have been brought regarding the constitutionality of such

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105. Mikah K. Thompson, *Blackness as Character Evidence*, 20 MICH. J. RACE & L. 321, 322 (2015).

106. Capers, *supra* note 19 at 884 (discussing how demeanor determinations are racially contingent, how studies have found that how jurors interpret facial expressions depends on the race of the juror and the race of the defendant, and how there are problems with cross-racial identifications of remorse).

107. Carlin, *supra* note 8 at 481–82 (describing the cross of Rachel Jeantel in the trial of George Zimmerman).

108. Honorable James P. Timony, *Demeanor Credibility*, 49 CATH. U. L. REV. 903, 930 (2000).

measures under the guise of a violation of the Confrontation Clause because of the impossibility to assess the witness' demeanor.[109]

Professor Julia Simon-Kerr has been cautiously optimistic about what we can learn from our unfounded reliance on demeanor during the COVID-19 pandemic. She points out that there "is some direct evidence" based on a mock jury study that when demeanor evidence is not available or limited, as when wearing a mask, we might instead simply listen to the testimony and pay attention to the verbal cues and to the story itself; improving the probabilities of detecting a lie above chance level.[110] However, she acknowledges that not all witnesses might be perceived equally even if everyone is wearing a mask. For example, black men could be perceived as more threatening.[111] Although she ponders whether "such biases might be muted in a courtroom in which all participants are masked, particularly if the masks are uniform and provided by the court,"[112] I am less optimistic about the implementation of a similar practice to reduce our reliance on demeanor.

Even if biases mutate in a way that would benefit members of the nonwhite culture, other functional evidence like speech would serve to discount their testimony. It has been documented that idiolect,[113] accent,[114] and English dialects[115] are used to discount credibility. For example, the use of African American Vernacular English (AAVE) in courts proceedings or during pre-trial stages as opposed to "standard English" (the white normative dialect of English that because white transparency it is neither recognized as such nor often challenged in court on racial

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109. Pueblo v. Cruz Rosario, 204 D.P.R. 1040, 2020 WL 5238749; State v. Jesenya O., No. A-1-CA-39148, 2021 WL 959292 (N.M. Ct. App. Mar. 11, 2021) Commonwealth v. Masa, No. 1981CR0307, 2020 WL 4743019 (Mass. Super. Aug. 10, 2020); State v. Smith, No. ED 108626, 2021 WL 1619283 (Mo. Ct. App. Apr. 27, 2021). "[T]he Sixth Amendment's Confrontation Clause arguably includes the right to display demeanor while confronting witnesses (i.e., disbelief, derision, or disappointment)." Capers, *supra* note 19; *supra* note 95.

110. Simon-Kerr, *supra* note 89 at 171 (discussing how a recent mock juror study sought to test whether niqab-wearing by witnesses would hamper truth-seeking).

111. *Id.* at 173.

112. *Id.*

113. Carlin, *supra* note 8 at 477-484.

114. Bonnie Urciuoli, EXPOSING PREJUDICE: PUERTO RICAN EXPERIENCES OF LANGUAGE, RACE, AND CLASS 2 (1996).

115. Laura Victorelli, *The Right to Be Heard (and Understood): Impartiality and the Effect of Sociolinguistic Bias in the Courtroom*, 80 U. PITT. L. REV. 709 (2019); Gelsey G. Beaubrun, *Talking Black: Destigmatizing Black English and Funding Bi-Dialectal Education Programs*, 10 COLUM. J. RACE & L. 196 (2020).

grounds) has disastrous effects in the administration of justice.[116] Similarly, with "any sign of accent or divergent stylization (read: signs of race or class or both), even native English speakers can be marked as speaking improper English,"[117] and, thus, being penalized with a credibility bias for not adhering to white norms.[118] Yet, these racialized linguistic practices of bias often go unchecked in court. As, with demeanor, racialized linguistic functional evidence enters the court and finds its way into adjudications.

2. Breaking the Silence from White Normativity & Transparency

If we consider how white normativity and transparency operate in the deliberations of triers of fact and consider various access points for reform, we can produce ways to correct some of these problems. One could be as radical as to implement blind testimony by having trial transcripts read by computers to jurors to avoid the unfounded use of demeanor in their deliberation.[119] In theory, this solution should not face any constitutional problems for civil matters. However, in criminal trials, that solution would violate the Confrontation Clause under its current understanding,[120] unless the defendant waives the right to have the jury present synchronous to the trial. Thus, we might look at different solutions for criminal trials like the following: (1) offering implicit bias training to jurors, attorneys, and judges;[121] (2) requiring legal education seminars on the basic principles of

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116. L. Danielle Tully, The *Cultural (Re)turn: The Case for Teaching Culturally Responsive Lawyering*, 16 STAN. J. CIV. RTS. & CIV. LIBERTIES 201 (2020); Caleb L. Green, *Upholding the Constitution Through Diversity*, NEV. LAW., February 2021, at 16.

117. Carlin, *supra* note 8 at 450, 474.

118. I, as a Puerto Rican English speaker, am often discredited because of my accent and stylization irrespective of my language abilities. See *id.* at 474.

119. This solution is sort of an LSU of testimony.

120. Maryland· v. Craig, 497 U.S. 836, 845 (1990) ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.").

121. However, the effectiveness of implicit bias training has been questioned. *See* Jason A. Cantone, Federal and State Court Cooperation: Effectiveness of Implicit Bias Trainings, FED. JUD. CTR., https://www.fjc.gov/content/337738/effectiveness-implicit-bias-trainings [https://perma.cc/X5WH-UL2N]; Robert J. Smith, *Reducing Racially Disparate Policing Outcomes: Is Implicit Bias Training the Answer*, 37 U. HAW. L. REV. 295 (2015); Phillip A. Goff, Jillian K. Swencionis, & Susan A. Bandes, *Why Behavioral Reforms Are More Likely Than Implicit Bias Training To Reduce Racial Conflicts in U.S. Policing*, SCHOLARS

CRT for all legal actors; (3) pre-trial trainings for jurors about the shortcomings of demeanor and other functional evidence; (4) mandatory jury instructions in every trial directing jurors not to take into account the race, speech, and other functional evidence of witnesses;[122] (5) having self-assessment forms for jurors or judges to check their biases during their deliberations; (6) polls to measure the use of implicit biases of jurors during deliberations; and (7) the creation of closed-circuit-television (CCTV) for witnesses (and maybe for every trial player) to diminish the amount of nonverbal cues that can be used in the liberations.[123]

This last solution has been tested as well due to the COVID-19 pandemic. Due to the public health emergency, trials have proceeded virtually through platforms such as Zoom,[124] Skype,[125] and Teams.[126] Even though we had limited experience with CCTV for certain witnesses (i.e., minors in sexual abuse cases)[127], its extent is not comparable with virtual trials or hearings where all proceedings are taking place outside the court, a white normative space, and all players are somehow equalized on their hierarchy by the impersonal boxes in our screens.

STRATEGY NETWORK (March 8, 2018), https://scholars.org/brief/why-behavioral-reforms-are-more-likely-implicit-bias-training-reduce-racial-conflicts-us [https://perma.cc/X2HA-5539]; Frank Kineavy, *Implicit Bias Training for Police Gaining Attention*, DIVERSITYINC (Oct. 10, 2016), http://www.diversityinc.com/news/implicit-bias-training-police-gaining-attention [https://perma.cc/P4R9-ERXF]; Destiny Peery, Opinion, *Implicit Bias Training for Police May Help, but It's Not Enough*, HUFFINGTON POST (Mar. 14, 2016), http://www.huffingtonpost.com/destiny-peery/implicit-bias-training-fo_b_9464564.html [https://perma.cc/3ZW4-QHNF]; Michael Noon, *Pointless Diversity Training: Unconscious Bias, New Racism and Agency*, Work, 32(1) EMPLOYMENT AND SOCIETY, 198–209 (2018).

122. Capers, *supra* note 19, at 898-900. *See* People v. Boone, 30 N.Y.3d 521, 91 N.E.3d 1194 (2017) (holding that when a witness identifying a defendant is of a different race, a trial court is required to give, upon request, a jury charge on cross-racial identification biases).

123. These solutions can be implemented as well in civil cases.

124. *See* Illinois's instructions for conducting hearings on Zoom, https://19thcircuitcourt.state.il.us/DocumentCenter/View/2812/Zoom-Instruction-and-Protocol-Sheet?bidId= [https://perma.cc/2QYB-DZAC].

125. *See* New York's instructions for conducting hearings on Skype, https://www.nycourts.gov/courts/nyc/SSI/images/CORONA/Skype_Instructions.pdf [https://perma.cc/2HPB-HJGG].

126. *See* Washington's instructions for conducting hearings on Teams, http://www.washingtoncourts.us/DocumentCenter/View/445/Guide-to-Virtual-Hearings-and-Microsoft-Teams- [https://perma.cc/JY44-FKDA].

127. Maryland v. Craig, 497 U.S. 836 (1990).

Some judges have recognized the equalizing nature of the virtual space in which "charismatic or bullying lawyers" are kept from steamrolling everyone else.[128] This solution presents the same challenges as computer read transcripts to jurors in terms of the Confrontation Clause. Thus, it would require in criminal cases, as courts currently do,[129] a waiver of the defendant's right to an in-person trial. But this is not the only challenge that this equalizing solution presents.

Attorneys participating in trials through videoconferencing report a decline in empathy.[130] And perhaps there is some truth to that. A Journal of Criminal Law and Criminology article reports that the use of CCTV in bail hearings in Cook County, Illinois raised by 51% on average bail amounts while in-person bails remain the same.[131] This seems to suggest that the absence of personal contact could make adjudicators act more severely and less empathetically.

However, some have argued that "video-conferencing could create new opportunities for understanding and empathy" as jurors, attorneys, and judges could see the environment witnesses and parties inhabit and feel more palpable the consequences of their adjudications or perhaps better understand parties and witnesses.[132] Yet, that would require a deeper transformation of the legal canons so that they no longer privilege white normativity. The plethora of articles discussing how to observe "good" or "appropriate" behavior or etiquette during virtual trials and about how witnesses and defendants have consistently and "comically" ignored these rules is a good indicator of how far we might be from the transformation of those white canons.[133] When litigants, for example in rent court

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128. Eric Scigliano, *Zoom Court Is Changing How Justice Is Served For better, for worse, and possibly forever*, THE ATLANTIC (April 13, 2021), https://www.theatlantic.com/magazine/archive/2021/05/can-justice-be-served-on-zoom/618392/ [https://perma.cc/R7DM-M3VH].

129. Court Operations During COVID-19: 50-State Resources, JUSTIA https://www.justia.com/covid-19/50-state-covid-19-resources/court-operations-during-covid-19-50-state-resources/ [https://perma.cc/CYB8-5J55] (last visited April 4, 2022).

130. Scigliano, *supra* note 128.

131. Shari S. Diamond et. al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 892 (2010).

132. Scigliano, *supra* note 128.

133. *Zoom Court Dos and Don'ts*, PRO LEGAL CARE LLC https://prolegalcare.com/zoom-court-dos-and-donts/ [https://perma.cc/DA8A-VVVG] (last visited April 4, 2022); Dani Kass, *Judge Warns Attys Not To Be Slobs in Video Hearings*, LAW360 (April 14, 2021), https://www.law360.com/articles/1372802/judge-warns-attys-not-to-be-slobs-in-video-hearings [https://perma.cc/7REY-S2KA]; Andrew

proceedings or in cases of sexualized violence, present their narratives in alternatives forms from the standard legal canon they are deemed untrustworthy; [134]. Moreover, entering into the personal spaces would open the door for the use of more functional evidence in deliberations, probably increasing the racialized nature of adjudications for falling outside the white norm and further suppressing nonwhite narratives.

3. A Silenced Duchess

We see the effects and the makings of this racist strategy in Markle's interview as well. After being asked by Oprah if she was silenced by the Royal Family, Markle explained that she believed that she was going to be protected, only to later realize that she would not.[135] They specifically discussed how she was asked not to make any public statements to deny or refute reports on the tabloids about her.[136] Perhaps, the most salient gossip was that Markle made Catherine, Duchess of Cambridge (Kate) cry during the preparations for her wedding to Prince Harry.[137] When, as we found out from Oprah's interview, it was the other way around.[138] She felt that she was not given the same treatment that the Royal Family gave Kate.[139] But, more importantly, Markle discovered how white norms

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Wolfson, *Virtual Court Hearings in 2020 Have it All: Nudity, beer, bikinis and barking dogs*, USA TODAY (Dec. 21, 2020), https://www.usatoday.com/story/news/nation/2020/12/21/amid-covid-19-zoom-court-hearings-include-nudity-beer-bikinis-dogs/3956427001/ [https://perma.cc/3PU9-PW76]; Elisabeth Waldon, *Declining Decorum: Judges Strive to Maintain Order in the Courtroom in the Age of Zoom*, THE DAILY NEWS (December 21, 2020), https://thedailynews.cc/articles/declining-decorum/ [https: //perma.cc/62VZ-JNDS].

134. *See* Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992) (describing how pro se litigants in landlord-tenant cases are often ignored and dismissed for not fitting the legal narrative canon); Kim L. Scheppele, Just the Facts, Ma'am: Sexualized Violence, *Evidentiary Habits, and the Revision of the Truth*, 37 N.Y.L. SCH. L. REV 123 (1992) (describing how victims of gender violence are not believed because the way they tell their stories does not fit the judicial mold of the truth).

135. Sun Reporter, *supra* note 2.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id. See also*, Mikhaila Friel, *Buckingham Palace Continues to Protect Prince Andrew but it's a Different Story for Meghan Markle*, INSIDER (Mar 5, 2021), https://www.insider.com/buckingham-palace-protects-prince-andrew-rejects-prince-harry-meghan-2021-3 [https://perma.cc/RFR7-RX44] (discussing

applied to her. The public, contrary to what happens with other members of the Royal family that do not deny gossip publicly, believed that the rumors about her were true. The net result of her experience was that she was silenced, her story was squashed, and she was turned into a villain.

The same happens in our evidentiary system. We believe that the system is structured to bring out the truth of what happened but systemically POC's experiences are silenced through white normativity and transparency. Moreover, jurors, attorneys, or judges of color, like Markle, are not granted many opportunities by the system nor do they feel that they should consider race or their own experiences when interpreting the evidence being introduced at the trial. Additionally, unless race is at the forefront of the issue in a trial, race is deemed oftentimes irrelevant (when it seldom is).

C. Contestation of Racialized Evidence & Its Backlash

Exposing this truth is not an easy task. But more importantly, it should not be left to legal actors to do so on their own. Unmasking white transparency and normativity and exposing credibility injustice is a complicated process not only because of their well-concealed nature but because the system is built to deter their contestation. When legal players challenge racialized evidence, they are faced with backlash. Moreover, the onus to challenge non-blatant racial injustice and introduce nonwhite narratives as truth in the judicial processes falls mostly on POC. This is the reality that the third motif, the contestation of racialized evidence and its backlash, evokes.

1. White Fragile Pundits

This motif is present, too, in the aftermath of Markle's interview. The embodiment of this issue in Markle's case was the reaction of British pundit Piers Morgan and the discussion on the racist nature of that response that sparked between *The Talk* co-hosts Sharon Osbourne and Sheryl Underwood.

Following the interview, Morgan tweeted, "I wouldn't believe Meghan Markle if she gave me a weather report."[140] He then followed suit

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how Prince Andrew, who has been accused of sexual assault by one of Jeffrey Epstein's victims who has (and published) photos of the two together, has received a different treatment as the Palace continues to protect him).

140. Piers Morgan (@piersmorgan), TWITTER (March 8, 2021, 1:15 A.M.), https://twitter.com/piersmorgan/status/1368792528632348674 [https://perma.cc/L2P7-NKDK].

by attacking Markle's credibility and calling the allegations of racism cowardly and unfounded in a column in the *Daily Mail*.[141] After the column was published, Morgan was called out on air for his racist

141. His relevant remarks were as follow:

> First, Meghan claimed to have been left suicidal by the pressure of being a Princess and had her requests for help rejected by the cold, heartless Palace.
>
> We weren't told who did the rejecting, or why she couldn't seek her own therapy or treatment if that's what she felt she needed. After all, her husband has spent years talking about mental health and has close connections with all the major mental health charities.
>
> Instead, we're left to believe the Palace spurned a pregnant suicidal woman in her hour of desperate need.
>
> But that wasn't even the most explosive revelation.
>
> No, that came when Meghan told Oprah that a member of the Royal Family had queried what colour her baby would be during a conversation with Harry.
>
> In fact, she said there were several conversations, whereas he said there was only one.
>
> But neither of them would name the offending Royal.
>
> Harry said he would never reveal the name.
>
> So, we're now left to view all the Royals as racists.
>
> Nor were we given any details of exactly what was said, or in what context it was said.
>
> Would an older senior Royal innocently asking Harry what skin colour his baby might have, given that Meghan's mother is black and her father white, constitute racism?
>
> It would if there was any derogatory tone to the question, or any suggestion that it would be a problem how dark the child's skin was. But we don't know the answers to those vital questions, because having let off the racism bomb, the Sussexes won't say any more.
>
> I find that cowardly.
>
> And the racism charge got worse.

Piers Morgan, PIERS MORGAN: *Meghan and Harry's Nauseating Two-Hour Oprah Whine-athon was a Disgraceful Diatribe of Cynical Race-Baiting Propaganda Designed to Damage the Queen as Her Husband Lies in Hospital - and Destroy the Monarchy,* MAIL ONLINE (March 8, 2021), https://www.dailymail.co.uk/news/article-9338343/PIERS-MORGAN-Meghan-Harrys-nauseating-two-hour-Oprah-whine-athon-disgraceful-diatribe.html

comments by *Good Morning Britain* co-host Alex Beresford.[142] Morgan faced this confrontation by quitting the show live.[143]

Sharon Osbourne defended Morgan on Twitter, saying the following:

> @piersmorgan I am with you. I stand by you. People forget that you're paid for your opinion and that you're just speaking your truth.

The View co-host Sheryl Underwood confronted Osbourne on the show about her support for Morgan. She stated the following:

> I've never seen anything come out of you [Sharon] other than, "If I don't know, I'm willing to learn. If it comes off a certain way, I stand corrected." So, what would you say to people who may feel that while you're standing by your friend, it appears that you give validation or safe haven to something that he has uttered that is racist?[144]

Osbourne responded with various statements among the following: "I don't know what he uttered that is racist. I'm not trying to slide out of this one. Tell me. What has he uttered that is racist?"[145] She continued her argument by turning herself into a victim by saying, "I feel even like I'm about to be put in the electric chair because I have a friend who many people think is a racist, so that makes me a racist."[146] Finally, she defended herself from allegedly being called a racist for defending Morgan by stating, "How can I be racist about anybody or anything in my life? How can I?"[147]After some profane language and a commercial break, Osbourne questioned Underwood's intentions and flipped the burden on her by saying, "I will ask you again, Sheryl. And don't try and cry. If anyone should be crying, it should be me. Educate me. Tell me when you have heard [Piers Morgan] say racist things. Educate me. Tell me."[148]

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142. Good Morning Britain, *supra* note 27.

143. Sharon Osbourne (@MrsSOsbourne), TWITTER (March 9, 2021, 2:57 P.M.), https://twitter.com/MrsSOsbourne/status/1369361831354073091 [https://perma.cc/3UCP-XZMU].

144. Ryan Schocket, *Sharon Osbourne and Sheryl Underwood Had a Discussion About Race and Things Got Heated*, BUZZFEED (Mar 13, 2021), https://www.buzzfeed.com/ryanschocket2/sharon-osbourne-sheryl-underwood-the-talk [https://perma.cc/H3ZN-SYRK].

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

Underwood, keeping her composure in light of Osbourne's self-proclaimed victimization and her neglect of Markle's racist treatment (i.e., white fragility),[149] assumed the unwarranted role of a teacher in racism. This is a role many of us POC are often required to undertake because of white normativity and transparency. And, as perhaps she has been forced to do many times before, Underwood explained to Osbourne that

> [i]t was not the exact words of racism, it's the implications and reaction to it. To not want to address that she is a Black woman and to try to dismiss it or to make it seem less than what it is, that's what makes it racist. But right now, I'm talking to a woman who I believe is my friend. I don't want anybody here to watch this and say we're attacking you for being racist.[150]

Osbourne mocking Underwood stated that it was too late and that she believed that the seed was already sowed.[151]

After further exchanges in which Underwood attempted to explain that she was not calling her a racist but that there was a racist behavior in Morgan's actions and that its defense is also a product of racist practices, Osbourne replied, "Ok, answer me this one. OK? Because I don't understand. If he doesn't like somebody — and I think this is for everybody born white — if Piers doesn't like someone, and they happen to be Black, does that make him a racist?"[152]

Underwood, replied with a clear answer to the fallacious reframing of the issue: "No".[153] What Sharon Osbourne does not seem to understand is that racism and racial subordination can exist without discriminatory intent.[154] The structure and the purpose of racist practices live beyond the

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149. "In 2011, [Robin] DiAngelo coined the term 'white fragility' to describe the disbelieving defensiveness that white people exhibit when their ideas about race and racism are challenged—and particularly when they feel implicated in white supremacy." Katy Waldman, *A Sociologist Examines the "White Fragility" That Prevents White Americans from Confronting Racism*, THE NEW YORKER (July 23, 2018), https://www.newyorker.com/books/page-turner/a-sociologist-examines-the-white-fragility-that-prevents-white-americans-from-confronting-racism [https://perma.cc/5M5K-WRZ8]. *See* Robin DiAngelo, *White Fragility*, *in* 497 COUNTERPOINTS 497 245 (2016); Robin DiAngelo, WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM (2018).

150. Schocket*, supra* note 144.

151. *Id.*

152. *Id.*

153. *Id.*

154. This is not the first time that Osbourne seems to have missed how racism operates, especially white transparency. Following Underwood and Osbourne's

individual intent of one person, just like the historically racist practices of racism in the United States have lived in the evidence rules such as hearsay, character evidence, impeachment, expert testimony, demeanor rules, or any other rule of our probative system.

2. Challenges to Racialized Adjudication

Their exchange invites us to question how we challenge racial subordination in our evidence rules without unleashing the backlash that usually ensues when, as in Underwood and Osbourne's exchange, we challenge racialized evidence practices or how do we deal with this inevitable reaction. It also makes us think about how to make the legislative and the judiciary understand that our system is inherently racist and that the burden to correct its racial injustice cannot be put on a few of its participants, especially not the ones who suffered its prejudicial effects.

Despite the undisputed evidence about the pervasiveness of racial subordination practices in our legal system, our rules operate under a presumption of colorblindness. Our probative system has very few checkpoints to correct the admissibility of racialized evidence or prevent its effects during adjudications nor does it penalize actors who engaged in racist practices through the rules of evidence. Moreover, as recent case law shows, people engaging in these racist practices rarely feel safe to share them explicitly so that the system takes corrective measures. And in those rare occasions, it is on the shoulders of those suffering the effects of racial injustice to seek its redress.

Take, for example, the Sixth Circuit opinion in *Harden v. Hillman*[155] extending to civil cases the no-impeachment rule[156] exception crafted by the United States Supreme Court in *Pena-Rodriguez v. Colorado*[157], which generally bars evidence of jury deliberations. Under this exception,

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

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exchange, former *The Talk* co-host, Holly Robinson Peete, spoke about how Osbourne complained that she was "too ghetto." Holly Robinson Peete🤣🤣 (@hollyrpeete), TWITTER (March 12, 2021 11:35 P.M.), https://twitter.com/hollyrpeete/status/1370428336028090372 [https://perma.cc/4CGP-2L9K]. A clear reference to how Robinson Pete did not follow acceptable norms of white behavior and should refrain from doing so on national TV, which is another manifestation of racism.

155. 993 F.3d 465, 479 (6th Cir. 2021).

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

157. 137 S. Ct. 855, 869 (2017).

> defendant, the Sixth Amendment requires the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.[158]

The exception requires showing overt racism. However, overt racism is not enough. The Supreme Court also requires that "the racial animus was a significant motivating factor in the juror's vote to convict."[159]

To unveil white transparency and see proof of that as required by the Supreme Court is exceedingly difficult and exceptional. As *Harden* shows, jurors must feel that the other jurors share their own racist prejudices or that they will not face any consequences for expressing those views (as it was in the case of *Harde*n). It is unlikely that defendants will be able to show overt racism as a significant motivating factor because even jurors who harbor racist prejudice that affects their analysis are unlikely to voice that prejudice unless they feel comfortable doing so among a group of relative strangers. The only way that would happen is if jurors think their fellow jurors are white (or white-passing) with the same race values. In a group of jurors that includes POC, who will be able to unveil white transparency more easily, a juror will probably not feel comfortable sharing over racist prejudices. Further, the onus will be on legal players that, like in *Harden*, are aware of the effects of these prejudices because they have experienced them or know people who live through them.

The facts of *Harden* are illuminating in this aspect. In this case,

> Harden's counsel . . . filed a second Motion for New Trial along with an affidavit from Juror T.H. In her affidavit, T.H., an African American woman, stated that her "service on the jury was a very painful, humiliating and embarrassing experience, so much so that it has caused me not to ever again want to serve on another jury. I feel this way because of the blatant racial stereotyping, bias, and prejudice shown by my fellow jurors toward Mr. Harden and his legal team." She explained that her "fellow jurors, all of whom were white, spoke freely in [her] presence because they thought [she] was Latin[a] because of [her] complexion and the pronunciation of [her] name."
>
> Specifically, she averred that her fellow jurors "discounted and totally disregarded Mr. Harden's testimony in particular and his case in general because they believed he was a crack addict, and

158. Pena v. Rodriguez*,* 137 S. Ct. 855, 858.
159. *Id.* at 858.

> that his intent was to start trouble with Officer Hillman so he could sue the police department and get some money," and that "[t]hey discredited his testimony and attributed the calmness he showed in describing the events by claiming that he was taking dope or drinking during breaks in the trial." T.H. further alleged that the jurors "took verbatim what Mr. Hillman's [white] attorney said but described [Harden's African American lawyer] and his team as the 'Cosby Show.'" T.H. sought to remind her fellow jurors that their job was to decide whether Hillman had used excessive force; however, the jurors "kept saying he just wants money; he's a crack head; he's an alcoholic; look at his wife, she's nodding off; she looks like she's on heroin." When T.H. explained that she was a nurse and that Harden "wouldn't be able to stay in the courtroom all these hours and stay focused if he was on drugs," members of the jury replied, "you don't know what he's doing on breaks," which T.H. understood to indicate a belief that Harden was "taking a swig during breaks to stay calm." T.H. concluded: "It is my very firm and absolute belief that Mr. Harden did not get a fair trial because of his race and racial stereotyping. Furthermore, there is absolutely no doubt in my mind that the race of the lawyers was a significant factor. The jurors hung on [to Hillman's counsel's] every word but gave no consideration at all to [Harden's counsel's] points."[160]

Apart from illustrating the credibility injustice and the indiscriminate use of unreliable functional evidence during trials discussed, the excerpt shows how difficult it would be for a juror to challenge the racist practices of fellow jurors and the typical responses of such challenges to white normativity and transparency. From the account, it can be deduced also that if it were not for T.H.'s racially ambiguous nature, those comments made aloud would not have been made but, nonetheless, would have been used to decide the case. And if T.H. had not been compelled to recount her experience, that verdict would have stood. This situation, thus, exposes the need not to only consider overt racism in the probative system but also other forms of racial oppression. It also supports the need for checkpoints to mitigate the effects of racialized evidence in deliberations pre-trial, during, and post-trial.

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160. *Id.* 472-73 (citations omitted).

3. Visibilizing Racial Biases & Practices

A possible solution could be to craft a different standard of review from the one in *Pena-Rodriguez* that includes implicit biases.[161] Another option could be to make the no-impeachment rule inapplicable with regard to race. In that case, courts could conduct exit polls that assess whether jurors impermissibly took race into account in their deliberations by asking jurors under oath about the conduct of their fellow jurors and initiate an investigation on the verdict *motu proprio* if the allegations are meritorious.[162] That will take the onus from the parties affected and will make the system itself accountable for enabling racist practices and evidence. It will also serve as a way to validate non-white narratives during trials by acknowledging their experiences with white supremacy. And, equally importantly, it will prevent parties from harassing jurors and frivolous attempts to find grounds to reverse a verdict while preserving the institution of the jury.

On the other hand, we can look into *ex-ante* solutions to ensure that jurors with implicit biases do not make it into a jury box. For that, *Ristiano*[163] and *Rosales-Lopez*,[164] which established a limited constitutional application of a right to conduct a *voir dire* into racial prejudices "but recognized that a non-constitutional standard could be required in federal courts under the Supreme Court's supervisory power,"[165] should be expanded under the Court's supervisory power to allow questions about racial biases in every case during *voir dire*.[166] Legislators can also enact laws that would serve to deter the use of race in deliberations by attaching juror liability in such cases beyond the new trial or jury nullification remedies.

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161. R. Jannell Granger, Note, *Justice for All: The Sixth Amendment Mandates Purging All Racial Prejudice from the Black Box*, 63 HOW. L.J. 57, 86 (2019).

162. This could be part of jury service exit questionnaires which courts usually provide at the end of jury duty. *See Jury Service Exit Questionnaire Superior Court of California - County of Yolo*, https://www.yolo.courts.ca.gov/general-information/jury-services/jury-service-exit-questionnaire [https://perma.cc/NB5G-8R9R] (last visited April 4, 2022).

163. Ristaino v. Ross, 424 U.S. 589 (1976).

164. Rosales-Lopez v. United States, 451 U.S. 182 (1981).

165. Nancy Lewis Alvarez, *Racial Bias and the Right to an Impartial Jury: A Standard for Allowing Voir dire Inquiry*, 33 HASTINGS L.J. 959, 960 (1982).

166. *See* Lauren Crump, Comment, *Removing Race from the Jury Deliberation Room: The Shortcomings of Peña-Rodriguez v. Colorado and How to Address Them*, 52 U. RICH. L. REV. 475, 493 (2018).

Another set of preventive measures could be, as it was suggested, to require implicit bias training for jurors or having jury instructions that alert jurors about impermissibly taking race into account in their deliberations and that it would be grounds for challenging a verdict.[167] Concerns with these measures include the efficacy of implicit bias training[168] and whether it could be counterproductive to point out to jurors that they could be engaging in racist practices. However, some research suggests that when race is brought into a trial in the form of instructions, jurors tend to be more cognizant of their implicit biases and remove them from their deliberations as opposed to when it is not.[169] This opposite reaction from Osbourne toward Sheryl Underwood's challenge to her defense of Morgan could be because the implicit bias training and the jury instructions are not an individual challenge to the racial subordinating behavior of jurors but a general warning not to engage in it.

Such reactions from jurors suggest that it is possible to make white normativity and transparency visible while preventing the backlash commonly associated with their challenge. The question remains whether the same could be achieved with legislators and the judiciary. Our legal system should confront the racist history of the United States and reform the rules of evidence that still bond white supremacy so that the voices and experiences of nonwhite people are introduced in the judicial process and validated as forms of truth.

CONCLUSION

If we were playing Jeopardy and the late Alex Trebek read the clue "A wee bit racist," this article has shown how our evidence system, despite its race neutrality, would be a clear contender. Its racist history exemplified

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167. Natalie A. Spiess, Comment, *Peña-Rodriguez v. Colorado: A Critical, but Incomplete, Step in the Never-Ending War on Racial Bias*, 95 DENV. L. REV. 809 (2018) (arguing that for Pena-Rodriguez to be a real tool in preventing the use of race in deliberations it should be coupled with jury instructions).

168. *See* Timony, *supra* note 108.

169. *See* Elizabeth Ingriselli, Note, *Mitigating Jurors' Racial Biases: The Effects of Content and Timing of Jury Instructions*, 124 YALE L.J. 1690, 1729-30 (2015); Samuel R. Sommers, and Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions.*, PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 26, no. 11 (November 2000): 1367–79. https://journals.sagepub.com/doi/10.1177/0146167200263005 [https://perma.cc/Z9RJ-NUHE] (a study suggests that whites are motivated to appear nonprejudiced when racial issues are salient while racial issues are generally salient in the minds of Black jurors in interracial cases with Black defendants).

in white competency rules cannot be erased just by removing explicit white supremacist practices. The system still operates under the premise of white normativity, which inevitably leads to the admission of racialized evidence while systematically excluding the possibility of impeaching such evidence.

To counter these racist practices, this article has offered a framework to reform the evidence rules and make white transparency visible by looking at various points of entry during the process through three motifs that embody CRT principles and that serve to understand racial injustice and how to redress it. And even though the purpose of this reflection was not to analyze in-depth possible reforms, the article has offered some possible solutions that could be studied further, such as (1) admissibility rules that require LSU for certain evidence and expert opinion; (2) blind testimony; (3) jury instructions; (4) reformulations to the no-impeachment rule, hearsay exceptions, and impeachment rules; implicit bias training; (5) polling of jurors on the use of race in deliberations; and (6) the regulation of functional evidence, among others.

Fixing a problem so systemic and multifaceted as racial practices in our evidence system requires multiple efforts in addition to the ones mentioned in the paper.[170] Yet, I hope this reflection continues to pave the way to reform evidence rules to make them race-conscious and finally dismantle white supremacy.

170. Other options not mentioned in the examples included that would be worth exploring include: state-provided experts on race subordination practices available for parties to use during trials; reinterpretation of relevancy rules to include race even if the elements of the cause of action do not involve race; strict professional sanctions for the use of racial stereotypes; and perhaps the reorganization of how evidence is presented so that the race of the parties involved is unknown until the fact-finders understand what had transpired.