THE DANGER OF UNFAIR PREJUDICE: RACIAL DISPARITIES IN THE FEDERAL RULES OF EVIDENCE

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"The chasm between the principles upon which this Government was founded . . . and those which are daily practiced under the protection of the flag, yawns so wide and deep."

- Mary Church Terrell, 1906

I. INTRODUCTION

The year 2020 brought about many new challenges in America. The COVID-19 pandemic ushered in a nationwide sense of unease and uncertainty that manifested in a myriad of ways: while some Americans scrambled to find toilet paper,[1] others found themselves in shock after a video of police officer Derek Chauvin slowly killing George Floyd in broad daylight went viral.[2] This video catalyzed a racial reckoning in America as people across the country poured into the streets, enraged, to protest the disparate treatment of people of color by law enforcement.[3]

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1. Marc Fisher, *Flushing Out the True Cause of the Global Toilet Paper Shortage Amid Coronavirus Pandemic*, WASH. POST (Apr. 7, 2020), https://www.washingtonpost.com/national/coronavirus-toilet-paper-shortage-panic/2020/04/07/1fd30e92-75b5-11ea-87da-77a8136c1a6d_story.html.

2. Meredith Deliso, *Timeline: The Impact of George Floyd's Death in Minneapolis and Beyond*, ABC (Apr. 21, 2021, 3:35 PM), https://abcnews.go.com/US/timeline-impact-george-floyds-death-minneapolis/story?id=70999322.

3. *Id.*

Unsurprisingly, this racial reckoning focused on police reform.[4] Police officers patrol the streets armed to the teeth, seemingly with impunity, at times acting as judge, jury, and executioner.[5] Police reform is not the only avenue to be explored in America's quest to eliminate racial disparity in our justice system. It is worthwhile to examine how we can bridge the gap from within the court system itself, and there is no better place to begin than the foundation upon which much of American jurisprudence rests: the Federal Rules of Evidence.[6] This Article aims to not only identify implicit bias in the Federal Rules of Evidence but to propose a practical solution. In order to critique the prejudice shrouded within the facially neutral Federal Rules of Evidence, Part II briefly examines the history of evidence and the inception of the rules to supply a framework within which to navigate. Part III then thoroughly examines specific Federal Rules of Evidence that enshrine and beget implicit bias and racial stereotypes, and illustrates how far the rules have strayed from their stated purpose.[7] Finally, through an explanation of how a more robust, thorough, and comprehensive application of Rule 403 can combat this implicit bias, Part IV provides a solution to bridging the gap between the stated purpose of the Federal Rules of Evidence and the reality of today's America, where confidence in our court system is at an all-time low,[8] and race is often determinative of just how much justice an individual receives.[9]

4. H.R. 7120, 116th Cong. (2020); Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, BRENNAN CTR. FOR JUST. (May 21, 2021), https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder.

5. Luke Darby, *A Former Cop Explains How the Police Get Away with Killing People*, GQ (Oct. 20, 2016), https://www.gq.com/story/a-former-cop-explains-how-the-police-get-away-with-killing-people; Somil Trivedi, *Why Prosecutors Keep Letting Police Get Away with Murder*, AM. CIV. LIBERTIES UNION (June 26, 2020), https://www.aclu.org/news/criminal-law-reform/why-prosecutors-keep-letting-police-get-away-with-murder/.

6. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 587 (1993).

7. "These rules should be construed so as to administer every proceeding fairly . . . to the end of ascertaining the truth and securing a just determination." FED. R. EVID. 102.

8. Logan Cornett & Natalie Knowlten, *Public Perspectives on Trust and Confidence in the Courts*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (June 29, 2020), https://iaals.du.edu/publications/public-perspectives-trust-and-confidence-courts.

9. Jules Epstein, *Race and the Law of Evidence: A Second Look at the Rules is Needed*, LAW (July 1, 2020, 1:05 PM), https://www.law.com/thelegalintelligencer/2020/07/01/race-and-the-law-of-evidence-a-second-look-at-the-rules-is-needed/; Monica Anderson, *Vast Majority of Blacks View the Criminal Justice System as Unfair*, PEW RSCH. CTR. (Aug. 12, 2014), https://www.pewresearch.org/fact-tank/2014/08/12/vast-majority-of-Blacks-view-the-criminal-justice-system-as-unfair/ (explaining that the majority of minorities believe that Blacks are treated less fairly than whites in the United States court system).

II. HISTORY

Today, evidence (and the rules that govern it) at least appears facially neutral, but this was not always the case.[10] Before uniform rules of evidence were ever considered, many evidence laws outright prohibited people of color from testifying in court, particularly if the case involved a white person.[11] An example of this is the California Crimes and Punishment Act of 1850, reading that "no black or mulatto person, or Indian, shall be permitted to give evidence in favor of or against any white person."[12] Some states did not outright prohibit people of color from testifying in court, but limited their testimony to that which was in support of a white party, never against.[13] The exclusion of witnesses based explicitly on race stopped in 1864 when Congress passed a law stating that "in the courts of the United States there shall be no exclusion of any witness on account of color."[14]

Fortunately, the early drafters of what would become the Federal Rules of Evidence gave little consideration to preexisting statutes or caselaw concerning evidence when they began codification efforts.[15] The first serious attempt came when the American Law Institute formed an advisory committee in 1939.[16] The American Law Institute tasked this committee with working on the law of evidence "with a view not to its Restatement but to its revision."[17] This early draft of the rules was met with a disastrous result: Nebraska was the only state to adopt the American Law Institute's Model Code of Evidence.[18] A second attempt at uniformity was made in 1948 by the National Conference of Commissioners on Uniform State Laws (a division of the American Bar Association).[19] These rules, drafted in secret,

10. Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2245 (2017).

11. *Id.* at 2245–46.

12. People v. Howard, 17 Cal. 63, 64 (Cal. 1860) (quoting the California Crimes and Punishment Act of 1850, § 14 (repealed 1872)).

13. Alfred Alvins, *The Right to Be a Witness and the Fourteenth Amendment*, 31 MO. L. REV. 471, 474–75 (1966) (citing Burton v. Roe, 7 Del. (2 Houst.) 49 (Del. 1859)).

14. Act of July 2, 1864, ch. 210, § 3, 13 Stat. 351 (1864).

15. 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM JR., FEDERAL PRACTICE AND PROCEDURE § 5005 (2d ed. 1996).

16. *Id.*

17. *Id.* (citing MODEL CODE OF EVIDENCE p. ix (AM. L. INST. 1942)).

18. Edmund M. Morgan, *The Future of the Law of Evidence*, 29 TEX. L. REV. 587, 599 (1951).

19. 21 WRIGHT & GRAHAM, *supra* note 15, § 5005.

were finished and approved by the Committee in 1953.[20] These rules were slightly more successful than the Model Code due to some modifications, but it met the same fate as only Kansas adopted them without significant amendment.[21]

In March of 1965, the United States Supreme Court announced the members of its newly formed Advisory Committee that were tasked with the production of what would ultimately become the Federal Rules of Evidence.[22] Prior to forming this committee, a preliminary report circulated, promising that the committee members would "represent all segments and interests of the legal profession."[23] The committee took two years to form, and the search resulted in a less than representative makeup: most committee appointees were American Bar Association members, at least six appointees were associated with the American College of Trial Lawyers (an extremely conservative group), and every appointee was a white male.[24] The Chairman of the Committee, Albert E. Jenner, Jr., told a group of insurance attorneys that the Advisory Committee comprised "your kind of people" and would later tell Congress that the Committee was not "inclined to give the family jewels away or tip or rock the laws of evidence."[25] After several drafts, revisions, and Congressional interventions, President Gerald Ford signed H.R. 5463 into law on January 2, 1975.[26] The Federal Rules of Evidence, as we know them today, went into effect on July 1, 1975.[27]

III. RACIAL DISPARITIES IN THE FEDERAL RULES OF EVIDENCE

Any mention of race, ethnicity, or national origin is notably absent from the modern Federal Rules of Evidence.[28] Nonetheless, traces of its white, male authorship are found throughout the

20. *Id.*
21. *Id.*
22. Press Release, United States Supreme Court, Uniform Rules of Evidence for the United States District Courts (Mar. 8, 1965), https://heinonline-org.stetsonlaw.idm.oclc.org/HOL/Page?collection=usreports&handle=hein.journals/usscbull79&id=1127&men_tab=srchresults.
23. 21 WRIGHT& GRAHAM, *supra* note 15, § 5006.
24. *Id.*
25. *Id.*
26. Act of Jan. 2, 1975, Pub. L. No. 93-595, § 1, 88 Stat. 1926.
27. *Id.*
28. *See generally* FED. R. EVID.

rules. The drafters, however, did provide a failsafe rule designed to keep unfairly prejudicial evidence from being admitted, even when relevant: Rule 403.[29] In the Advisory Committee's note to Rule 403, it explains that "'[u]nfair' prejudice within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[30] In other words, even if evidence is relevant and otherwise admissible, it can be excluded on the basis that a jury may improperly use it in a way that unfairly prejudices the party it is being used against.[31] In theory, the ability to exclude evidence due to unfair prejudice should eliminate much of the racial bias found in the Federal Rules of Evidence by giving judges broad discretion to exclude evidence on a case-by-case basis.[32] In practice, Rule 403 falls far short of its goal for a number of reasons that trace back to its inception but are still pervasive today.

The makeup of the American judiciary today resembles the homogenous white male Advisory Committee of 1965.[33] As of August 2019, just ten percent of federal judges were African American, while Hispanic judges comprise only six percent of sitting judges on the courts.[34] The result of this unrepresentative judiciary is that prejudice, in the context of Rule 403, is defined solely through the lens of the white experience and perspective.[35] Unsurprisingly, a Pew Research Center survey found that twenty-seven percent of white respondents, forty percent of Hispanic respondents, and sixty-eight percent of Black respondents felt that, in court, Black people were treated less fairly than white people.[36]

The racial disparity in what is considered "prejudicial" is particularly devastating considering the general racial bias

29. "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED. R. EVID. 403.

30. FED. R. EVID. 403 advisory committee's note to 2011 proposed rules.

31. *Id.*

32. *See, e.g.*, United States v. Abel, 469 U.S. 45, 54 (1984).

33. Danielle Root, *Building a More Inclusive Federal Judiciary*, CTR. FOR AM. PROGRESS (Oct. 3, 2019), https://www.americanprogress.org/article/building-inclusive-federal-judiciary/ (citing *Biographical Directory of Article III Federal Judges: 1789-present: Advanced Search Criteria*, U.S. FED. JUD. CTR., https://www.fjc.gov/history/judges (last visited Aug. 21, 2022)).

34. *Id.*

35. *Id.*

36. Anderson, *supra* note 9.

present in American courtrooms. A 2010 study discovered that despite the presumption of innocence in criminal cases, an implicit racial bias of "guilt" exists in cases where the defendant is Black.[37] Even asking potential jurors questions to assess their ability to render unbiased verdicts during *voir dire* is unlikely to combat this bias: individuals reporting feeling "warmly" toward Black people still showed a strong implicit bias of "guilt" against Black defendants.[38] This bias can be attributed to cultural associations with Black people as more aggressive, more violent, and more likely to be criminals.[39] Another study from 2004 found that jurors with an implicit bias against Black defendants have a strong tendency to evaluate ambiguous evidence unfavorably to Black defendants.[40]

These biases all amount to a stark revelation: the harm likely to result from the admission of prejudicial evidence changes dramatically depending on the race or ethnicity of the person it is being offered against.[41] Implicit bias must be identified as a source of unfair prejudice and rooted out to level the playing field when an affected party is especially vulnerable to "implicit fact finder stereotypes."[42]

A. Rule 404: Color as Character

Federal Rule of Evidence 404 governs the use of character evidence and crimes, wrongs, or other past acts as evidence in trial.[43] Rule 404(b)(1) strictly prohibits the admission of evidence of a person's past crime, wrong, or act to prove a person's character

37. Demetria D. Frank, *The Proof Is in the Prejudice: Implicit Racial Bias, Uncharged Act Evidence & the Colorblind Courtroom*, 32 HARV. J. RACIAL & ETHNIC JUST. 1, 20 (2016) (citing Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 204 (2010)). Participants in the study displayed a "significant association between Black and Guilty compared to White and Guilty," resulting in a significant difference that demonstrated an "implicit association between Black and Guilty." *Id.*

38. *Id.*

39. *Id.* (citing Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY AND SOC. PSYCH. 876, 876 (2004)).

40. William J. Bowers et al., *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant Is Black and the Victim is White*, 53 DEPAUL L. REV. 1497, 1508–09 (2004).

41. Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 874 (2016).

42. *Id.* at 875.

43. FED. R. EVID. 404.

and show that "on a particular occasion the person acted in accordance with the character."[44] In other words, evidence of crimes, wrongs, or other acts is not admissible to prove that because an individual has done something in the past, they are likely to have done it again.[45] Rule 404(b)(2) permits the admission of evidence of past crimes, wrongs, or acts to "prov[e] motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[46] In short, propensity use of character evidence is prohibited while the other listed uses are permissible.[47]

There is no shortage of evidence that shows that jurors are unable or unwilling to distinguish between propensity evidence and the permitted uses, and often use it for the impermissible purpose.[48] A study by Professor Andrew Taslitz looked at other empirical studies that concluded that jurors reason by "telling stories."[49] In this study, jurors were found to fill in gaps in the mental states of the participants using inferences they made based on character—a clear danger to defendants of color.[50] Many jurors view individuals charged with a crime as the "other."[51] When the accused is a different race than the juror, the sense of difference is expanded.[52] Alarmingly, "the presumption of innocence diminishes as the margin of difference increases."[53] When the evidence is not strong enough to convict a criminal defendant, white jurors will give the benefit of the doubt to a white defendant but not to a Black one.[54]

Prosecutors often have a difficult time proving intent.[55] Courts routinely allow the admission of prior acts to prove intent for this

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

45. FED. R. EVID. 404 advisory committee's note to 2011 proposed rules.

46. FED. R. EVID. 404(b)(2).

47. *See generally* FED. R. EVID. 404.

48. L. TIMOTHY PERRIN ET AL., THE ART AND SCIENCE OF TRIAL ADVOCACY 351–52 (2003) (explaining that despite limiting instructions, jurors will use evidence in "any way that makes sense to them").

49. Josephine Ross, *"He Looks Guilty": Reforming Good Character Evidence to Undercut the Presumption of Guilt*, 65 U. PITT. L. REV. 227, 255 (2004) (citing Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 495 (1996)).

50. *Id.*

51. *Id.* at 263.

52. *Id.*

53. *Id.*

54. Denis Chimaeze E. Ugwuegbu, *Racial Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. EXPERIMENTAL SOC. PSYCH. 133, 139–40 (1979).

55. Frank, *supra* note 37, at 10.

reason, even though it inevitably produces a propensity inference.[56] Prior acts are commonly admitted to prove intent by showing that the defendants committed similar acts, and therefore, a mistake is unlikely in the current case.[57] The prior act is used to prove intent through propensity, which is impermissible.[58] Even more troubling is that a juror's understanding of the definition of intent is often ambiguous and often creates a vehicle for implicit bias.[59] A recent example of issues with a layperson's understanding of intent can be found in the media coverage of the Derek Chauvin trial.[60] During the trial, a correspondent for the cable news network One America News Network (OANN) tweeted several times that prosecutors had to prove that Chauvin intentionally murdered Floyd.[61] These tweets were designed to be misleading, as prosecutors did not have to prove that Chauvin intended to murder Floyd; they only had to prove that Chauvin intended to use illegal force.[62] The OANN correspondent that tweeted this misinformation, has 1.8 million Twitter followers.[63] Given the confusion surrounding the meaning of intent, easily spun by the media and attorneys alike, it is no surprise that advocates in the courtroom often take advantage of ambiguities surrounding the meaning of intent to nudge the jury toward a desired result.[64]

Explicit racial references are, of course, inadmissible due to prejudice,[65] but implicit references to race through the guise of character evidence are common and easily slip past the gatekeeper, "leaving defense counsel without a 'firm basis' for objecting."[66] An example of a surreptitious racial reference is a

56. *Id.*
57. *Id.* at 13.
58. *Id.*
59. David Crump, *What Does Intent Mean?*, 38 HOFSTRA L. REV. 1059, 1071 (2010).
60. Michael Edison Hayden, *Chauvin Trial Inspires Racist Conspiracy Theories*, S. POVERTY L. CTR. (Apr. 25, 2021), https://www.splcenter.org/hatewatch/2021/04/25/chauvin-trial-inspires-racist-conspiracy-theories.
61. *Id.*; *see, e.g.*, Jack Posobiec (@JackPosobiec), TWITTER (Apr. 14, 2021, 2:14 PM), https://archive.li/aKm37.
62. Hayden, *supra* note 60.
63. *See generally* Jack Posobiec (@JackPosobiec), TWITTER, https://twitter.com/JACKPOSOBIEC?REF_SRC=TWSRC%5EGOOGLE%7CTWCAMP%5ESESE%7CTWGR%5EAUTHOR (last visited Aug. 21, 2022).
64. Crump, *supra* note 59, at 1073.
65. Chris Chambers Goodman, *The Color of Our Character: Confronting the Racial Character of Rule 404(b) Evidence*, 25 MINN. J. L. & INEQ. 1, 21 (2007).
66. *Id.* at 22–23.

victim testifying that the defendant "looked suspicious."[67] Such a reference triggers racial bias in even non-prejudicial jurors because they are "faced with the opportunity to confirm the stereotype" that people of color are more likely to look suspicious.[68] These stereotypes amount to a shortcut to proof for the prosecution and operate as presumptions; because the stereotype "is not explicitly state[d] . . . , all the prosecution needs to do is . . . trigger" it with character evidence.[69] An illustration of this in practice is *United States v. Jones*, where two Black men were charged with carjacking.[70] The prosecutors repeatedly referred to the carjacking as an "assault," even though the defendants were never charged with assault.[71] The defendants were convicted and appealed on the basis of prosecutorial misconduct for the use of the word "assault," but the Seventh Circuit held that the description was not improper.[72] This example is a case where the crime of assault was never charged, but implicit bias was weaponized by the prosecution to "impermissibly trigger the [B]lack male as violent stereotype."[73] When jurors think about their idea of a "criminal," they see a dark, shadowy face.[74] All humans make sense of their life experiences by categorizing people and events, but when prosecutors take advantage of these tendencies, defendants and witnesses of color suffer.[75]

To further illustrate the point, if you flip a coin, it will always land either heads up or tails up.[76] It does not matter how it has landed in prior instances of it being flipped: the probability is always fifty-fifty.[77] That being said, with criminal activities, a defendant may either repeat his behavior from a prior instance or do something other than repeating his behavior from a prior instance.[78] Nothing about his past behavior, however, would tend to make it more or less likely that he would continue to commit

67. *Id.* at 27.
68. *Id.*
69. *Id.*
70. 188 F.3d 773, 776–77 (7th Cir. 1999).
71. *Id.* at 778
72. *Id.* at 778–79; Goodman, *supra* note 65, at 20.
73. Goodman, *supra* note 65, at 20.
74. Ross, *supra* note 49, at 57.
75. *Id.* at 58.
76. Goodman, *supra* note 65, at 9.
77. *Id.*
78. *Id.* at 10.

crimes.[79] The assumption that a past act can help predict future behavior is an impermissible propensity inference, but it invariably results from the admission of this type of evidence.[80] The bottom line is that when a prior act is admitted, and the act is something stereotypically associated with a certain race, jurors are highly likely to fill any gaps with their individual racial biases.[81]

B. Rule 609: Impeachment on the Basis of Race

Federal Rule of Evidence 609 permits impeachment of a witness by evidence of a criminal conviction.[82] Rule 609 is an exception to Rule 404's general prohibition on character evidence.[83] Convictions for crimes of dishonesty that occurred within the last ten years are automatically admitted with no balancing test.[84] Felony convictions from the past ten years that do not involve dishonesty come in using the regular 403 balancing test as long as the witness is not the accused; if the witness is the accused, the felony conviction is subject to a more stringent balancing test.[85] If the conviction is more than ten years old, a very strong showing of probative value is needed, and the court is unlikely to admit it.[86] The premise of this rule is a stereotype in and of itself that perpetuates the prejudicial belief that individuals with criminal convictions are less trustworthy, and, therefore, their testimony is less valuable.[87]

Putting aside how irrelevant criminal convictions are to determining trustworthiness,[88] a glaring issue with this rule is

79. *Id.* at 10–11 ("The assumption that past bad acts lead to unchanging behavior relies upon an [] assumption that the past predicts the future, and can only arise when propensity inferences are made.").

80. *Id.* at 11.

81. *Id.* at 27.

82. FED. R. EVID. 609.

83. *Id.*

84. FED. R. EVID. 609(a)(2).

85. FED. R. EVID. 609(a)(1)(A); FED. R. EVID. 609(a)(1)(B) ("[I]f the witness is a defendant, [] the probative value of the evidence [must] outweigh[] its prejudicial effect to that defendant.").

86. FED. R. EVID. 609(b)(1).

87. *See* Campbell v. Greer, 831 F.2d 700, 707 (7th Cir. 1987) ("Rule 609 and the common law tradition out of which it evolved rest on the common-sense proposition that a person who has flouted society's most fundamental norms, as embodied in its felony statutes, is less likely than other members of society to be deterred from lying under oath in a trial by the solemnity of the oath.").

88. *See generally Research Resources*, INNOCENCE PROJECT, https://innocenceproject.org / research-resources/ (last visited Aug. 21, 2022).

that people of color, particularly "[B]lack men[,] face far more criminal convictions than any other demographic."[89] The statistics regarding people of color in the United States criminal justice system paint an alarming picture.[90] For example, five percent of illicit drug users are Black, yet Black people represent twenty-nine percent of those arrested and thirty-three percent of those incarcerated for drug offenses.[91] In addition, thirty-two percent of the United States population is Black or Hispanic, while fifty-six percent of the United States incarcerated population is Black or Hispanic.[92] While Black Americans account for only thirteen percent of the United States population, thirty-five percent of the individuals executed under the death penalty within the last forty years have been Black.[93]

These statistics are even more alarming in the context of the Federal Rules of Evidence because Rule 609 assumes that jurors will ignore the improper propensity application of a prior conviction and will use the evidence to determine the credibility of a witness.[94] This results in jurors often finding Black witnesses less credible than white witnesses and, when the defendant is Black, can cause jurors to draw an inference that they are guilty of the crime charged due to their past criminal history.[95] This implicit bias can also have detrimental effects in the other direction: if the bias of jurors can lead them to overestimate the criminality of minorities, it can also lead them to underestimate the criminality of white defendants and witnesses.[96] These implications are detrimental to people of color in the United States' court system, in part due to what Montré D. Carodine calls the "Black Tax."[97] We

89. Carta H. Robinson, *Assessment of Federal Rule of Evidence 609 and the Necessity of a Deeper Collaboration with the Social Sciences for Racial Equality*, 7 IND. J.L. & SOC. EQUAL. 312, 314 (2019).

90. *See generally Criminal Justice Fact Sheet*, NAACP, https://naacp.org/resources/criminal-justice-fact-sheet (last visited Aug. 21, 2022).

91. *Id.*

92. *Id.*

93. *Id.*

94. Robinson, *supra* note 89, at 323–24.

95. *Id.* at 330–31.

96. Ted Sampsell-Jones, *Implicit Stereotyping as Unfair Prejudice in Evidence Law*, 83 U. CHI. L. REV. 174, 182 (2016).

97. Montré D. Carodine, *"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 534 (2009). As Professor Armour defines it, "[t]he Black [T]ax is the price Black people pay in their encounters with Whites (and some Blacks) because of Black stereotypes." Blacks are forced to accept and literally

often see the "Black Tax" in action in our everyday lives due to the media's constant narrative of the "Black criminal threatening the innocence of White America."[98] This narrative causes juries to see Black witnesses and defendants as criminals from the moment they walk into the courtroom; Rule 609 reinforces these stereotypes and even encourages jurors to engage in "reasonable racism."[99]

When applying the probative versus prejudice balancing test to prior convictions, statistics involving the unfair treatment of people of color in our justice system are never considered, undercutting the presumption that evidence of prior convictions is somehow a reliable indicator of the truthfulness of the witness.[100] In addition, none of the rules give guidance to the court on how to handle this balancing test.[101] The burden lies with the proponent of the evidence, and this burden is heavier than the standard 403 balancing test.[102] Beyond that, factors that a court may consider when assessing whether the proponent's burden is met are not identified in the Federal Rules of Evidence or elsewhere, leaving each federal circuit to figure it out on its own.[103]

Most troubling is the chilling effect impeachment by prior conviction can have on the witness' decision to testify at all. In a study of exonerated defendants, the most common reason they gave for deciding not to testify on their behalf was fear of prior conviction impeachment.[104] If a criminal defendant "facing impeachment decides to testify[,] . . . the risk of prejudice is significant, especially if the impeaching conviction is similar to the charge at trial."[105] If a criminal defendant facing impeachment

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pay the Black Tax on a daily basis. The "payment" can be in actual dollars or in less tangible, but nevertheless very real, social disadvantages. *Id.* at 533–34 (quoting JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 13 (1997)).

98. *Id.* (quoting Adeno Addis, *Recycling in Hell*, 67 TUL. L. REV. 2253, 2263 (1993)).

99. *Id.* at 535 (defining "reasonable racism" as "responding reasonably" and rightly being suspicious of persons who seem "out of place").

100. Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563, 563 (2014) (citing Carodine, *supra* note 97, at 526).

101. *See generally* FED. R. EVID.

102. *Id.* at 569.

103. *Id.*

104. Roberts, *supra* note 100, at 564 (citing John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 483 n.19 (2008)).

105. *Id.* at 574.

decides not to testify, the risk of prejudice may be even higher.[106] "Despite the presumption of innocence," jurors interpret silence as an indicator of possible guilt, "whether or not they know the reason for silence."[107] In addition, the defendant's decision not to testify on their own behalf leaves the jurors without material facts and information and can lead to false conviction.[108] A defendant's reluctance to testify may lead to their acceptance of a plea deal, which not only robs the defendant of their opportunity to have a voice in their own case, but also can lead to a prosecutorial advantage by giving the prosecution undue leverage.[109]

Like prior bad act evidence, impeachment evidence is a wholly unreliable method of determining the trustworthiness of a witness.[110] Jurors are instructed not to use prior convictions as character evidence, and Rule 609 improperly assumes that they listen to and understand this instruction.[111] Further, it is known, and even expected, that juries will misuse this evidence despite limiting instructions and convict a defendant for being a "bad" person—which is especially problematic in light of how people of color are disparately impacted by the United States criminal justice system.[112]

C. Rule 613: Impeachment by Prior Inconsistent Statement with Improper Transcription

Federal Rule of Evidence 613 governs impeachment of a witness by prior inconsistent statement.[113] When examining a witness, the witness's prior inconsistent statement can be used to attack their trustworthiness, and extrinsic evidence of the inconsistent statement is allowed so long as "the witness is given an opportunity to explain or deny the statement and an adverse party is given the opportunity to examine the witness about it."[114] This method of impeachment is facially neutral and seems to lack racial implication but presents issues to people of color when the

106. *Id.*
107. *Id.*
108. *Id.* at 575.
109. *Id.* (citing DEBRA S. EMMELMAN, JUSTICE FOR THE POOR: A STUDY OF CRIMINAL DEFENSE WORK 41 (2003)).
110. *Id.* at 576.
111. Carodine, *supra* note 97, at 541.
112. *Id.* at 541–42.
113. *See generally* FED. R. EVID. 613.
114. *Id.*

prior "inconsistent" statement is improperly transcribed.[115] Studies have shown that where the speaker is Black, accuracy of the transcription is incredibly low and unreliable.[116]

An example of an unreliable transcription can be found in a study conducted in Philadelphia, where a witness said in court, "He don't be in that neighborhood."[117] The court reporter transcribed this statement as "We going to be in this neighborhood"—the exact opposite meaning of the phrase the witness actually said.[118] This study uncovered a startling statistic: on average, court reporters made errors in two out of every five sentences spoken by speakers of African American English.[119] "The researchers [concluded] that the court reporters were not transcribing with any malicious intent[,] [b]ut . . . did have a . . . limited understanding of [B]lack dialect" and were influenced by their prejudice toward people of color.[120]

One of the most striking examples of this propensity to misinterpret African American English is the Louisiana Supreme Court's refusal to hear an appeal from a defendant who claimed his constitutional right to an attorney had been violated when police refused to stop questioning after he asked for a lawyer.[121] Warren Demesme voluntarily agreed to speak with police until he realized that he was being questioned as a suspect for statutory

115. John Eligon, *Speaking Black Dialect in Courtrooms Can Have Striking Consequences*, N.Y. TIMES (Jan. 25, 2019), https://www.nytimes.com/2019/01/25/us/black-dialect-courtrooms.html.

116. *See, e.g.*, *Black Dialects a Barrier to Justice*, LANGUAGE MAG. (Apr. 2, 2019), https://www.languagemagazine.com/2019/04/02/a-new-study-finds-that-philadelphia-court-reporters-did-not-accurately-transcribe-the-speech-of-speakers-of-african-american-english-aae. For example, a four-year study, conducted by Jessica Kalbfeld of New York University's sociology department, Ryan Hancock of Philadelphia Lawyers for Social Equity, and Robin Clark and Taylor Jones of the University of Pennsylvania's linguistics department, found in a sentence-by-sentence evaluation that only 59.5% of the transcribed sentences of African American English speakers were accurate. *Id.* The study also found that "77% of the time[,] . . . transcriptionists could not paraphrase what they heard." *Id.* Eleven percent of the time, "the transcriptions made no sense whatsoever." *Id.* These numbers fall well below the required 95% accuracy for transcriptionists. *Id.*

117. Eligon, *supra* note 115.

118. *Id.*

119. *Id.*

120. *Id.*

121. State v. Demesme, 228 So. 3d 1206, 1206–07 (La. 2017) (Crichton, J., concurring) (mem.).

rape.[122] He then asked for an attorney.[123] In *Edwards v. Arizona*, the United States Supreme Court held that when a suspect asks for an attorney, the interrogation must stop until a lawyer is provided.[124] The issue here was the manner in which Demesme asked for an attorney: once he realized he was a suspect, he told police, "If y'all, this is how I feel, if y'all think I did it, I know that I didn't do it, so why don't you just give me a lawyer dog cause this is not what's up."[125] The police disregarded Demesme's request and continued interrogating him, and the trial court would go on to convict him based on statements he made after requesting an attorney.[126]

Demesme appealed his conviction on the basis that his Fifth and Sixth Amendment rights to an attorney had been violated.[127] The appeals court held that Demesme's rights had not been violated, and the Louisiana Supreme Court denied review of that judgment.[128] Judge Crichton, in his concurrence to the court's decision to deny the defendant's writ application, wrote, "[T]he defendant's ambiguous and equivocal reference to a 'lawyer dog' does not constitute an invocation of counsel that warrants termination of the interview and does not violate *Edwards v. Arizona*."[129] Crichton's argument relies upon a fabricated ambiguity of what a "lawyer dog" might mean, as anyone familiar with Black vernacular would know that Demesme was simply asking for an attorney, not an animal.[130] This "ambiguity" that Judge Crichton wrote about belongs solely to the court, not Demesme, and is the result of a lack of a comma between "lawyer" and "dog" in the court transcript.[131] Demesme was denied his right to an additional appeal not because he never asked for an attorney,

122. Mark Joseph Stern, *Suspect Asks for "a Lawyer, Dawg." Judge Says He Asked for "a Lawyer Dog,"* SLATE (Oct. 31, 2017), https://slate.com/news-and-politics/2017/10/suspect-asks-for-a-lawyer-dawg-judge-says-he-asked-for-a-lawyer-dog.html.

123. *Id.*

124. *See generally* Edwards v. Arizona, 451 U.S. 477, 484–85 (1981).

125. Stern, *supra* note 122; Ed Krayewski, *He Said He Wanted a 'Lawyer[,] Dog'; The Court Ruled That Was Too Vague*, REASON (Oct. 30, 2017), https://reason.com/2017/10/30/he-said-he-wanted-a-lawyer-dog-the-court/.

126. Stern, *supra* note 120; Krayewski, *supra* note 125.

127. *See* State v. Demesme, 228 So. 3d 1206, 1206 (La. 2017) (Crichton, J., concurring) (mem.).

128. *Id.*

129. *Id.* at 1207.

130. Krayewski, *supra* note 125.

131. *Id.*

but because he asked for one in Black vernacular.[132] Once again, we are faced with the "Black [T]ax" that witnesses and defendants must pay for being different than their white peers, and the willful ignorance courts are happy to hide behind to charge it.[133] Further, as Demesme's attorney said, "If the court reporters are missing the story, . . . the jurors are missing the story."[134]

Another recent example of this sort of inaccurate transcription is the testimony of Rachel Jeantel, the prosecution's key witness in the trial of George Zimmerman for the murder of Trayvon Martin in 2012.[135] Jeantel testified for nearly six hours, but due to her use of Black vernacular, her testimony was misunderstood, improperly transcribed, and ultimately discredited.[136] Jeantel was Martin's friend and the last person to speak to him on the night of his murder.[137] The defense accused her of not being attentive to the conversation with Martin on the night he was killed, and Jeantel responded by saying, "I was *been* paying attention," meaning that she was paying attention to Martin on the night of the call and is still paying attention.[138] The court reporter omitted "been" from Jeantel's testimony and transcribed the phrase as "I was paying attention," altering the statement to mean that she was paying attention only at the time of the phone call (and not at the present moment).[139] While this example did not make a huge difference,

132. Dennis Baron, Miranda *and the Louisiana Lawyer Dog: A Case of Talking While Black*, THE WEB OF LANGUAGE (Nov. 4, 2017, 10:00 AM), https://blogs.illinois.edu/view/25/574827.

> [*D*]*awg* is a term of address popular in African American informal English, and one used by non-African Americans as well. And the New Orleans detectives, who live in a city with a large African American population, surely had no trouble understanding Demesme's request, which means that the police and Judge Crichton willfully ignored the prisoner's assertion of his rights and then pretended that they didn't understand him. Not because he spoke ambiguously, or informally, but because he spoke black.

Id.

133. Carodine, *supra* note 97, at 534.

134. Eligon, *supra* note 115.

135. Kaitlyn Alger, *More Than What Meets the Ear: Speech Transcription as a Barrier to Justice for African American Vernacular English Speakers*, 13 GEO. J. L. & MOD. CRITICAL RACE PERSP. 87, 94 (2021).

136. *Id.* (citing John R. Rickford & Sharese King, *Language and Linguistics on Trial: Hearing Rachel Jeantel (and Other Vernacular Speakers) in the Courtroom and Beyond*, 92 LANGUAGE 948, 950 (2016)).

137. *Id.*

138. *Id.* (citing Grace Catherine Sullivan, Problematizing Minority Voices: Intertextuality and Ideology in Court Reporter's Representation of Rachel Jeantel's Voice in the State of Florida v. Zimmerman Murder Trial 187 (Feb. 17, 2017) (Ph.D. dissertation, Georgetown University) (ProQuest)).

139. *Id.*

another error by the court reporter led to Jeantel's testimony ultimately being discredited.[140] In her pretrial deposition with the prosecutor, Jeantel stated that she heard someone say "Get off!" through the phone during the altercation between Martin and Zimmerman.[141] She was asked if she could tell who was saying that, and the transcript read that she answered, "I couldn't know Trayvon" and then "I couldn't hear Trayvon."[142] Neither of these transcriptions makes much sense contextually,[143] and it is very likely that Jeantel said, "I could an' it was Trayvon," according to a linguistic expert who listened to the recording of her deposition.[144] Ultimately, the court reporter's transcription error contradicted what Jeantel said at trial and was used by the defense as a method to impeach her for a prior inconsistent statement.[145]

Unfortunately, there has been no widespread push to improve the accuracy of transcription of Black dialect because of a wide societal assumption that Black dialect is "just a broken way of speaking standard English."[146] Putting all of this together, it is clear that witnesses and defendants of color are significantly and disparately harmed by impeachment with an inaccurately transcribed prior statement.[147] According to the aforementioned study, when a witness of color is impeached by a prior statement, that prior statement has been transcribed inaccurately and its original meaning has been altered.[148] Thus, witnesses of color are being disproportionally discredited and dismissed on the stand for nothing more than a misunderstanding at best and willful ignorance and stereotyping at worst.[149]

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140. *Id.* at 94–95.
141. *Id.* at 95.
142. *Id.*
143. *Id.* (citing Marguerite Rigoglioso, *Stanford Linguist Says Prejudice Toward African American Dialect Can Result in Unfair Rulings*, STANFORD REP. (Dec. 2, 2014), https://news.stanford.edu/news/2014/december/vernacular-trial-testimony-120214.html.
144. Rigoglioso, *supra* note 143.
145. Alger, *supra* note 135, at 95.
146. *Id.* at 102.
147. *See generally* Taylor Jones et al., *Testifying while Black: An Experimental Study of Court Reporter Accuracy in Transcription of African American English*, 95 LANGUAGE 216 (June 2019); Epstein, *supra* note 9.
148. *See* Jones et al., *supra* note 147, at 216, 246–47; Epstein, *supra* note 9.
149. *See* Alger, *supra* note 135, at 88–89, 92, 99–100.

D. Rules 801–807: Using Hearsay and Its Exceptions to Call Witness of Color Unreliable

Federal Rule of Evidence 801(c) defines hearsay as an out-of-court statement offered to prove the truth of whatever it asserts.[150] Rule 802 describes hearsay as inadmissible unless otherwise provided elsewhere in the Federal Rules of Evidence, by statute, or by rules prescribed by the Supreme Court.[151] The goal of the hearsay rules is to reduce the admission of irrelevant and unreliable evidence and to prevent juries from basing their verdicts on unreliable evidence.[152] The practical result of the broadness and vagueness of hearsay rules is that they serve as sweeping vehicles for the exclusion of evidence that the judge does not trust.[153] A fundamental issue with broad hearsay rules is that when a judge generally distrusts the testimony of minorities, they can easily rely on the hearsay rule to keep that testimony out.[154] For example, a judge who holds the stereotype that minorities feel a strong bond toward one another may be likely to distrust the testimony of one minority on behalf of another and exclude it.[155] Very rarely will this kind of bias be overt—in most cases, a judge thinks *unconsciously* that Black people and minorities are likely to lie for one another, making this kind of discrimination "covert and subtle."[156] The vague definition of hearsay and the wide discretion given to judges in determining whether evidence is admissible results in hearsay rules that are so broad that they surreptitiously invite racial bias into the courtroom.[157]

Despite the sweeping prohibition on hearsay codified in Rule 802, the Federal Rules of Evidence contain thirty-seven exceptions

150. FED. R. EVID. 801(c) ("'Hearsay' means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.").

151. FED. R. EVID. 802 (excluding hearsay unless any of the following provide otherwise: a federal statute, these rules, or other rules prescribed by the Supreme Court).

152. Andrew Elliot Carpenter, Chambers v. Mississippi*: The Hearsay Rule and Racial Evaluations of Credibility*, 8 WASH. & LEE J. CIV. RTS. & SOC. JUST. 15, 16 (2002) (citing FED. R. EVID. 804).

153. *Id.* at 22–23.

154. *Id.* at 23.

155. *Id.*

156. *Id.*

157. *See id.*

to the inadmissibility of hearsay evidence.[158] The many exceptions to the general prohibition of hearsay evidence have drawn widespread criticism. While some call for the addition of a corroboration requirement to specific exceptions,[159] others advocate to eliminate elimination of the exceptions altogether.[160] One specific exception to the hearsay rule is the adoptive admission of an opposing party.[161] There are a number of ways that an opposing party may adopt the statement of another person. Verbal communication is the simplest way, but the rule allows for various forms of nonverbal communication as well (such as nodding).[162] Interestingly, Rule 801 allows for an opposing party to adopt the statement of another person by doing nothing at all and remaining completely silent.[163]

One of the major issues with the adoptive admission of an opposing party exception is that the judge must evaluate each statement on a case-by-case basis based upon their perception of "probable human behavior."[164] The Advisory Committee's note on this rule purports that the result of this case-by-case evaluation has been satisfactory in civil cases but is troublesome in criminal cases.[165] In criminal cases, the inference that someone would have protested the statement if untrue is weak at best, as silence may be motivated by the advice of an attorney or the understanding that anything the defendant says will be used against them.[166] Putting aside the general reasons that this hearsay exception is incredibly weak when applied to people of any race, there is, of

158. Liesa L. Richter, *Goldilocks and the Rule 803 Hearsay Exceptions*, 59 WM. & MARY L. REV. 897, 904 (2018) (first citing FED. R. EVID. 801(d) (listing eight conditions under which a statement is not hearsay); then citing FED. R. EVID. 803 (listing twenty-three statement categories that "are not excluded by the rule against hearsay"); then citing FED. R. EVID. 804(b) (listing five statement types that "are not excluded by the rule against hearsay if the declarant is unavailable as a witness"); and then citing FED. R. EVID. 807 (creating one "residual exception" that enables a court to admit a hearsay statement under certain circumstances "even if the statement is not admissible under" the other thirty-six hearsay exceptions listed elsewhere in the Rules)).

159. *Id.* at 908.

160. *Id.*

161. FED. R. EVID. 801(d)(2)(B) ("An opposing party's statement . . . is one the party manifested that it adopted or believed to be true.").

162. *See generally* FED. R. EVID. 801 advisory committee's 1975 note to proposed rules.

163. *Id.* ("When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue.").

164. *Id.*

165. *Id.*

166. *Id.*

course, the issue that the vast majority of judges are white.[167] When asking a judge to consider what constitutes "probable human behavior" in an evidentiary determination, it would be unreasonable to assume that he would not apply his own racial and cultural norms.[168] "Probable human behavior" based solely on white culture and perspective presents unique problems for witnesses and defendants of color.[169]

An example of the implicit racial bias in this exception is *Tillman v. Commonwealth of Virginia*, a case out of the Supreme Court of Appeals of Virginia.[170] The defendant in this case, Spencer Tillman, was a fifty-seven-year-old Black man who worked as a longshoreman.[171] Tillman was accused of murdering his wife, and his defense was that he had caught her cheating on him with another man and had accidentally killed her with a bullet meant for that man.[172] The prosecution argued that Tillman could not have been that surprised by his discovery because he knew his wife was a prostitute.[173] While questioning Tillman about the murder, a detective said:

> Spencer, you know your wife is a prostitute and has been living in this house plying her trade for years and you know no excitement didn't come up to cause you to shoot someone on account of her being with another man. . . . You two have been scrapping long enough, and now you have finally killed her. What have you got to say about that?[174]

Because Tillman did not refute the detective's statement, it was used against him in court as a "tacit admission[]" of its truth. The court reasoned that if the statement had been untrue, Tillman would have denied it.[175] The reality of this situation is that there were more reasons for Tillman to remain silent than for him not to. This case was decided in 1946, and, prior to the Civil Rights

167. Root, *supra* note 33; FED. R. EVID. 801 advisory committee's 1975 note to subdivision (d).
168. *See generally id.*
169. *See generally* Bret Ruber, *Adoptive Admissions and the Duty to Speak: A Proposal for an Appropriate Test for the Admissibility of Silence in the Face of an Accusation*, 36 CARDOZO L. REV. 299 (2014).
170. Tillman v. Commonwealth, 185 S.E.2d 768, 769 (Va. 1946).
171. *Id.*
172. *Id.* at 770–71.
173. *Id.* at 770.
174. *Id.*
175. *Id.* at 773.

Movement, a Black man in the South very likely believed he had no right to talk back to a detective.[176] Tillman may have thought that as a Black man his response would not have been believed or, worse, could trigger "violent retribution" for challenging a white man in a position of authority.[177]

Another example of this exception's racial bias in practice is *Commonwealth v. Dravecz*.[178] In this case, the Pennsylvania Supreme Court cited Joseph Dravecz's class and education level when they struck down the application of the adoptive admission of an opposing party exception to him.[179] The court reasoned:

> [it was] unrealistic, to say nothing of unjust, to assume that he knew that if he did not make some comment on Stockley's comments, this would prove he had committed a crime. Stockley's statement was a long one. It could have contained averments with which Dravecz agreed, and averments with which he disagreed as not being the truth. Was he sufficiently educated and trained in expression to analyze the wordy paper and specify what he regarded right and what he regarded wrong?[180]

In other words, the court looked beyond its own perspective and culture and determined that silence is not always an indicator of consent; sometimes, it is an indicator of unfamiliarity or ignorance.[181]

Misunderstanding, then, can often form the basis of silence.[182] If a witness does not speak the speaker's language, it is unreasonable to assume that they can understand a statement enough to disagree with it.[183] An example of this is *United States*

176. Maria L. Ontiveros, *Adoptive Admissions and the Meaning of Silence: Continuing the Inquiry into Evidence Law and Issues of Race, Class, Gender, and Ethnicity*, 28 SW. U. L. REV. 337, 349 (1999).

177. *Id.* ("The overwhelming oppression faced by African Americans in the United States has led to a strategy of indirection by [African American] speakers as a linguistic mechanism to avoid conflict. The speaker's message is delivered as suggestions, innuendoes, implications, insinuations, or inferences. This use of indirect speech patterns in order to avoid conflict is the hallmark of a pragmatic usage by persons without power, and can be found . . . in the adaptive speech patterns of subordinated African Americans forced to deal with white authority figures.").

178. *See generally* Commonwealth v. Dravecz, 227 A.2d 904 (Pa. 1967).

179. *Id.* at 908.

180. *Id.*

181. Ontiveros, *supra* note 176, at 341–42.

182. *Id.* at 342.

183. *Id.*

v. Flecha.[184] In that case, the appellant, Flecha, was convicted on two substantive counts and one conspiracy count relating to the importation and possession of marijuana.[185] The trial court allowed the use of Flecha's silence in response to the statement, "Why so much excitement? If we are caught, we are caught," spoken in Spanish, to be used against him as an adoptive admission.[186] The Second Circuit recognized that the original statement in Spanish was never relayed. Due to our monolingual court system, the English transcription was the only version the court had to consider, with no way to know if the original statement was ambiguous.[187] Additionally, the Second Circuit's opinion never mentions whether Flecha understood Spanish at all and appears to assume that he did because he was Hispanic.[188] This is but one of many examples where silence is not based on agreement but on misunderstanding.[189]

In 1826, the Pennsylvania Supreme Court called adoptive admissions the most dangerous type of evidence and warned that they should be used in the most limited of circumstances.[190] Adoptive admissions being dangerous is especially concerning for minorities where a white judge is likely to apply white norms of communication and conduct and determine that the statement they failed to respond to called for protest.[191] While silence may indicate tacit agreement to someone who is white, silence in many minority communities can mean something completely different.[192] For example, the Spanish language is generally less direct, more subtle, and less confrontational than white norms suggest.[193] A Spanish-speaking witness may respond to a prosecutor's question with "if you say so, sir" to imply deference to authority rather than agreement.[194] In the Asian-American community, indirect language and forms of communication are often preferred and

184. 539 F.2d 874 (2d Cir. 1976).
185. *Id.* at 875.
186. *Id.* at 876.
187. *Id.* at 877; Ontiveros, *supra* note 176, at 342 (citing Maria L. Ontiveros, *Rosa Lopez, David Letterman, Christopher Darden, and Me: Issues of Gender, Ethnicity, and Class in Evaluating Witness Credibility*, 6 HASTINGS WOMEN'S L.J. 135, 143–48 (1995)).
188. Ontiveros, *supra* note 176, at 342–43.
189. *Id.* at 343.
190. *See* Moore v. Smith, 14 Serg. & Rawle 388, 393 (Pa. 1826).
191. Gonzales Rose, *supra* note 10, at 2254.
192. *Id.*
193. Ontiveros, *supra* note 176, at 344.
194. *Id.*

considered more mature. Silence is valued much higher than it is in the Anglo-American community, and many believe that communication is best when indirect.[195] In addition, Asian-Americans generally value greater deference to authority figures and tend to show more passivity when faced with authority.[196] Both Latino and Asian-American groups are more likely to remain silent than their white counterparts, which creates disparities in the application of the adoptive admissions exception.[197] Someone who "remains silent in the face of oppression is not really saying, 'I consent to this tyranny.'"[198] We should not construe silence from those in our society who are most vulnerable and most often subjected to disenfranchisement as consenting to the tyranny of the masses.

IV. SUGGESTIONS FOR BRIDGING THE RACIAL DISPARITY GAP IN THE RULES OF EVIDENCE.

It comes as no surprise that bridging the racial gap has been widely discussed in the legal community.[199] Those discussions have also come with an array of suggestions for how amending the Federal Rules of Evidence might bridge the racial gap in the courtroom.[200] It is pertinent to examine those suggestions before outlining my own suggestion for improvement.

Demetria D. Frank, in her Harvard Journal of Racial and Ethnic Justice article, suggests that Congress should amend Rule 404(b) to require a three-part analysis as a prerequisite to admitting prior bad acts in criminal trials.[201] The first part of this

195. *Id.*
196. *Id.* at 344–45.
197. *Id.*
198. Peter Tiersma, *The Language of Silence*, 48 RUTGERS L. REV. 1, 10 (1995).
199. *See, e.g.*, Frank, *supra* note 37; Ontiveros, *supra* note 176; Sampsell-Jones, *supra* note 96; Carodine, *supra* note 97.
200. *Id.*
201. Frank, *supra* note 37, at 43. The three-part analysis that Frank suggests reads:

> 1. The court may admit relevant evidence of an accused uncharged crime, wrong, or other act if: (1) it tends to make a disputed issue in the case more or less probable absent a propensity inference; and (2) its probative value substantially outweighs its prejudicial effect to the accused.
>
> 2. In assessing whether the probative value of the unchanged conduct substantially outweighs its prejudicial effect, the court must explain in the trial record the basis of its ruling on each of the following: (1) timing of the uncharged act; (2) reliability of the uncharged act; (3) similarity between the uncharged act and

analysis requires the prosecution to show that this proposed character evidence is relevant to a "disputed issue" in the case.[202] This would result in uncharged prior act evidence not being admitted unless it truly assists the jury in resolving a "genuinely disputed issue that is central to the charge or defense."[203] The second part of this proposed analysis suggests uniform factors the trial court would consider when determining probity versus prejudice in a reverse 403 analysis.[204] This proposed change would result in a better appellate record and give the courts and parties insight into how the proposed evidence will be evaluated, giving defendants some degree of predictability as to whether the evidence will be admitted.[205] The third part of this analysis requires the judge to determine whether the accused actually committed the uncharged act before it is presented to a jury.[206] Frank suggests this can be accomplished at a pretrial hearing or some other proceeding outside of the jury's presence, preventing the need for a limiting instruction the jury is unlikely to follow.[207]

While the proposed changes are well-founded and follow sound logic, there is one glaring, practical aspect of reforming evidence rules that Frank forgets to consider: Congress took decades to begin codifying the Federal Rules of Evidence, and it is unlikely that any meaningful formal change will take place in the near (or distant) future.[208] The truth is that the federal government is

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charged crime; (4) whether the uncharged act would likely cause racial or other implicit bias associations to the detriment of the accused; (5) availability of other forms of less prejudicial evidence; and (6) any other factor that might result in prejudice to the accused.

3. Evidence of an uncharged act should only be admitted and considered by the trier of fact after the court has determined, supported by specific facts and circumstances, that there is evidence sufficient to support a finding that the act was committed by the accused.

Id.

202. *Id.* at 44.

203. *Id.* at 45.

204. *Id.* at 47. The six factors would be: the timing of the prior uncharged act, the reliability of the evidence, the similarity between the uncharged act and the crime charged, whether the uncharged act would cause racial bias to the detriment of the accused, the availability of other forms of less prejudicial evidence, and any other factor that might result in unfair prejudice to the accused. *Id.* at 48–54.

205. *Id.* at 48.

206. *Id.* at 54.

207. *Id.*

208. *See* 21 WRIGHT & GRAHAM, *supra* note 15, § 5005 (describing the formation of an advisory committee to discuss the formation of uniform rules of evidence in 1939); Press Release, *supra* note 22 (the Supreme Court announced an advisory committee to draft what

procedurally slow, and an amendment to rules that are largely unknown to those outside of the legal profession is unlikely to be prioritized anytime soon.[209] Even when assuming that somehow these proposed changes find their way onto our lawmakers' list of priorities, the chances of amending the Federal Rules of Evidence to account for racial bias and inequality is virtually zero because, in today's society, even health and safety measures are politicized.[210] In Arkansas, for example, lawmakers approved a measure that bans state contractors from "offering training that promotes 'division between, resentment of, *or social justice for*' groups based on race, gender, or political affiliation."[211] This law shows how lawmakers actively work to curtail measures that promote racial equality, and a revision of the Federal Rules of Evidence would be no exception to this effort.[212] In theory, an amendment that would promote racial equality as envisioned by Frank is a sound suggestion, but in practice, it is dead in the water.[213]

Another proposed solution to this issue takes the opposite approach to Frank; some in the legal community have called for a

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would become the Federal Rules of Evidence in 1965); Act of Jan. 2, 1975, Pub. L. No. 93-595, § 1, 88 Stat. 1926 (explaining that the Federal Rules of Evidence went into effect in 1975).

209. *See, e.g.*, Derek Willis & Paul Kane, *How Congress Stopped Working*, PROPUBLICA (Nov. 5, 2018), https://www.propublica.org/article/how-congress-stopped-working (describing a weakened legislative branch where party leaders control the agenda, debate is largely absent, most representatives have little to no opportunity to speak, and government shutdowns constantly loom).

210. *See, e.g.*, Char Adams, *Republicans Announce Federal Bills to 'Restrict the Spread' of Critical Race Theory*, NBC (May 12, 2021), https://www.nbcnews.com/news/nbcblk/republicans-announce-federal-bills-restrict-spread-critical-race-theory-n1267161 (explaining that Republican lawmakers introduced a pair of bills to ban diversity training for federal employees and the military); Dina Smeltz, *Republican Views on Racial Inequality Starkly Contrast Those of Democrats*, CHI. COUNCIL ON GLOB. AFFS. (Oct. 19, 2020), https://www.thechicagocouncil.org/research/public-opinion-survey/republican-views-racial-inequality-starkly-contrast-those-democrats (detailing a survey that found that while nearly three-quarters of Democrats say that racial inequality is a critical threat to our country, only twenty-three percent of Republicans believe that racial inequality is a critical threat).

211. Adam Harris, *The GOP's 'Critical Race Theory' Obsession*, ATLANTIC (May 7, 2021), https://www.theatlantic.com/politics/archive/2021/05/gops-critical-race-theory-fixation-explained/618828/ (emphasis added).

212. *Id.* (describing a bill introduced in New Hampshire that would ban schools from suggesting that the United States is "fundamentally racist," a bill in Idaho that prohibits public schools from compelling students to adhere to beliefs about race, sex, or religion, and a bill in Louisiana that is nearly identical to the Idaho bill just listed).

213. *See, e.g.*, Chris Johnson, *Senate Vote on Equality Act Blocked by Republican Citing J.K. Rowling*, WASH. BLADE (June 18, 2020), https://www.washingtonblade.com/2020/06/18/senate-vote-on-equality-act-blocked-by-republican-citing-j-k-rowling/.

relaxation of the barriers to admission of character evidence.[214] The proponents of such a solution advocate for a more liberal approach to the admission of character evidence, where nearly all prior bad acts would be admissible "absent some plain and forceful reason not to do so."[215] This approach would require courts to rely heavily on detailed jury instructions to prevent the jury from misusing the character evidence for propensity reasons.[216] As Edward Imwinkelried writes in his article on limiting instructions:

> [O]nce the judge decides to admit the uncharge[d] misconduct evidence, the limiting instruction is the defense's best—and only—antidote against jury misuse of the evidence. One of the leading American litigators, Mr. Mark Dombroff, recently observed that "[o]ne area of trial practice that frequently seems to be shortchanged . . . is that of jury instruction." An experienced trial attorney, Mr. Dombroff emphasized that in the jurors' eyes, the judge is not only "the authority figure" but also "the living symbol of justice." The jurors realize that the attorneys are advocates and, consequently, discount the attorneys' statements during the trial. In sharp contrast, the jurors "listen more closely and weigh more heavily almost everything said to them by the judge, including the jury instructions." In Mr. Dombroff's judgment, in a close case a favorable jury instruction can "pay substantial dividends that may translate into trial results."[217]

In theory, this approach seems sound, especially when an evidentiary powerhouse like Imwinkelried appears to endorse it.[218] However, this approach relies upon some unfounded assumptions.

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214. *See generally* Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547, 1624–28 (1998) (advocating for the abolishment of Federal Rules of Evidence 404, 405, 413, 414, 415, 608, and 609 and proposing four replacement rules that would relax the barriers to admission of character evidence); Thomas J. Leach, *"Propensity" Evidence and FRE 404: A Proposed Amended Rule With an Accompanying "Plain English" Jury Instruction*, 68 TENN. L. REV. 825, 867–71 (2001) (proposing amended rules similar to Melilli's but adding a "plain English" jury instruction that explains the appropriate use of character evidence to jurors).

215. Melilli, *supra* note 214, at 1623 (citing Edward J. Imwinkelried, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 VILL. L. REV. 1465, 1485 (1985) ("The admission of all relevant evidence ordinarily promotes the public interest in discovering the truth in litigation, and that interest is weightier than any of the competing interests listed in rule 403.")).

216. *See* Leach, *supra* note 214, at 867.

217. *Id.* (citing Edward J. Imwinkelried, *Limiting Instructions on Uncharged Misconduct Evidence: The Last Line of Defense Against Jury Misuse of the Evidence*, 8 TRIAL DIPL. J., 23, 27 (1985)).

218. *See id.*

The first assumption this proposal makes is that a more liberal approach to the admissibility of character evidence will not have a disparate racial impact when it undoubtedly would.[219] When a witness or defendant is a person of color, and the character evidence is neither universal nor racially or morally neutral, there are unique consequences.[220] Jurors use prior act evidence to label defendants, and these labels are "not only prone to, but are exacerbated by, cultural biases."[221] In addition, this proposed solution assumes that jury instructions reliably prevent juries from misusing evidence when this has proven to be an untrue premise.[222] Studies have shown that limiting instructions are ineffective and insufficient at preventing jurors from misusing evidence,[223] so allowing *more* character evidence is likely to exacerbate the issue rather than alleviate it.

Yet another proposed solution advocates for an expanded role for jurors, where they would play an active role in determining things like whether silence indicates consent.[224] Maria Ontiveros argues that a jury may be better equipped than a judge to determine whether silence indicates consent because a group of jurors likely represents a "broader range of human experience" than an individual judge does.[225] Ontiveros also calls for expert testimony to educate juries on the effects of race, class, ethnicity, and gender.[226] Specifically, this expert testimony can focus on the use of silence in the defendant's culture, similar to the use of expert testimony to explain syndromes in California courts.[227] Finally, Ontiveros suggests that Federal Rule of Evidence 801(d)(2)(B) may be amended to reflect an instruction to jurors that would ask them

219. *See generally Criminal Justice Fact Sheet*, *supra* note 90 ("[Eighty-seven] percent of Black adults say the U.S. criminal justice system is more unjust towards Black people; [sixty-one] percent of white adults agree.").

220. Goodman, *supra* note 65, at 11–12.

221. *Id.* at 16.

222. L. TIMOTHY PERRIN ET AL., THE ART & SCIENCE OF TRIAL ADVOCACY 351–52 (2003) (explaining that despite limiting instructions, jurors will use evidence in "any way that makes sense to them").

223. *See generally* Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 LAW & HUM. BEHAV. 67 (1995); Meredith Allison & C.A. Elizabeth Brimacombe, *Alibi Believability: The Effect of Prior Convictions and Judicial Instructions*, 40 J. APP. SOC. PSYCH. 1054 (2010); Roselle L. Wissler & Michael J. Saks, *On the Inefficiency of Limiting Instructions*, 9 LAW & HUM. BEHAV. 37 (1985).

224. Ontiveros, *supra* note 176, at 350.

225. *Id.* at 351.

226. *Id.*

227. *Id.* at 351–52.

to consider culture when deciding what a defendant's silence meant.[228] Alternatively, Ontiveros suggests this exception could be eliminated altogether based on the difficulty of determining human behavior and because of the implicit bias toward people of color.[229]

While this proposal is more practical and realistic than the ones previously discussed, it is still too complex to be timely and functional. Taking the role of determining admissibility of any evidence from the judge and giving it to the jury would require not only an amendment to the rules but would require a personal amendment to each individual judge across the country.[230] As Scott Turow writes, "This is one of those issues, of which there are so many during a trial, where a judge is within legal boundaries no matter what he does. The authorities support a ruling for either side."[231] The judge is the gatekeeper of evidence and is not even bound by the rules of evidence, except those relating to privilege, and the first person who has to tell a judge otherwise is not in an enviable position, to say the least.[232] As to Ontiveros's second proposal, the use of experts would likely be very helpful and would most certainly educate the court and jurors alike on the cultural differences in the meaning of silence. This proposed solution begs the question: who will pay for these experts? In 2017, the average national cost for courtroom testimony was $477.70 *per hour*.[233] In a court system that already favors the wealthy, this may alleviate some of the racial bias, but it is also sure to widen the economic gap in the justice system.[234] To briefly address Ontiveros's final suggestion of amending or eliminating Federal Rule of Evidence

228. *Id.* at 352.

229. *Id.*

230. FED. R. EVID. 104(a) ("The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.").

231. SCOTT TUROW, PRESUMED INNOCENT 315 (1987).

232. *Id.*

233. Victoria Negron, *Expert Witness Fee Report: Facts, Figures & Trends in 2017*, EXPERT INST. (June 23, 2020), https://www.expertinstitute.com/resources/insights/expert-witness-fee-report-facts-figures-trends-in-2017/.

234. *See, e.g.*, John Mathews II & Felipe Curiel, *Criminal Justice Debt Problems*, AM. BAR ASS'N (Nov. 30, 2019), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-justice/criminal-justice-debt-problems/; Lea Hunter, *What You Need to Know About Ending Cash Bail*, CTR. FOR AM. PROGRESS (Mar. 16, 2020), https://www.americanprogress.org/issues/criminal-justice/reports/2020/03/16/481543/ending-cash-bail/.

801(d)(2)(B), I would make the same argument about an official amendment to the rules as before—that it would be next to impossible, practically speaking, for the same reasons discussed above.[235]

The solution this Article proposes is much simpler than those currently bouncing around the annals of legal academia. The working solution to bridging the racial gap disparity in the Federal Rules of Evidence is found entirely within Rule 403's existing language and framework.[236] The phrase "unfair prejudice" is found right in the rule,[237] so the rule itself is not the problem: the problem is the application of the rule.[238] The solution is for judges to take a deeper, more comprehensive look at Rule 403 when determining the admissibility of evidence that may be problematic for racial, ethnic, or cultural reasons.[239] The question then becomes: how do we encourage judges to do so?

The answer is twofold, and it is right before us: precedent and scholarship. Precedent can be surprisingly controversial.[240] The late Justice Lewis Powell said of precedent, "restraint in decision making and respect for decisions once made are the keys to preservation of an independent judiciary and public respect for the judiciary's role as a guardian of rights."[241] The other side of the precedent coin is best summed up by the late Justice Antonin Scalia, who views precedent as an obstacle to be eliminated when the Court is faced with a prior erroneous decision.[242] Regardless, it is undeniable that precedent plays an important role in our legal

235. *See generally* Adams, *supra* note 210; Smeltz, *supra* note 210; Harris, *supra* note 211; Johnson, *supra* note 213.

236. *See* FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

237. *Id.*

238. Jules Epstein & Suzanne Mannes, *"Gruesome" Evidence, Science, and Rule 403*, THE NAT'L JUD. COLL. (Mar. 17, 2016), https://www.judges.org/news-and-info/gruesome-evidence-science-and-rule-403/ (describing an "I know it when I see it" approach to assessing the risk of unfair prejudice and how such an approach "begets arbitrariness").

239. *See generally id.*

240. *See* Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1173 (2006).

241. *Id.* (citing Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 289–90 (1990)).

242. *Id.* at 1173–74 (citing South Carolina v. Gathers, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting) (first quoting William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949); and then quoting Smith v. Allwright, 321 U.S. 649, 665 (1944)), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991)).

system and that stare decisis is the place that all judges begin when writing an opinion, since even our nation's highest court requires "special justification" for departing from the doctrine.[243] That being said, precedent is built and changed by challenges to the existing law through our appellate courts,[244] and this is exactly what advocates for equality must do. One example of precedent changing in response to racial bias is the Supreme Court's 2017 decision, *Pena-Rodriguez v. Colorado*.[245] The Court held that when a juror states that they relied on racial stereotypes to convict a defendant, the Sixth Amendment requires the trial judge to consider whether the defendant has been denied their Constitutional right to a fair trial.[246] Prior to this ruling, jury deliberations were cloaked in secrecy, as Federal Rule of Evidence 606(b) (known colloquially as the "no-impeachment rule"[247]) prohibits jurors from testifying about any statements made during the jury's deliberations.[248] This change to Federal Rule of Evidence 606(b)'s application was not effected through an amendment to the rule, the addition of expert testimony, or by *telling* the judge what to do; this change came from advocates who presented sound legal arguments to the court and *asked* the judge to overturn precedent, creating new and more equal precedent.[249] Lawyers who care to bridge the racial gap in the Federal Rules of Evidence can start by taking to appellate courts and *asking* judges to change the way Rule 403 is applied.

Legal scholarship represents another avenue for changing the way judges apply Rule 403. Judges not only read legal academia, but they cite to legal academia.[250] Over two Supreme Court terms,

243. Arizona v. Rumsey, 467 U.S. 203, 212 (1984) ("Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification.").

244. *See, e.g.*, *Table of Supreme Court Decisions Overruled by Subsequent Decisions*, U.S. CONG., https://constitution.congress.gov/resources/decisions-overruled/ (last visited Aug. 21, 2022).

245. Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (2017).

246. *Id.*

247. John Austin Morales, Pena-Rodriguez v. Colorado*: Carving Out a Racial-Bias Exception to the No-Impeachment Rule*, 50 ST. MARY'S L.J. 767, 767 (2019).

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

249. In his opinion, Justice Kennedy writes that though the "no-impeachment" rule is precedent, so too is the principle that "discrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice.'" *Pena-Rodriguez*, 137 S. Ct. at 867–68.

250. *See generally* Adam Feldman, *Empirical Scotus: With a Little Help from Academic Scholarship*, SCOTUSBLOG (Oct. 21, 2018), https://www.scotusblog.com/2018/10/empirical-scotus-with-a-little-help-from-academic-scholarship/.

the justices cited to the Harvard Law Review twenty-nine times, and to the Yale Law Review fifteen times.[251] Journal articles play an important role in the Supreme Court's modern jurisprudence, and their impact should not be underestimated by advocates looking to make change in our federal court system.[252] Between August 1, 2013 and August 14, 2014, 11.4% of the Seventh Circuit's published opinions included one or more references to legal scholarship.[253] In light of this, it stands to reason that the best way for racial equality advocates in the legal field to fight for a more robust application of Rule 403, when they are not writing appellate briefs, is to write articles and comments for publication. Much like what is seen in political activist groups, an organized effort to do so may lead to even greater results as academic law journals publish more frequently on the subject.[254]

V. CONCLUSION

In the wake of the George Floyd murder and cultural uprising that followed, Americans are desperate for tangible improvement of the treatment of people of color in our court systems.[255] While so much of the focus is on police reform, there are changes that can be made in the courtroom with relative ease that may serve to level the racial playing field and make positive strides forward. The Federal Rules of Evidence, like so many other things promulgated solely by white men, have racial undertones that have a detrimental impact on people of color.

From the admission of prior bad acts and convictions to impeachment by prior inconsistent statements, people of color consistently experience severe and significant disadvantages in the United States court system. They do not have to, and the solution is simple: through precedent and scholarship, advocates for racial equality can convince the judiciary that a more thorough, comprehensive look at Rule 403 is not only beneficial, but necessary for the equal administration of justice. Attorneys and

251. *Id.*
252. *See generally id.*
253. Diane P. Wood, *Legal Scholarship for Judges*, 124 YALE L.J. 2592, 2604 (2015).
254. *See generally* Adriel Hampton, *Helping Activists Be Organizers*, MEDIUM (Jan. 31, 2019), https://medium.com/organizer-sandbox/helping-activists-be-organizers-1848b0c1589e (explaining that organized activism can accomplish bigger goals and tasks than individual activism can).
255. Deliso, *supra* note 2.

legal scholars have an obligation to work toward a better, more equal justice system; as one example, Florida attorneys pledge to "never reject, from any consideration personal to myself, the cause of the defenseless or oppressed" when they take the Oath of Admission to the Florida Bar.[256] In this era of civil unrest and racial awakening, this Article serves as a call to action to legal scholars and lawyers alike. While others take to the streets, it is our absolute obligation to take to the courtrooms by way of appeals and to take to academic journals by way of scholarship to make our case. That racism in the United States is pervasive is no longer a theory, and it is time to face the issue head-on and act.

256. *Uploads*, FLA. BAR (Sept. 12, 2011), https://www-media.floridabar.org/uploads/2017/04/oath-of-admission-to-the-florida-bar-ada.pdf.