

## EVIDENCE WITHOUT RULES

*Bennett Capers\**

*Much of what we tell ourselves about the Rules of Evidence—that they serve as an all-seeing gatekeeper, checking evidence for relevance and trustworthiness, screening it for unfair prejudice—is simply wrong. In courtrooms every day, fact finders rely on “evidence”—for example, a style of dress, the presence of family members in the gallery, and of course race—that rarely passes as evidence in the formal sense, and thus breezes past evidentiary gatekeepers unseen and unchecked. This Article calls much needed attention to this other evidence and demonstrates that such unregulated evidence matters. Jurors use this other evidence to decide whether to find for a plaintiff or defendant, whether a defendant should go free or be deprived of liberty, even whether a defendant is deserving of life or death. More broadly, the role of other evidence belies what we tell ourselves about the way justice works, that it is based on the “rule of law.” The truth is less comforting. The determination of outcomes, notwithstanding the Rules of Evidence, is often ruleless. To address this state of affairs, this Article first offers a modest proposal—a simple jury instruction and directive. It then offers a solution that is anything but modest—a radical rethinking of the Rules of Evidence.*

### INTRODUCTION

Imagine walking through a busy courthouse. In Courtroom One, a sexual assault case is in progress. The assistant district attorney has just called the victim as a witness. As the victim approaches the stand, you notice that she is modestly dressed, and you instantly begin to think of her as credible. Perhaps the jurors, who are nodding, are thinking the same thing. In Courtroom Two, the judge is conducting a voir dire as the lawyers begin the process of selecting a jury in an insurance fraud case. Although the jury pool

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nearly fills the courtroom gallery, you notice a young woman and three small children sitting apart from everyone else. You assume they are the defendant's family, and cannot help but wonder if a guilty verdict will separate the family. Will the jurors wonder this as well? Courtroom Three is almost the opposite, the gallery is completely empty but for you, the only spectator. The defense lawyer is cross-examining a uniformed police officer who claims he observed the defendant throw away a gun as the defendant was running from the officer. Even though jurors are rarely told anything about a defendant's criminal history, you wonder if the defendant, who is black, has a criminal record. You glance at the jurors, who seem bored. Perhaps they are assuming the same thing and are wondering whether they can simply vote guilty already.

On the surface, these three cases—a sexual assault case, an insurance fraud case, a gun possession case—are different.<sup>1</sup> Yet in one important respect they share something in common: in all of these cases, fact finders will likely rely on “evidence”—a style of dress, the presence of family members, and race—that is rarely treated as evidence by the Rules of Evidence. Indeed, in some instances, the fact finders will rely on evidence that runs directly *counter* to evidentiary rules.<sup>2</sup> Most troubling of all, because this evidence is rarely recognized as evidence in the formal sense, it typically enters unnoticed. It typically goes unremarked upon.

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1 Of course, these are just three examples. Allow me to offer two more. Imagine Courtroom Four, where a female plaintiff in an employment discrimination case claims she was denied partnership at her law firm because of sex stereotyping. The law firm claims their decision was based on a combination of her poor “interpersonal skills,” including sometimes being “overly talkative” and “overly aggressive,” and her lack of competence. Even without any witnesses being called, because of implicit biases, you might wonder if perhaps she *was* less competent, and suspect the jurors are wondering this too. Finally, imagine Courtroom Five, where a defense lawyer is summing up during the penalty phase of a capital case. Because capital cases are rare, you are not surprised this case has drawn a sizeable crowd of onlookers and reporters. Indeed, the room is so crowded that seating is hard to find, and a marshal has to point you to a seat. The jurors seem to be listening attentively to the defense lawyer, but you also notice that they keep glancing over at the defendant, who stares blankly ahead. You are trying to figure out if he looks remorseful enough to be spared the death penalty. You realize the jurors are probably doing the same thing.

2 Another example might be useful. In Courtroom Two, the insurance fraud case, if the defense wanted to call the defendant's wife to the stand so that she could explain how devastated she would be if her husband were found guilty, the court would quickly reject this testimony. Her testimony might be relevant at sentencing, but it is completely irrelevant as to the issue of guilt or innocence. The judge, and prosecutor, would rely on Rules 401 and 403 to bar her testimony. And yet change the facts a little, and something curious happens. Instead of the wife taking the stand, the wife and children remain in the gallery, quietly sobbing. The effect is the same: the jurors will use this as evidence that a vote of guilty will impact not only the defendant but also his family. It will function as if the wife had taken the stand. The defense will be content, thinking that his chances of an acquittal have just gone up; the prosecutor will be annoyed. And yet because we are not trained to think of this as evidence, it is likely that none of the litigators will think to subject this to the Rules of Evidence or to invoke their gatekeeping function.

The first goal of this Article is to call attention to this other evidence. For too long scholars and jurists have proclaimed and insisted that the Rules of Evidence serve as a powerful, all-seeing gatekeeper, culling evidence brought before juries for relevance and trustworthiness.<sup>3</sup> In fact, there is a panoply of evidence that, because it is rarely recognized as such, routinely passes evidentiary gatekeepers unobserved and unchecked. Calling attention to this evidence, indeed exposing it as evidence too, is the first goal of this Article.

The second goal of this Article is to demonstrate that such unregulated evidence matters. Consider the courtroom examples again. It is axiomatic among prosecutors that presenting a rape victim in more modest dress increases the chances of securing a conviction,<sup>4</sup> just as defense lawyers know that having family members and friends in the gallery can increase jury sympathy and the likelihood of an acquittal.<sup>5</sup> Turning to the gun possession case in Courtroom Three, litigators know that quite possibly the most powerful evidence in the case will be the defendant's race.<sup>6</sup> In a very real sense, "race itself is evidence."<sup>7</sup>

All of this has consequences for victims of crime. For example, to the extent that punishment serves the purpose of facilitating victim vindication, it should strike us as a design flaw that such vindication could turn on whether a prosecutor remembers to tell a rape victim to dress conservatively in court. This also has consequences for defendants: the very issue of guilt may turn on whether family members, either the defendant's or the victim's, are sitting in the courtroom. Even in cases that do not go to trial—the overwhelming majority—this unregulated evidence has outsized consequences,

3 See discussion *infra* Part I.

4 See, e.g., I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 864 n.197 (2013) [hereinafter Capers, *Real Women, Real Rape*]; Amanda Konradi, *Too Little, Too Late: Prosecutors' Pre-Court Preparation of Rape Survivors*, 22 LAW & SOC. INQUIRY 1, 27–28 (1997); cf. SUSAN ESTRICH, *REAL RAPE* 9 (1987) (describing a case where the rape victim came to a meeting wearing tight blue jeans and a see-through blouse).

5 See, e.g., Victor Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, 65 N.C. L. REV. 481, 494–95 (1987) (discussing defensive tactic of “[loading] the courtroom with spectators”); Laurie L. Levenson, *Courtroom Demeanor: The Theater of the Courtroom*, 92 MINN. L. REV. 573, 587–88 (2008) (describing strategy and effect of “packing the courtroom audience with supporters”).

6 See discussion *infra* Section II.C.

7 Montré D. Carodine, *Contemporary Issues in Critical Race Theory: The Implications of Race as Character Evidence in Recent High-Profile Cases*, 75 U. PITT. L. REV. 679, 679, 681 (2014) [hereinafter Carodine, *Contemporary Issues*]; see also Montré D. Carodine, *Race Is Evidence: (Mis)Characterizing Blackness in the American Civil Rights Story*, in CIVIL RIGHTS IN AMERICAN LAW, HISTORY, AND POLITICS 64, 64–67 (Austin Sarat ed., 2014) [hereinafter Carodine, *Race Is Evidence*]. Professor David Harris makes a similar claim in the context of what passes as reasonable within the Fourth Amendment, noting that “[s]kin color becomes evidence.” See David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 268 (1999).

since these cases are negotiated and settled with prospective jurors in mind<sup>8</sup> and in the “shadow of trial.”<sup>9</sup> And all of this has consequences for our entire judicial system, especially our criminal justice system. It certainly belies what we tell ourselves about the way justice works, that it is based on the “rule of law.” The truth is far less comforting. The determination of outcomes, notwithstanding the Rules of Evidence, is often ruleless.

The remainder of this Article proceeds as follows. Part I briefly reviews what we tell ourselves about the Rules of Evidence, namely that they are all-seeing, vigilant gatekeepers, and shows how untrue this is. Using the specific examples of modes of dress, demeanor evidence, and race, Part II elaborates upon the consequences of our misapprehension. Finally, Part III puts forward a proposal for screening other evidence so that trials are more equitable and consistent with our notions of justice. It begins with a modest proposal, a simple jury instruction and directive. It then offers a solution that is anything but modest—a radical rethinking of the Rules of Evidence.

Nearly a century ago, in the pages of the *Yale Law Journal*, Professor Edson R. Sunderland wrote that the secrecy with which we cloak jury deliberations allows society at large to ignore the very imperfections that exist in the justice system. As Sunderland put it,

[Jury secrecy] covers up all the shortcomings which frail human nature is unable to eliminate from the trial of a case. . . . [C]oncrete details are swallowed up, and the eye of the law, searching anxiously for the realization of logical perfection, is satisfied. . . . It serves as the great procedural opiate, which draws the curtain upon human errors and soothes us with the assurance that we have attained the unattainable.<sup>10</sup>

Sunderland is right, to be sure. But he also misses the larger picture. It is not just jury secrecy<sup>11</sup> that serves “as the great procedural opiate.”<sup>12</sup> It is the Rules of Evidence *in toto* that lull us into thinking their vigilance knows

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8 See, e.g., HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 31–32 (1966) (“[A]t every stage of this informal process of pre-trial dispositions . . . decisions are in part informed by expectations of what the jury will do. Thus, the jury is not controlling merely the immediate case . . . but the host of cases . . . which are destined to be disposed of by the pre-trial process.”); Jeffrey Bellin, *The Silence Penalty*, 103 *IOWA L. REV.* 395, 400 (2018) (observing that though the “real action in the criminal justice system happens pretrial and the parallel penalty dynamic [of evidentiary rules] operates there as well”); Lauren M. Ouziel, *Beyond Law and Fact: Jury Evaluation of Law Enforcement*, 92 *NOTRE DAME L. REV.* 691, 703 (2016) (“Criminal trials may be vanishing, but their outcomes . . . still exert a powerful influence on plea bargaining.”).

9 It is the rare lawyer who does not think, in contemplating settlement or plea negotiations, about all the evidence a prospective jury might see, including unregulated other evidence. See, e.g., Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950 (1979); see also Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 *HARV. L. REV.* 2464 (2004); I. Bennett Capers, *The Prosecutor’s Turn*, 57 *WM. & MARY L. REV.* 1277 (2016).

10 Edson R. Sunderland, *Verdicts, General and Special*, 29 *YALE L.J.* 253, 262 (1920).

11 Indeed, jury secrecy is now codified as Rule 606(b). *FED. R. EVID.* 606(b).

12 Sunderland, *supra* note 10, at 262.

no bounds, and that they stand ready at the gatehouse to admit only relevant and trustworthy evidence, and to exclude any evidence that is overly prejudicial or privileged. In truth, the gatekeepers see only what we have directed them to see. When other types of evidence approach the gate—from modes of dress, to the presence of family members, to race—the gatekeepers stand idly by, not even seeing this evidence for what it is.<sup>13</sup> But the fact finders do. And it is time, indeed past time, that we recognized this.

## I. THE ALL-SEEING GATEKEEPERS

“Evidence law is about the limits we place on the information juries hear.”<sup>14</sup> Thus begins Professor George Fisher in his well-known casebook. The implication, whether intended or not, is that the rules are all-encompassing and unbounded. But the truth is far different. To be sure, the Rules of Evidence place limits on *some* of the information jurors hear and see, such as witness testimony and exhibits, the type of information that is formally announced and introduced as evidence by lawyers. Other evidence—functional evidence, if you will—passes by evidentiary gatekeepers, practically unseen and unnoticed. Jurors use it to decide who was right and who was wrong; who committed a crime and who did not. But before turning to these consequences, it makes sense to begin with the untruth we tell ourselves: the Rules of Evidence see and govern everything. And for that, it makes sense to begin with the rules themselves.

### A. *The Rules of Evidence*

Though of fairly recent vintage—they were enacted by Congress in 1975 and have largely remained unchanged but for a few notable exceptions<sup>15</sup>—one could think of the Federal Rules of Evidence as centuries in the making.<sup>16</sup> Not that this common-law process was linear. As one commentator has noted, prior to the enactment of the Federal Rules of Evidence, the history of evidence law was one of “spotted and often accidental growth.”<sup>17</sup> Furthermore, the common law of evidence was often counterintuitive and incoherent, so much so that in 1948 the Supreme Court called the

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13 How evidence is taught likely exacerbates the problem. Taught to focus on particular things—character evidence and prejudice and expert testimony, to name a few—lawyers often fail to see other evidence for what it is. As a result, the lawyers fail to formally announce and introduce this evidence to the gatekeepers, or object when the other side fails to do so. So the gatekeepers let the evidence pass by unchecked and unpoliced.

14 GEORGE FISHER, *EVIDENCE* 1 (3d ed. 2013).

15 The most important changes were the inclusion of a rape shield, Rule 412, in 1978, and the inclusion of rape swords, Rules 413–415, in 1994. *FED. R. EVID.* 412–415. For a discussion of the adoption of these rules, see Capers, *Real Women, Real Rape*, *supra* note 4.

16 DAVID ALAN SKLANSKY, *EVIDENCE* 2 (4th ed. 2016) (describing evidence law as “the end product of centuries of effort to make [the trial] process as fair, as accurate, and as conclusive as possible”).

17 Mason Ladd, *A Modern Code of Evidence*, 27 *IOWA L. REV.* 213, 214, 218 (1942).

hodgepodge of evidentiary practices and caselaw a “grotesque structure.”<sup>18</sup> Perhaps nowhere was the structure more grotesque—or in contemporary terms, a “hot mess”—than with respect to hearsay rules. As two prominent commentators put it early on: “[A] picture of the hearsay rule with its exceptions would resemble an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists.”<sup>19</sup>

Faced with this hot mess, Chief Justice Earl Warren, relying on the Rules Enabling Act, formed an Advisory Committee in 1965 to undertake the process of codifying common-law evidentiary practices into a comprehensive code of evidence. The result, ten years later, was the Federal Rules of Evidence. Although crafted with federal trials in mind, the influence of the Federal Rules of Evidence was much wider; forty-five states and Puerto Rico have all adopted or modeled their own rules on the Federal Rules of Evidence. It is for this reason that this Article uses the generic term “Rules of Evidence.” In a very real sense, the Federal Rules of Evidence *are* the Rules of Evidence. And the Rules of Evidence, in turn, are “the nuts and bolts of courtroom work.”<sup>20</sup>

The larger point, however, is this: the Rules of Evidence were understood, and continue to be understood, as all-seeing, all-encompassing gatekeepers, checking *all* of the information juries may hear or see for relevance and trustworthiness.<sup>21</sup> The next Section makes this point clear.

### B. *The All-Seeing Gatekeepers*

Although it is not necessarily self-evident from the rules themselves or the accompanying Advisory Committee Notes, even a brief survey of what evidence scholars and jurists have said about the rules makes it abundantly clear that the rules are often understood as all-seeing, vigilant gatekeepers. I have already quoted Professor George Fisher: “Evidence law is about the limits we place on the information juries hear.”<sup>22</sup> But Fisher is by no means alone. Professor David Alan Sklansky begins his evidence casebook by expan-

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18 *Michelson v. United States*, 335 U.S. 469, 486 (1948) (conceding that much of evidence law is “archaic, paradoxical and full of compromises” but concluding it is best left unchanged, and “[t]o pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice”). Indeed, as early as the 1800s, one of the early giants of evidence law, James Bradley Thayer, described evidence law as “a piece of illogical . . . patchwork.” JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 508–09 (1898). A similar observation appears in Professor Edmund Morgan’s foreword to the American Law Institute’s proposed Model Code of Evidence. See Edmund M. Morgan, *Foreword to MODEL CODE OF EVIDENCE* 1, 5 (AM. LAW INST. 1942).

19 Edmund M. Morgan & John MacArthur Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 921 (1937).

20 SKLANSKY, *supra* note 16, at 2.

21 To be clear, the Rules of Evidence function as gatekeepers in partnership with judges, who are tasked with implementing the rules in each case. In this sense, “gatekeepers” is short for both the Rules of Evidence and the judges who enforce them.

22 FISHER, *supra* note 14, at 1.

sively observing that “[t]he rules of evidence dictate how and when facts may be proved or disproved at a trial.”<sup>23</sup> Or consider the first line of one of former Judge Richard Posner’s oft-cited articles on evidence: “The law of evidence is the body of rules that determines what, and how, information may be provided to a legal tribunal that must resolve a factual dispute.”<sup>24</sup> Professor Jasmine Gonzales Rose writes, “[Evidence law] determines which facts will be considered to decide a person’s guilt or innocence in a criminal prosecution and one’s liability or immunity from responsibility in a civil action.”<sup>25</sup> Professor Keith Findley asserts “the law of evidence is largely about preventing the admission of unreliable or otherwise unfair evidence.”<sup>26</sup> Even Edward Cleary, Reporter for the Advisory Committee that drafted the Federal Rules of Evidence, described them as “an entire system.”<sup>27</sup>

The generally understood purpose of evidence law supports this broad reading of the Rules of Evidence. As a well-known treatise puts it, one of the purposes of evidence law is to limit the information jurors hear and see so that verdicts are not based on extraneous or untrustworthy information.<sup>28</sup> By way of illustration, the treatise observes that the “hearsay doctrine exists, for example, largely because we think lay jurors cannot properly evaluate statements made outside their presence, and the rules governing character evidence assume that juries place too much weight on such proof or employ it improperly for punitive purposes.”<sup>29</sup>

But if the rules are often understood as all-seeing and all-encompassing, and if the understood purpose of the rules is to “ascertain[ ] the truth and secur[e] a just determination,”<sup>30</sup> then the question must be asked: Why do we permit so much evidence to breeze unchecked past these evidentiary gatekeepers? The next Part limns several examples to show just how selectively blind (rather than all-seeing) the Rules of Evidence are, and the consequences that flow from this blindness.

23 SKLANSKY, *supra* note 16, at 2.

24 Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1477 (1999).

25 Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2250 (2017).

26 Keith A. Findley, *Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence*, 47 GA. L. REV. 723, 725 (2013).

27 Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 917 (1978). *But see* Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 NW. U. L. REV. 604, 627–28 (1994) (arguing evidence law foregoes “reliance on any formalized theory of evidence and instead locate[s] the decision over what is evidence somewhere and more or less live[s] with the result”).

28 CHRISTOPHER MUELLER ET AL., EVIDENCE § 1.1 (6th ed. 2018).

29 *Id.*

30 FED. R. EVID. 102; *see also* *Brinegar v. United States*, 338 U.S. 160, 174 (1949) (noting evidentiary rules safeguard defendants “from dubious and unjust convictions, with [their] resulting forfeitures of life, liberty, and property”).

## II. EVIDENCE WITHOUT RULES

As the preceding Part should make clear, what we tell ourselves about evidentiary rules is that they limit the information jurors see and hear, screening it for its probative value and trustworthiness and ensuring that it is not unduly prejudicial. The argument this Part makes is that what we tell ourselves is not true. The Rules of Evidence stand ready to check the relevancy and trustworthiness of *some* of the evidence brought before jurors, specifically the evidence that is *announced* as such. Other information proceeds past the gatekeepers unnoticed and unchecked.

But the real focus of this Part is the consequences. If the goal of evidence law is “ascertaining the truth and securing a just determination,”<sup>31</sup> then that objective is frustrated when outputs turn on improper and unchecked inputs. To demonstrate and show the implications of this point, this Part focuses on three types of “offstage”<sup>32</sup> evidence that are frequently considered by jurors, and yet almost always pass unscrutinized by evidentiary gatekeepers. The first two types of evidence may at first glance seem minor—modes of dress and demeanor evidence—but in fact their impact is substantial. The significance of the third type of evidence should be obvious, and yet also passes largely unchecked by evidentiary rules: race, or what a critical race theorist might call the “sticky tar-baby of race.”<sup>33</sup> To be clear, these three examples of unregulated evidence are simply that: examples. They do not begin to exhaust the many types of other evidence that come before jurors. However, these three examples do illustrate that what we tell ourselves about evidence law’s gatekeeping function is all wrong.

### A. Modes of Dress

*The beginning of all Wisdom is to look fixedly on Clothes, or even with armed eyesight, till they become transparent.*

—Thomas Carlyle<sup>34</sup>

*We felt she (the woman) asked for it for the way she was dressed.*

—Juror following not guilty verdict in a rape trial<sup>35</sup>

Clothing is rarely the focus of legal scholarship, at least not scholarship about evidence or factfinding, trials, or juries.<sup>36</sup> This omission in evidence

31 FED. R. EVID. 102.

32 See Mary R. Rose et al., *Goffman on the Jury: Real Jurors’ Attention to the “Offstage” of Trials*, 34 LAW & HUM. BEHAV. 310 (2010).

33 See I. Bennett Capers, Essay, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 679 (2018); see also Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 85 CALIF. L. REV. 1585 (1997).

34 THOMAS CARLYLE, *SARTOR RESARTUS* 52 (1987).

35 *Jury: Woman in Rape Case “Asked for It,”* CHI. TRIB., Oct. 6, 1989, at 11.

36 But see I. Bennett Capers, *Cross Dressing and the Criminal*, 20 YALE J.L. & HUMAN. 1 (2008) [hereinafter Capers, *Cross Dressing and the Criminal*]; Bennett Capers, *Rape, Truth, and Hearsay*, 40 HARV. J.L. & GENDER 183, 210–14 (2017) [hereinafter Capers, *Rape, Truth,*



scholarship is surprising, given evidence law's focus on policing hearsay. This policing of hearsay, after all, governs not only verbal communications, but also nonverbal communications. A nod of the head receives the same scrutiny as a verbal "yes." And yet clothing routinely escapes evidentiary notice. Why is this strange? Because clothing itself is communicative. As Roland Barthes noted half a century ago, "[dress] is a kind of writing."<sup>37</sup> We certainly use it to communicate "status, rank, grade, tribe, milieu, beliefs, values, etc."<sup>38</sup>

And we certainly use dress to communicate ideas to jurors. The *Lawyerist* puts the matter of dress front and center:

In many cases, your client's appearance is their only opportunity to make an impression on the judge and jury. During most civil hearings, a client is unlikely to say anything. In criminal cases, many defendants rarely make any statements other than those required as part of an appearance or plea. What they are wearing might be the only "statement" they make to the court.<sup>39</sup>

*The Jury Expert* gives similar advice: "While witnesses' verbal and non-verbal behaviors affect their credibility, another factor in jurors' perceptions of them is their appearance."<sup>40</sup> Indeed, in all likelihood, it is the first thing considered by jurors.<sup>41</sup>

Consider the role dress plays during a sexual assault case. Notwithstanding rape shield protections that a victim's style of dress is normally inadmissible, defense lawyers will often offer into evidence the clothes the victim was wearing at the time of the alleged assault. For example, in the trial against William Kennedy Smith on charges that he sexually assaulted a woman, the judge permitted the defense to introduce the victim's "Ann Taylor dress, high heels, black and blue bra and Victoria's secret panties and panty hose," ostensibly to support the defense theory that the victim did not struggle.<sup>42</sup>

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and Hearsay]; Alinor C. Sterling, *Undressing the Victim: The Intersection of Evidentiary and Semiotic Meanings of Women's Clothing in Rape Trials*, 7 *YALE J.L. & FEMINISM* 87 (1995).

37 ROLAND BARTHES, *The Diseases of Costume*, in *CRITICAL ESSAYS* 41, 49 (Richard Howard trans., 1972).

38 Capers, *Cross Dressing and the Criminal*, *supra* note 36, at 6; Sterling, *supra* note 36, at 91 ("[D]ress is perceived both as a description of the wearer and as the wearer's means of communicating her persona to the viewer. Dress makes a sign that describes the wearer, and the wearer uses dress to make a sign.").

39 Randall Ryder, *What Your Clients Should Wear to Court*, *LAWYERIST* (Apr. 27, 2011), <https://lawyerist.com/clients-wear-court/>.

40 Merrie Jo Pitera, *Courtroom Attire: Ensuring Witness Attire Makes the Right Statement*, *JURY EXPERT* 40, 40 (July 31, 2012), <http://www.thejuryexpert.com/2012/07/courtroom-attire-ensuring-witness-attire-makes-the-right-statement/>.

41 See Annie Murphy Paul, *Judging by Appearance*, *PSYCHOL. TODAY* (Nov. 1, 1997), <http://www.psychologytoday.com/articles/200909/judging-appearance> ("[A]n entire industry has emerged to advise lawyers, plaintiffs, and defendants on their aesthetic choices.").

42 David Margolick, *Credibility Seen as Crux of Celebrated Rape Trial*, *N.Y. TIMES* (Dec. 1, 1991), <https://www.nytimes.com/1991/12/01/us/credibility-seen-as-crux-of-celebrated-rape-trial.html>; see also Sterling, *supra* note 36, at 88.

But separate and apart from what the victim was wearing at the time of the assault—this clothing, after all, is at least subjected to evidentiary rules and gatekeeping—there is also the matter of what clothing the victim wears to trial. This latter clothing is not subjected to evidentiary rules. The smart prosecutor will instruct the victim to dress modestly at trial in order to present the victim as a “good girl.”<sup>43</sup> By doing so, and without uttering a word, the prosecutor is introducing evidence of the victim’s character.

Nor is the strategic use of dress to communicate ideas limited to sexual assault cases. Indeed, dress is, in a certain sense, used strategically in almost every criminal case. Prosecutors ensure that law enforcement witnesses, even officers who exclusively work in plain clothes, dress in uniform during trial;<sup>44</sup> lay witnesses and expert witnesses are similarly groomed for trial. Even witnesses who have pleaded guilty to their role in the offense and are now testifying as cooperating witnesses in exchange for leniency are dressed by prosecutors, usually in prison garb to communicate to the jury that the cooperating witnesses, unlike the defendant, have accepted responsibility for their role in the offense, and are now being truthful.<sup>45</sup> In all of these instances, the prosecutor is using clothing to communicate ideas. In all of these instances, the prosecutor is using clothing as evidence.

Defense lawyers deploy dress as well. Almost every defense lawyer will instruct her male client to wear a suit to directly communicate respect for the court and authority, and indirectly communicate law abidingness. They ensure that their clients’ regular style of dress—for example, a muscle shirt

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43 Capers, *Real Women, Real Rape*, *supra* note 4, at 864. It is no surprise that Professor Susan Estrich describes the “bad” rape victim as wearing to court “tight blue jeans. Very tight. With a see-through blouse on top. Very revealing.” *Id.* at 864 n.197 (quoting ESTRICH, *supra* note 4, at 9); see also Deborah Tuerkheimer, *Judging Sex*, 97 CORNELL L. REV. 1461, 1463 n.6 (2012). To be sure, many rape victims are male, a point I explore elsewhere. See Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259 (2011). However, few male rape victim cases go to trial. *Id.* at 1298.

44 Capers, *Cross Dressing and the Criminal*, *supra* note 36, at 12; see also PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 32 (2017) (“I’d point to the police officer on the stand; I always made sure my cops wore their uniforms to court and looked buttoned down and professional, which the defendants rarely did.”). This preference for uniforms is not universal. Professor Ric Simmons has advised me that when he was a prosecutor in the Manhattan District Attorney’s Office in the late 1990s, the “rule was exactly the opposite: we were told to have our officers always wear a suit and tie for court, even if they wore a uniform on the job.” The theory, at the time, was that “Manhattan jurors didn’t particularly like cops . . . . Cops in suit and ties [at least] looked professional, thoughtful, trustworthy, and intelligent.” Email from Ric Simmons, Professor of Law, Ohio State Univ., Moritz Coll. of Law, to I. Bennett Capers, Professor of Law, Brooklyn Law Sch. (Apr. 13, 2018) (on file with author). Similarly, George Fisher advised me that when he was a prosecutor in Massachusetts, most judges forbade officers from testifying in uniform. Email from George Fisher, Professor of Law, Stanford Law Sch., to I. Bennett Capers, Professor of Law, Brooklyn Law Sch. (Aug. 26, 2018) (on file with author).

45 Capers, *Cross Dressing and the Criminal*, *supra* note 36, at 12.

or baggy jeans—does not become “Exhibit A for the prosecution.”<sup>46</sup> Public defender offices even keep suits available for indigent defendants.<sup>47</sup> There is sometimes more individualized sartorial management. Consider a handful of well-known cases. A defense lawyer said of Amy Fisher, the “Long Island Lolita” who shot and severely wounded her married lover’s wife,<sup>48</sup> “I would have put her in a French schoolgirl dress with a big collar, a dark color, ribbon in her hair, no makeup . . . Make her look as young and innocent as possible.”<sup>49</sup> Regarding boxing champion Mike Tyson, who was convicted of rape in 1992, the lawyer would have ordered him to wear looser clothing to play down his size, and pastels to soften his appearance.<sup>50</sup> When Patty Hearst, the granddaughter of publishing magnate William Randolph Hearst, was tried on armed bank robbery charges, her lawyer instructed her to wear clothes a couple of sizes too large to give the appearance that she was also a victim.<sup>51</sup> Erik and Lyle Menendez, the wealthy teenagers who were tried for killing their parents, abandoned the suits they wore during pretrial appearances to wear collegiate V-neck sweaters at trial.<sup>52</sup> In the Enron trial, the defense team made sure their clients did not wear their \$10,000 Rolex watches in front of the jury.<sup>53</sup> More recently, the defense team representing Casey Anthony, who faced capital murder charges in connection with the death of her two-year-old daughter, instructed her to wear preppy clothing and soft colors to project an image of childlike innocence.<sup>54</sup>

Consider too the advice given by jury consultants. A jury consultant notes that savvy lawyers should spray a defendant’s glasses with PAM cooking spray so that the jury cannot see the person’s eyes, at least when the lawyer

46 John Schwartz, *Guilty of Violating Dress Code, in Any Case*, N.Y. TIMES (Dec. 5, 2010), <https://www.nytimes.com/2010/12/06/us/06tattooside.html>.

47 See, e.g., Dennis McCarthy, *Poor Defendants Deserve Good Clothes, Too*, L.A. DAILY NEWS (Mar. 27, 2014), <http://www.dailynews.com/general-news/20140327/poor-defendants-deserve-good-clothes-too>; Kim Segal, *Life as a Public Defender*, CBS NEWS (Aug. 5, 2015), <http://www.cbsnews.com/news/kim-segal-life-as-a-public-defender-3/>.

48 Eric Killelea, *Flashback: Amy Fisher Becomes ‘Long Island Lolita’*, ROLLING STONE (May 19, 2017), <http://www.rollingstone.com/culture/flashback-amy-fisher-becomes-long-island-lolita-w483321>.

49 Andrea Heiman, *The Picture of Innocence?*, L.A. TIMES (Apr. 4, 1993), [http://articles.latimes.com/1993-04-04/news/vw-18896\\_1\\_amy-fisher-michael-milken-jury-behavior-research](http://articles.latimes.com/1993-04-04/news/vw-18896_1_amy-fisher-michael-milken-jury-behavior-research).

50 *Id.*

51 *Id.*

52 *Id.*; see also KATHY BRAIDHILL, *BEAUTY KILLERS* 215 (2010) (noting that the lawyer who represented the Menendez brothers dressed her clients in pastel sweaters and dress slacks).

53 John Schwartz, *Extreme Makeover: Criminal Court Edition*, N.Y. TIMES (Dec. 5, 2010), <https://www.nytimes.com/2010/12/06/us/06tattoo.html>.

54 See, e.g., Ivy Bigbee, *Fashioning a Defense: Casey Anthony’s Evolving Style*, CRIM. REP. DAILY (Apr. 29, 2011), [http://web.archive.org/web/20120520050256/http://blogs.discoverery.com/criminal\\_report/2011/04/fashioning-a-defense-casey-anthonys-evolving-style.html](http://web.archive.org/web/20120520050256/http://blogs.discoverery.com/criminal_report/2011/04/fashioning-a-defense-casey-anthonys-evolving-style.html) (noting that, due to her defense team, “Anthony’s courtroom appearances at hearings ironically have spoken volumes, without her uttering a single word”).

fears the defendant might come across as “shifty-eyed.”<sup>55</sup> Lawyers should also direct clients accused of violent crimes to wear glasses, in effect offering what has been characterized as a “nerd defense,”<sup>56</sup> since this might increase the chances of an acquittal.<sup>57</sup> Lawyers representing clients accused of white-collar crimes should do the opposite—advise their clients not to wear glasses—since glasses may make them look more culpable.<sup>58</sup> Indeed, at least two consultants have described glasses as “one of the most important artifacts used in the courtroom.”<sup>59</sup>

And of course, there is also the issue of how lawyers self-dress to communicate ideas and influence fact finders. Professor Paul Butler describes a case involving an African American attorney who wore kente cloth in front of a jury, and the judge’s concern that the kente cloth would “send[ ] a hidden message to jurors.”<sup>60</sup> More recently, another African American attorney wore a “Black Lives Matter” pin to court.<sup>61</sup> And in Louisiana, prosecutors wore ties with images of nooses and ties with images of the grim reaper, while

55 See Heiman, *supra* note 49.

56 See Sarah Merry, Note, “Eye See You”: *How Criminal Defendants Have Utilized the Nerd Defense to Influence Jurors’ Perceptions*, 21 J.L. & POL’Y 725, 755–57 (2013) (providing examples).

57 Keith L. Alexander, *Trendy, Non-Prescription Eyewear Latest in Criminal Defendant Strategic Attire*, WASH. POST (Mar. 27, 2012), [http://www.washingtonpost.com/local/crime/trendy-non-prescription-eyewear-latest-in-criminal-defendant-strategic-attire/2012/03/17/gIQA62xJeS\\_story.html](http://www.washingtonpost.com/local/crime/trendy-non-prescription-eyewear-latest-in-criminal-defendant-strategic-attire/2012/03/17/gIQA62xJeS_story.html) (quoting lawyer who encourages “all his clients [to] wear glasses” to make them “appear less intimidating”); see also Michael J. Brown, *Is Justice Blind or Just Visually Impaired? The Effects of Eyeglasses on Mock Juror Decisions*, JURY EXPERT 1, 3 (Mar. 2011), [http://www.thejuryexpert.com/wp-content/uploads/2011/03/TJEVol123Num2\\_Mar2011.pdf](http://www.thejuryexpert.com/wp-content/uploads/2011/03/TJEVol123Num2_Mar2011.pdf) (concluding that mock jurors were less likely to find defendants guilty who wore glasses compared to similarly situated defendants who did not); Debra Cassens Weiss, *Jurors Less Likely to Convict Defendants Wearing Glasses, Say Lawyers and 2008 Study*, A.B.A. J. (Feb. 14, 2011), [http://www.abajournal.com/news/article/jurors\\_less\\_likely\\_convict\\_defendants\\_wearing\\_glasses\\_say\\_lawyers\\_and\\_2008/](http://www.abajournal.com/news/article/jurors_less_likely_convict_defendants_wearing_glasses_say_lawyers_and_2008/).

58 See Brown, *supra* note 57.

59 LAWRENCE J. SMITH & LORETTA A. MALANDRO, *COURTROOM COMMUNICATION STRATEGIES* § 1.21, at 42 (1985). Of course, this raises the question of whether it may be unethical for an attorney to dress her client in a way that is misleading, for example, by placing glasses on a client who does not need glasses. ABA Model Rule 8.4(c) bars attorneys from engaging in “conduct involving dishonesty, fraud, deceit or misrepresentation.” On whether this includes deceptive clothing, see RICHARD ZITRIN ET AL., *LEGAL ETHICS IN THE PRACTICE OF LAW* (4th ed. 2013). A special thanks to attorneys David Berger and Michael Vogel for bringing this to my attention.

60 Paul Butler, Essay, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 685 (1995) (quoting *Black D.C. Atty. Is At Odds With Judge Over Kente Cloth*, JET, June 22, 1992, at 35). Indeed, a related point is how attorneys of color often find themselves having to dress in a certain way, or style their hair in a certain way, and indeed perform in a certain way that assumes whiteness as the norm. Their failure to do so can undermine their credibility in court, and impact the outcome of the case. For more on the “extra” work people of color must do, see Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000).

61 Cleve R. Wootson, Jr., *This Attorney Wore a Black Lives Matter Pin to Court—And Went to Jail for It*, WASH. POST (July 26, 2016), <https://www.washingtonpost.com/news/post->

trying death penalty cases.<sup>62</sup> While these examples may seem extreme,<sup>63</sup> more subtle sartorial choices are made every day. For example, the journal *Litigation Insights* recommends that lawyers wear attire “that connects with jurors.”<sup>64</sup> Another example: when I was a federal prosecutor at the U.S. Attorney’s Office for the Southern District of New York, the office made a point about how government prosecutors should dress, favoring plain suits and even encouraging frayed sleeve cuffs to communicate hard work and public service; flashier suits, we were told, were for defense lawyers.<sup>65</sup>

The goal of this Section is not to exhaust all of the ways dress is used to communicate ideas to the jury. Rather, the goal is to argue that we should be troubled by a system of justice that turns on whether a prosecutor reminds a rape victim to dress conservatively for trial—in short, to dress like a “good girl.”<sup>66</sup> Similarly, we should be troubled by a justice system where guilt or innocence turns on whether a defendant can afford a proper suit, or whether a law enforcement officer wears a uniform when he testifies, or whether the defendant wears glasses, or how an attorney dresses.

The goal is to call attention to the dissonance between what we tell ourselves about the Rules of Evidence—that they screen all information that juries may hear or see—and the reality: that ideas communicated through dress are routinely considered by jurors without any evidentiary gatekeeping checks at all. To be sure, courts have policed clothing in a handful of circumstances when it rises to the level of a constitutional claim. For example, the Supreme Court has read the Due Process Clause, and its implied pre-

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nation/wp/2016/07/25/this-attorney-wore-a-black-live-matter-pin-to-court-and-went-to-jail-for-it/?tid=A\_inl&utm\_term=.4d0fe207722a.

62 Jeffrey Gettleman, *Prosecutors’ Morbid Neckties Stir Criticism*, N.Y. TIMES (Jan. 5, 2003), <https://www.nytimes.com/2003/01/05/us/prosecutors-morbid-neckties-stir-criticism.html>.

63 Another example comes from Professor Jenny Carroll, dating from a trial she did as a law student representing a DUI client. For her first trial as a student, her mother sent her a pink dress with a matching pink bow and pink shoes. It being too late to find something else, Professor Carroll wore the outfit in front of the jury, which came back with a not guilty verdict despite the evidence against her client. When Professor Carroll spoke to the jurors afterwards, they told her she looked so cute in her pink dress that there was no way she could represent someone who was actually guilty. Email from Jenny Carroll, Professor of Law, Univ. of Ala., Hugh F. Culverhouse Jr. Sch. of Law, to I. Bennett Capers, Professor of Law, Brooklyn Law Sch. (June 10, 2018) (on file with author).

64 Barbara Hillmer, *What Are the Best Types of Clothes for Lawyers to Wear in the Courtroom?*, LITIG. INSIGHTS (Nov. 13, 2015), <http://litigationinsights.com/case-strategies/best-clothes-lawyers-wear-in-courtroom/>.

65 Defense lawyers sometimes choose expensive suits to communicate to the jury their success and that they normally win cases. See Gabrielle Banks, *Dressing for (Legal) Success: Fashion Strategy for the Courtroom and Office*, PITTSBURGH POST-GAZETTE (Mar. 12, 2012), <http://old.post-gazette.com/pg/12072/1215718-499-0.stm>.

66 Among other things, this is inconsistent with the agency of victims to self-dress. It is certainly inconsistent with any goal of sex positivity. For more on this aspect, see Capers, *Rape, Truth, and Hearsay*, *supra* note 36; Deborah Tuerkheimer, *Slutwalking in the Shadow of the Law*, 98 MINN. L. REV. 1453 (2014).

sumption of innocence, to impose a bar on compelling a defendant to be tried in prison garb.<sup>67</sup> Courts have also held that a defendant has a First Amendment right to wear a uniform or even a religious symbol.<sup>68</sup> But beyond these limited circumstances, the Constitution, and more specifically the Rules of Evidence, are rarely invoked to screen this mode of dress for probative value or unfair prejudice, to say nothing of trustworthiness. Indeed, even the exception for prison garb begs the question: If we recognize the influence prison garb may play in influencing jurors,<sup>69</sup> why are the evidentiary rules so blind to other types of dress?

### B. Demeanor

*All of us know that, in every-day life, the way a man behaves when he tells a story—his intonations, his fidgetings or composure, his yawns, the use of his eyes, his air of candor or of evasiveness—may furnish valuable clues to his reliability. Such clues are by no means impeccable guides, but they are often immensely helpful. So the courts have concluded.*

—Jerome Frank<sup>70</sup>

In a sense, demeanor evidence is at the other end of the spectrum compared to modes of dress. Far from breezing unseen and unnoticed past evidentiary gatekeepers, demeanor evidence is considered part and parcel of how jurors should evaluate witness testimony. At the heart of the evidentiary rule barring hearsay, defined as out-of-court statements offered in evidence to prove the truth of the matter asserted, is a long-standing belief that in-court testimony is essential so that jurors can judge each witness's demeanor—often perceived as “the true window to the person's essence”<sup>71</sup>—in order to determine what weight, if any, should be accorded their testi-

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67 *Estelle v. Williams*, 425 U.S. 501 (1976) (ruling that compelling a defendant to wear prison garb would undermine the presumption of innocence). Using similar reasoning, at least one court has ruled that a defendant facing capital charges should be allowed to cover his Nazi tattoos to avoid unfair prejudice. See Schwartz, *supra* note 53. For an early discussion of other aspects of the “garb of innocence” to which criminal defendants are entitled, see Robert G. Neds, *Criminal Defendants: Maintaining the Appearance of Innocence*, 37 MO. L. REV. 660 (1972).

68 See, e.g., *United States v. Yahweh*, 779 F. Supp. 1342, 1345 (S.D. Fla. 1992) (right of religious cult defendants to wear their religious garb at trial); *Joseph v. State*, 642 So. 2d 613, 615 (Fla. Dist. Ct. App. 1994) (right of defendant to wear religious symbol); *Close-It Enters. v. Weinberger*, 407 N.Y.S.2d 587 (N.Y. App. Div. 1978) (right of Jewish defendant to wear yarmulke); *Johnson v. Commonwealth*, 449 S.E.2d 819, 821 (Va. Ct. App. 1994) (right of naval officer defendant to wear naval uniform).

69 The Court's language in *Estelle v. Williams* about prison garb is particularly revealing. The Court noted that prison attire “may affect a juror's judgment” and “be a continuing influence throughout the trial.” *Estelle*, 425 U.S. at 504–05.

70 JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 21 (1950).

71 RICHARD WEISMAN, SHOWING REMORSE: LAW AND THE SOCIAL CONTROL OF EMOTION 32 (2014).

mony.<sup>72</sup> That jurors should consider the facial expressions, or more generally demeanor, of testifying witnesses is also emphasized in jury instructions. For example, pattern instructions for the district courts of the First Circuit begin: “You may want to take into consideration such factors as the witnesses’ conduct and demeanor while testifying.”<sup>73</sup>

On the surface then, demeanor evidence might not seem like other evidence at all,<sup>74</sup> since it is indirectly regulated through evidentiary rules such as those barring hearsay and the right to confront witnesses.<sup>75</sup> But there are other aspects of demeanor evidence that escape the gatekeeping process entirely, and it is this gap in gatekeeping that should be disconcerting.

Consider the lawyer who drums her fingers on the table while a witness testifies on the stand, or rolls her eyes or raises a skeptical eyebrow. Or the lawyer who quietly nods along at a certain point in a witness’s testimony.<sup>76</sup> All of this is problematic from an evidentiary standpoint, since the lawyers are intending to communicate to the jury when they engage in these actions. They are in effect vouching for witnesses, or in the case of opposing wit-

72 Laurence H. Tribe, Comment, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 957–61 (1974) (arguing that the ban against hearsay promotes accuracy); see also Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948). For a cogent critique of the accuracy rationale, see Justin Sevier, *Testing Tribe’s Triangle: Juries, Hearsay, and Psychological Distance*, 103 GEO. L.J. 879 (2015).

73 PATTERN CRIMINAL JURY INSTRUCTIONS FOR THE DIST. COURTS OF THE FIRST CIRCUIT § 3.06 (PATTERN CRIMINAL JURY INSTRUCTIONS DRAFTING COMM. 1998). The Seventh Circuit and the Ninth Circuit have similar instructions. See PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 3.01 (COMM. ON FED. CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT 2012); MANUAL OF MODEL JURY INSTRUCTIONS FOR THE DIST. COURTS OF THE NINTH CIRCUIT § 3.9 (NINTH CIRCUIT JURY INSTRUCTIONS COMM. 2010).

74 Though even with witness demeanor evidence, there are examples that perhaps cross the line into other evidence. Consider the witness who, called to testify against her abusive boyfriend, looks at the defendant and then immediately asks if she can keep a trash can next to her as she testifies, stating that she might need to vomit. A special thanks to Professor George Fisher for alerting me to this example from an actual case.

75 As Wigmore put it, a witness’s demeanor, “without any definite rules as to its significance, is always assumed to be in evidence.” 3A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 946, at 783 (James H. Chadbourn rev. ed., 1970). On the long history of permitting demeanor evidence, see James P. Timony, *Demeanor Credibility*, 49 CATH. U. L. REV. 903 (2000); see also Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075 (1991).

76 Judges, too, engage in nonverbal communications, usually inadvertently. For example, a judge may widen her eyes during a witness’s testimony, or lean back in her chair and glance at something else once cross-examination begins, or turn her back on a lawyer. For an example of the latter, see Malcolm Gladwell, *Mr. Hollowell Didn’t Like That*, REVISIONIST HIST., <http://revisionisthistory.com/episodes/18-mr-hollowell-didnt-like-that> (describing a judge turning his back when a black lawyer stood to speak). A judge may even display facial expressions of disgust during testimony. See *Allen v. State*, 276 So. 2d 583, 586 (Ala. 1973) (noting that such conduct could deprive a defendant of a fair trial but also recognizing that a judge “is a human being, not an automaton or a robot”). Such nonverbal communications, however inadvertent, would seem to run afoul not only of Rule 608(a), but also the judge’s duty of impartiality. See, e.g., CANONS OF JUDICIAL ETHICS Canon 34 (AM. BAR ASS’N 1924).

nesses, implying a witness is unworthy of belief. They are offering the equivalent of opinion testimony without themselves swearing an oath or taking the stand. They are certainly circumventing Rule 608(a), which governs the introduction of opinion evidence about another witness's credibility, and indeed prohibits vouching evidence unless the credibility of a witness has been attacked.<sup>77</sup> Nor are a lawyer's nonverbal communications always in reference to a testifying witness. For example, a similar "vouching" is at play when a defense lawyer makes a show of sitting shoulder to shoulder with her client, or putting an arm around a client's shoulder, especially a client accused of committing a violent crime.<sup>78</sup> When done for show, the lawyer is offering opinion testimony as to the client's nonviolent character.<sup>79</sup> This violates Rule 404(a), which generally prohibits the introduction of character evidence.<sup>80</sup> Or rather, this *would* violate Rule 404(a) if it were recognized for what it is—evidence—and the Rules of Evidence were applied accordingly.

The matter of greater consequence, however, is the outsized role a criminal defendant's demeanor plays in jurors' determinations about guilt or innocence. As Professor Laurie Levenson has observed: "While a defendant sits in court . . . he is at center stage and on display for the jury. Jurors scrutinize his every move . . ." <sup>81</sup> Professor Susan Bandes's research on visible indicia of remorse in capital determinations is particularly revealing. "Interviews with capital jurors contain a common refrain: jurors expect defendants to express visible emotion, and interpret its absence as arrogance, nonchalance, and lack of remorse."<sup>82</sup> She continues: "A defendant's perceived remorse or lack of remorse (based only on in-court observations of the defendant) is one of the most important factors in jurors' decision whether to sentence him to death."<sup>83</sup>

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

78 See Josephine Ross, "He Looks Guilty": *Reforming Good Character Evidence to Undercut the Presumption of Guilt*, 65 U. PITT. L. REV. 227, 257 (2004) ("[D]efense lawyers purposely communicate with their clients in front of the jury in such a way as to humanize them, so the jury will see the 'defendant' as a real person, a thinking person, perhaps a likable person."). Ross further observes that prosecutors engage in similar tactics. *Id.* at 255 ("Prosecutors do the same with their alleged victims: ask them to dress well, sit with their families in the front row, and consciously relate to them in a manner that signals to the jury the prosecutor's belief in their integrity.").

79 Judges also communicate ideas through their demeanor and actions. For example, Judge Mark Bennett makes a point of shaking the hand of criminal defendants at the start of trial to communicate to the jury the presumption of innocence. Mark W. Bennett, *The Presumption of Innocence and Trial Court Judges: Our Greatest Failing*, CHAMPION, Apr. 2015, at 20, 21.

80 FED. R. EVID. 404(a). Although Rule 404(a) permits a criminal defendant to introduce evidence of their pertinent character trait, such evidence must be in the form of opinion or reputation testimony. See *id.* 404(a)(1), 405(a).

81 Levenson, *supra* note 5, at 575.

82 Susan A. Bandes, *Remorse and Criminal Justice*, 8 EMOTION REV. 14, 14 (2016); see also Michael E. Antonio, *Arbitrariness and the Death Penalty: How the Defendant's Appearance During Trial Influences Capital Jurors' Punishment Decision*, 24 BEHAV. SCI. & L. 215, 223 (2006).

83 Bandes, *supra* note 82, at 14.



For example, during the recent capital trial of Dzhokhar Tsarnaev for his role in the Boston Marathon bombing, court observers made much of his demeanor and its likely impact on the jury's verdict in favor of the death penalty. They noted that Tsarnaev seemed indifferent as witnesses took the stand against him, that their presence did not seem "to bother him much."<sup>84</sup> Observers commented on his "impassive reactions to even the most graphic and heartbreaking testimony,"<sup>85</sup> and noted he appeared "bored and seldom looked at the witnesses, including those he maimed or those whose loved ones he killed."<sup>86</sup> He certainly did not exhibit the demeanor associated with remorse. Demeanor likely also played a role in the jury's decision to recommend death against Karla Faye Tucker, who became the first woman executed in America since 1984. A juror noted that she looked "cold" throughout the trial.<sup>87</sup> The same is likely true of Timothy McVeigh, sentenced to death for the Oklahoma City bombing; his demeanor during trial was described as that of a "cold, heartless and calculating killer,"<sup>88</sup> and at least one juror described McVeigh's lack of remorse in the courtroom as "in keeping with his character."<sup>89</sup> In short, jurors use the defendant's facial expression and demeanor as evidence.<sup>90</sup>

That jurors examine a defendant's face to look for expressions of remorse in deciding guilt or innocence, life or death, may at first seem natural and normatively appropriate.<sup>91</sup> But closer inspection should give us pause. For starters, it is problematic that jurors may invest meaning in some-

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84 Seth Stevenson, *The Implacable Bomber*, SLATE (Mar. 5, 2015), [http://www.slate.com/articles/news\\_and\\_politics/dispatches/2015/03/tsarnaev\\_trial\\_dzhokhar\\_appears\\_unmoved\\_by\\_a\\_day\\_of\\_grisly\\_testimony.html](http://www.slate.com/articles/news_and_politics/dispatches/2015/03/tsarnaev_trial_dzhokhar_appears_unmoved_by_a_day_of_grisly_testimony.html).

85 Adrienne Gaffney, *Why Are We Still Looking at Courtroom Sketches of the Nation's Most Famous Defendant?*, VANITY FAIR (Apr. 9, 2015), <http://www.vanityfair.com/news/2015/04/dzhokhar-tsarnaev-trial-no-cameras-boston-bomber>.

86 Katharine Q. Seelye, *Tsarnaev Expressed Sympathy for Boston Bomber Victims, Sister Helen Prejean Says*, N.Y. TIMES (May 11, 2015), <https://www.nytimes.com/2015/05/12/us/sister-helen-prejean-says-tsarnaev-shows-remorse-for-boston-bombing.html>. Commentators noted that Tsarnaev dropped his "blank, impassive demeanor" only when his aunt took the stand. Denise Lavoie, *The Boston Bomber Finally Broke His Blank, Expressionless Demeanor in Court*, BUS. INSIDER (May 4, 2015), <http://www.businessinsider.com/the-boston-bomber-finally-broke-his-blank-expressionless-demeanor-in-court-2015-5>.

87 BEVERLY LOWRY, *CROSSED-OVER: A MURDER, A MEMOIR* 171 (1992).

88 See *Killer Maintains Icy Composure, Waves to Parents*, CLEVELAND PLAIN DEALER, June 14, 1997, at 1A.

89 Tom Kenworthy & Lois Romano, *Jury Condemns McVeigh to Death*, WASH. POST (June 14, 1997), [https://www.washingtonpost.com/archive/politics/1997/06/14/jury-condemns-mcveigh-to-death/f160ca62-397d-4403-9aab-7176fcf7eba4/?utm\\_term=.4bb0ecd2108d](https://www.washingtonpost.com/archive/politics/1997/06/14/jury-condemns-mcveigh-to-death/f160ca62-397d-4403-9aab-7176fcf7eba4/?utm_term=.4bb0ecd2108d).

90 See Bennett Capers, Essay, *On Andy Warhol's Electric Chair*, 94 CALIF. L. REV. 243, 258 (2006) (using Warhol's iconic print series to posit the question, "[w]ho are we comfortable visualizing in the chair?").

91 See *Riggins v. Nevada*, 504 U.S. 127, 142 (1992) (Kennedy, J., concurring in the judgment) ("It is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at defense table."). Of course, allowing the defendant the choice in how to present

thing that is likely to be beyond the defendant's control, that is demonstrably unreliable,<sup>92</sup> and that is racially contingent. Several studies have found that how jurors interpret facial expressions depends on the race of the juror and the race of the defendant; not only do we have trouble with cross-racial identification,<sup>93</sup> we have trouble with cross-racial identifications of remorse.<sup>94</sup> But beyond race and perhaps more importantly, such reliance on what a

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himself to the jury—the issue in *Riggins*—is very different from imposing a particular view on him.

92 See, e.g., Susan A. Bandes, *Remorse, Demeanor, and the Consequences of Misinterpretation*, 3 J.L. RELIGION & ST. 170, 174 (2014) (“There is no good reason to believe that remorse can be accurately evaluated in the courtroom . . .”); Mark Bennett, *The Changing Science on Memory and Demeanor—and What It Means for Trial Judges*, JUDICATURE, Winter 2017, at 60; Christopher Y. Olivola et al., *Social Attributions from Faces Bias Human Choices*, 18 TRENDS COGNITIVE SCI. 566, 566 (2014) (“Many . . . studies find that individuals who possess particular facial characteristics are more likely to experience desirable outcomes (e.g., winning an election) or avoid undesirable outcomes (e.g., being convicted of a crime) than are their peers who lack these facial attributes.”); Stephen Porter et al., *Dangerous Decisions: The Impact of First Impressions of Trustworthiness on the Evaluation of Legal Evidence and Defendant Culpability*, 16 PSYCHOL. CRIME & L. 477, 486 (2010) (finding that “less evidence was necessary to convict an untrustworthy looking defendant of (the same) crime compared to a perceived trustworthy person, particularly in cases of murder (severe crimes)”); Naomi Sharp, *People Are Pretty Bad at Reading Faces*, ATLANTIC (Mar. 2016), <https://www.theatlantic.com/magazine/archive/2016/03/people-are-pretty-bad-at-reading-faces/426834/>. Indeed, the reliance on facial characteristics as a proxy for criminality brings to mind Cesare Lombroso’s *Criminal Man* and the troubling history of the “science” of criminal physiognomy. See generally CESARE LOMBROSO, *CRIMINAL MAN* (1911). As Alexander Todorov has demonstrated, modern attempts at determining character through physiognomy have proved similarly flawed. See ALEXANDER TODOROV, *FACE VALUE: THE IRRESISTIBLE INFLUENCE OF FIRST IMPRESSIONS* (2017).

93 See Gonzales Rose, *supra* note 25, at 2289 (“Sadly, cross-racial identification errors are so commonplace that they cannot be considered unusual or exceptional.”); Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984).

94 See 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) (concluding that, with respect to extralegal bias and juror decisionmaking in connection with physical appearance, “several participant characteristics arguably warrant the attention of attorneys (or trial consultants) . . . [including] the race of both jurors and defendants considered jointly”); 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) (concluding that “biasing effects of information beyond the evidence . . . may arise out of the expressions the defendant exhibits, and the attributions jurors make about those expressions”); see also William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors’ Race and Jury Racial Composition*, 3 J. CONST. L. 171, 213, 244–51 (2001). This study in particular found, in part, that, when asked whether “the defendant appear[ed] sorry for what s/he had done during the trial?,” juror responses were significantly impacted by the racial combination of the defendant and victim, especially in connection with the juror’s own race. *Id.* at 213. More particularly, for crimes with a white defendant and a white victim, 72.4% of white jurors answered the appearance question “no,” compared to 55.6% of black jurors. *Id.* For crimes with a black defendant and a white victim, 85.2% of white jurors answered the appearance question “no,” compared to 47.1% of black jurors. *Id.* For black on black crimes, 92.6% of white jurors

defendant conveys through his facial expressions seems at odds with our commitment to rights, that a defendant has a Fifth Amendment right not to testify and to remain silent. Examining a defendant's face and body language for expressions of remorse—at least where the defendant does not offer his demeanor for this purpose<sup>95</sup>—circumvents this right to be silent; the jurors are in effect compelling him to express himself without speech.<sup>96</sup> It is time we acknowledge this problem and address it.

### C. Race

*This case has nothing to do with race.*

—Lawyer for officer who shot an unarmed black man, Philando Castile<sup>97</sup>

*This case has nothing to do with race.*

—Police official, speaking of the arrest of Harvard Professor Henry Louis Gates for disorderly conduct when police suspected him of breaking into his own home<sup>98</sup>

*This case has nothing to do with race.*

—Prosecutor in case involving white officer's shooting of an undercover black officer<sup>99</sup>

*This case has never been about race.*

—Prosecutor speaking to the press following the acquittal of George Zimmerman for the death of unarmed black teenager Trayvon Martin<sup>100</sup>

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answered the appearance question “no,” compared to 73.7% of black jurors. *Id.*; cf. Antonio, *supra* note 82, at 233.

95 Indeed, the Sixth Amendment's Confrontation Clause arguably includes the right to display demeanor while confronting witnesses (i.e., disbelief, derision, or disappointment). Bandes, *supra* note 92, at 175.

96 Of course, as Professor Susan Bandes reminds me, all of this raises a difficult question: Is it even possible to have a baseline demeanor that communicates nothing? Consider again the attorney who places her arm around a defendant's shoulder. Certainly this communicates that she finds the defendant nonfrightening. But not putting her arm around a defendant also communicates something, likely something negative. The same is true of a defendant's demeanor, which communicates something even, or even especially, when the goal is to communicate nothing. The ambition of this Article is that the proposed solution in Part III can address even these seemingly thorny issues.

97 Blake McCoy & Elizabeth Chuck, *Lawyer for Officer Who Shot Philando Castile: Case 'Has Nothing to Do with Race'*, NBC NEWS (July 9, 2016), <https://www.nbcnews.com/news/us-news/lawyer-officer-who-shot-philando-castile-case-has-nothing-do-n606471>.

98 Michele McPhee & Sara Just, *Obama: Police Acted 'Stupidly' in Gates Case*, ABC NEWS (July 22, 2009), <http://abcnews.go.com/US/story?id=8148986&page=1>.

99 George James, *Race Had No Role in Officer's Shooting, Prosecutor Says*, N.Y. TIMES (Mar. 26, 1996), <http://www.nytimes.com/1996/03/26/nyregion/race-had-no-role-in-officer-shooting-prosecutor-says.html>.

100 Tom Winter et al., *Zimmerman Will Likely Get His Gun Back, If He Requests It*, NBC NEWS (July 14, 2013), <https://www.nbcnews.com/news/us-news/zimmerman-will-likely-get-his-gun-back-if-he-requests-flna6C10633577>.

*Race matters.*

—Cornel West<sup>101</sup>

Of the three examples of evidence considered by jurors and yet unchecked by the Rules of Evidence, race is the most troubling, especially given our aspiration of equal justice before the law. Indeed, it is arguable that this goal of equality, and indeed color blindness, prompts us to elide race at trial, at least officially. We tend to think saying nothing is the best policy.<sup>102</sup> Indeed, as the novelist Toni Morrison has observed, “the habit of ignoring race is understood to be a graceful, even generous, liberal gesture.”<sup>103</sup>

But what happens when we acknowledge that for jurors, “[r]ace is evidence,” even when race is unsaid?<sup>104</sup> An illustration of this can be found in *People v. Goetz*.<sup>105</sup> The case is known for its facts and its national media attention—Goetz, a white man, was acquitted after he shot four black youths on a New York City subway claiming that he reasonably feared deadly force after one or two of the youths asked him for five dollars. The case is also a staple of criminal law casebooks and the discussion of the “reasonable person” standard in self-defense cases.<sup>106</sup> As Professor Jody Armour famously asked, should a “reasonable racist” be able to kill because he “reasonably” fears black men as dangerous and successfully claim self-defense?<sup>107</sup> But there is another aspect of the case that illustrates, in particularly stark terms, how lawyers use race as evidence. At trial, the defense lawyer insisted that the path of the bullets Goetz fired was material to the case, and demanded that he be allowed to reenact the shooting in court so that the jurors could see the path of the bullets. The defense lawyer then brought in four “volunteers” to show where the victims were standing vis-à-vis Goetz. The four “volunteers,” that the defense claimed he needed simply to show the path of the

101 CORNEL WEST, *RACE MATTERS* (2017).

102 Courts, too, participate in this color blindness, often omitting racial markers when such markers would provide necessary context. For more on this phenomenon, see Justin Driver, Essay, *Recognizing Race*, 112 COLUM. L. REV. 404 (2012).

103 TONI MORRISON, *PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION* 9 (1992).

104 Carodine, *Race is Evidence*, *supra* note 7, at 67. I am not alone in calling attention to the role race plays as evidence at trial, or in applying critical race theory to evidence law. See, e.g., Carodine, *Contemporary Issues*, *supra* note 7; Montréal D. Carodine, “The Mis-Characterization of the Negro”: A Race Critique of the Prior Conviction Impeachment Rule, 84 IND. L.J. 521 (2009); Gabriel J. Chin, “A Chinaman’s Chance” in Court: Asian Pacific Americans and Racial Rules of Evidence, 3 U.C. IRVINE L. REV. 965 (2013); Gonzales Rose, *supra* note 25.

105 497 N.E.2d 41 (N.Y. 1986).

106 Rather cryptically, the New York Court of Appeals ruled that in determining whether a “reasonable person” might have acted as the defendant, jurors are entitled to consider “the physical attributes of all persons involved, including the defendant . . . [as well as] any prior experiences [the defendant] had which could provide a reasonable basis for a belief that another person’s intentions were to [harm him].” *Id.* at 52.

107 Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994).

bullets, were large black men.<sup>108</sup> In the words of Professor George Fletcher, the Columbia law professor who sat in on the trial and later wrote a book about it, the choice of large black men was patently strategic, designed “to reek with danger.”<sup>109</sup> Without saying a word, the defense lawyer put race front and center, and made race evidence.

It would be easy to argue that this backdoor race-ing of the four black youths in *People v. Goetz* is atypical. The reality is the exact opposite: that jurors, often with the complicity of lawyers, use race as evidence all of the time, and do so in ways that usually go unchecked by the Rules of Evidence.

Consider again one of the courtrooms visited in the Introduction. In Courtroom Three, a patrol officer was testifying about observing the defendant throw away a gun as the defendant ran from the officer. The officer eventually caught up with the defendant, apprehended him, recovered the gun from where it had been thrown, and arrested the defendant on gun possession charges. Although race was not mentioned in the case—the case is *United States v. Whitmore*<sup>110</sup>—it would be foolhardy to think that race was absent. Race, even when unsaid, is still seen. Race, even when unacknowledged, is still present. Indeed, the defendant’s race will likely be the first thing the jurors learn about a defendant, even before they learn his name. Before the first witness is called to the stand, before any opening statements, even before jury selection starts, jurors will see the race of the defendant sitting at the defense table, and will be unable to not see race. And jurors, even the most well-meaning, will likely use that race as evidence.<sup>111</sup>

This has obvious implications for cases involving black or Latino defendants. Social cognition research demonstrates that implicit biases about race—those assumptions and associations we have even when we believe we are “race blind”—are practically universal.<sup>112</sup> In particular, research suggests a tendency to implicitly associate dark skin with criminality.<sup>113</sup> In death pen-

108 GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 128–29 (1988).

109 *Id.* at 129.

110 359 F.3d 609 (D.C. Cir. 2004).

111 Sometimes this use of race will be explicit. In the recent case *Peña-Rodriguez v. Colorado*, for example, a juror who was a former law enforcement officer told fellow jurors, “I think [the defendant] did it because he’s Mexican” and explained his reasoning by discussing his experience with Mexican men in general. 137 S. Ct. 855, 862 (2017).

112 See generally Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 146 (2004); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1491–528 (2005); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011).

113 See Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004). Part of this may be attributable to priming by the media. For example, one study found that it is four times more likely that local news will show a mug shot of the accused when the accused is black rather than white, two times more likely that local news will show the accused physically restrained when the accused is black rather than white, and two times less likely that local news will show the name of the accused when the accused is black rather than white. See ROBERT M. ENTMAN & ANDREW ROJECKI, *THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA* 82–83 (2000);

alty litigation, “the perceived Blackness of a defendant is related to sentencing: the more Black, the more deathworthy.”<sup>114</sup> Moreover, this use of race as evidence tends to function automatically, including in ways that the person would not endorse as appropriate if he or she did have conscious awareness.<sup>115</sup> Although this association has been demonstrated in numerous ways, from Harvard’s standard implicit association tests (IAT) to Joshua Correll’s shooter bias studies,<sup>116</sup> one study deserves particular mention. Interested in adapting the standard IAT to something directly applicable to the legal setting, Professor Justin Levinson and others created a Guilty/Not Guilty IAT to test whether people implicitly associate blacks not just with criminality but specifically with guilt.<sup>117</sup> They also tested to see whether their results would predict how mock jurors responded to ambiguous evidence. Their results are revealing: participants displayed a significant association between blacks and guilt (as compared to whites and guilt).<sup>118</sup> A regression model further demonstrated that the association of blacks with guilt also predicted judgments about what weight to give certain evidence. Those with strong associations of blacks and guilt were more likely to judge ambiguous evidence as indicative of guilt in cases involving black defendants.<sup>119</sup>

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*see also* Nick Wing, *When the Media Treats White Suspects and Killers Better Than Black Victims*, HUFFINGTON POST, (Oct. 14, 2014, 8:35 AM) [http://www.huffingtonpost.com/2014/08/14/media-black-victims\\_n\\_5673291.html](http://www.huffingtonpost.com/2014/08/14/media-black-victims_n_5673291.html) .

114 Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCHOL. SCI. 1949, 1949 (2014) (citing Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 383 (2006)).

115 Kang, *supra* note 112, at 1529.

116 In Joshua Correll’s gun study, he and his colleagues asked participants to play a videogame in which they were tasked with determining whether a suspect was holding a gun or an innocuous object. The participants received points for shooting (in self-defense) the suspects brandishing guns; they lost points for shooting suspects who were unarmed. The study found that participants were more likely to shoot unarmed suspects who were black and less likely to shoot armed suspects who were white. *See* Joshua Correll et al., *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1315–19 (2002).

117 Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187 (2010).

118 *Id.* at 205. Indeed, individuals who reported feeling warmly toward African Americans proved “more likely to show an implicit guilty bias against Blacks.” *Id.*

119 *Id.* at 206; *see also* Denis Chimaeze E. Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. EXPERIMENTAL SOC. PSYCHOL. 133, 140 (1979). In another study, Justin Levinson and Danielle Young provided mock jury participants with over twenty pieces of evidence, including a surveillance camera photo that showed a masked gunman whose forearm and hand were visible. To test the role of implicit bias, Levinson and Young provided different participants the same surveillance camera photo but with some photos showing the forearm and hand with dark skin, and others with light skin. The study revealed that alteration in skin color altered how jurors viewed ambiguous evidence and their ultimate determination about whether the defendant was guilty or not guilty. Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 331–39 (2010).

The association of dark skin with criminality and guilt is just one of several ways race plays a role in jury determinations. Since “blue on black” police violence has been much in the news, consider the role race—and specifically the implicit association of blackness with violence—likely plays in police shootings and excessive force cases. Consider, too, studies that show individuals assume blacks experience less pain than whites,<sup>120</sup> and showing that individuals assume black men are larger than white men, even when they are the identical size.<sup>121</sup> Add to this studies that show individuals remember stories they are told differently when the race of the actors in the story is changed—specifically, people will “recall” aggressive behavior by black actors that was completely absent in the story.<sup>122</sup> Assuming “juror unexceptionalism”<sup>123</sup>—the idea that jurors will have the same implicit biases as the general public—these studies suggest jurors will be more likely to credit an officer’s justification defense that he reasonably believed a black victim presented a danger to his life, even when the actual evidence is to the contrary.

There are at least three other ways jurors treat race as evidence. The first has to do with our long history of tying race to credibility, beginning with laws and customs that prohibited nonwhites, including Latinos and Asians, from testifying against whites.<sup>124</sup> Even after race-based competency rules were eradicated, race continued to be tied to credibility. North Carolina, for example, required that “whenever a person of color shall be examined as a witness, the court shall warn the witness to declare the truth.”<sup>125</sup> The Oregon Supreme Court twice ruled that Chinese witnesses must be viewed with special scrutiny, stating in one case that “[e]xperience convinces every one that the testimony of Chinese witnesses is very unreliable.”<sup>126</sup> The point here

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120 See, e.g., Matteo Forgiarini et al., *Racism and the Empathy for Pain on Our Skin*, FRONTIERS PSYCHOL., May 2011, at 108; Sophie Trawalter et al., *Racial Bias in Perceptions of Others’ Pain*, PLOS ONE, Nov. 2012, at 1; see also Jason Silverstein, *I Don’t Feel Your Pain: A Failure of Empathy Perpetuates Racial Disparities*, SLATE (June 27, 2013), <https://slate.com/technology/2013/06/racial-empathy-gap-people-dont-perceive-pain-in-other-races.html>.

121 John Paul Wilson et al., *Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat*, 113 J. PERSONALITY & SOC. PSYCHOL. 59 (2017); AJ Willingham, *Study: We Think Black Men Are Bigger Than White Men (Even When They’re Not)*, CNN (Mar. 14, 2017), <http://www.cnn.com/2017/03/13/health/black-men-larger-study-trnd/index.html>.

122 See Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007); see also Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1580–86 (2013).

123 Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1144 (2012).  
124 See THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619–1860, at 239–48 (1996); Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415, 417 n.12 (1986). See generally Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261 (1996).

125 George Fisher, *The Jury’s Rise as Lie Detector*, 107 YALE L.J. 575, 685 (1997) (quoting ch. 40, § 10, 1866 N.C. Sess. Laws 99, 102).

126 *State v. Mah Jim*, 10 P. 306, 306–07 (Or. 1886). In the second case, *State v. Ching Ling*, the court stated that the “Chinamen . . . will not hesitate to conspire,” requiring juries to be “prudent, vigilant, and discriminating.” 18 P. 844, 847 (Or. 1888). For more on Asian Americans and the presumption against credibility, see Chin, *supra* note 104.

is not just that this history is important. It is that we have not yet untethered ourselves from history. Social science literature makes clear that race is still a factor in credibility determinations.<sup>127</sup> Another scholar puts the matter more bluntly: “In an instant, at first sight and without formally entering evidence or investing resources, the party calling the white witness [is] able to bolster the witness’s credibility for truthfulness. Conversely, a witness of color is automatically considered less credible . . . .”<sup>128</sup> All of this contributes to what the philosopher Miranda Fricker calls “testimonial injustice,” which occurs when “prejudice results in the speaker’s receiving more credibility than she otherwise would have—a *credibility excess*—or it results in her receiving less credibility than she otherwise would have—a *credibility deficit*.”<sup>129</sup> Professor Fricker goes on to note that who receives a credibility excess and who receives a credibility deficit often turns on the race of the speaker.<sup>130</sup>

The second way race is treated as evidence relates to prior convictions and other bad acts. Although evidentiary rules normally bar evidence of a defendant’s prior criminal record or other bad acts,<sup>131</sup> jurors likely assume past criminality for black defendants. Again, this is consistent with numerous IAT studies showing that most Americans implicitly associate dark skin with criminality. But it is also consistent with research from another field entirely: Harvard sociologist Devah Pager’s research on employment opportunities.<sup>132</sup> Using testers for entry-level jobs advertised in newspapers, Pager found that employers were less likely to pursue black applicants compared to white applicants with identical resumes and interview preparation. Her conclusion: racial discrimination in hiring, at least for low-level jobs, is very real. But her research also led to a second finding that is less well-known: callback rates still favored white applicants even when white applicants, and white applicants alone, disclosed on their applications that they had a prior conviction.

127 James W. Neuliep et al., *The Influence of Ethnocentrism in Organizational Contexts: Perceptions of Interviewee and Managerial Attractiveness, Credibility, and Effectiveness*, 53 COMM. Q. 41, 52 (2005); Chet K.W. Pager, *Blind Justice, Colored Truths and the Veil of Ignorance*, 41 WILLAMETTE L. REV. 373, 394–400 (2005); Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 42 (2000).

128 Gonzales Rose, *supra* note 25, at 2259; *see also* Amanda Carlin, Comment, *The Courtroom as White Space: Racial Performance as Noncredibility*, 63 UCLA L. REV. 450, 452 (2016).

129 MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 17 (2007).

130 *Id.* at 23–29.

131 As Professor Erin Collins notes, this ban “upholds the pillars of our criminal justice system: the presumption of innocence and the reasonable doubt standard. It is so crucial to ensuring a fair and just adjudication and ‘so deeply imbedded in our jurisprudence’ that it assumes ‘almost constitutional proportions.’” Erin R. Collins, *The Evidentiary Rules of Engagement in the War Against Domestic Violence*, 90 N.Y.U. L. REV. 397, 415–16 (2015) (footnote omitted) (quoting FED. R. EVID. 404 advisory committee’s note to 1972 proposed rules).

132 DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007).



tion.<sup>133</sup> In other words, employers treated white applicants who disclosed having a criminal record as effectively on par with black applicants without a criminal record. The most plausible explanation is many employers assumed a history of criminality for black applicants.<sup>134</sup> A recent paper from the National Bureau of Economic Research made similar findings.<sup>135</sup> Again, assuming juror unexceptionalism, this suggests jurors are more likely to treat black defendants as if they had prior convictions, which in turn is likely to contribute to a finding of guilty.<sup>136</sup> As Kimani Paul-Emile has recently written, in this and other ways blackness itself “operates as a disabling condition.”<sup>137</sup>

Before moving to the third point, there is one more thing to be said about race as evidence. Not only do we have biases that disfavor racial minorities. We also have biases that favor whites.<sup>138</sup> In particular, we have implicit biases that link whiteness with truth telling and innocence. In Pager’s employment studies, employers assumed white applicants had a clean slate

133 *Id.*; see also Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 958 (2003).

134 Professor Paul Butler makes a similar observation. See BUTLER, *supra* note 44, at 21.

135 The study examined the impact of recent efforts to bar employers from asking applicants about their criminal history and found that employers who were barred from asking about criminal history were more likely to assume black and Hispanic applicants had a criminal record, ultimately decreasing the probability that black or Hispanic men would be hired. See Jennifer L. Doleac & Benjamin Hansen, *Does “Ban the Box” Help or Hurt Low-Skilled Workers? Statistical Discrimination and Employment Outcomes When Criminal Histories are Hidden* 24 (Nat’l Bureau of Econ. Research, Working Paper No. 22469, 2016), <http://www.nber.org/papers/w22469#fromrss>. By contrast, white ex-offenders benefited from the bar, presumably because employers assumed that they did not have convictions. See Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment* (Mich. L. & Econ. Research Paper Series, Paper No. 16-012, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2795795](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795795); Alana Semuels, *When Banning One Kind of Discrimination Results in Another*, ATLANTIC (Aug. 4, 2016), <https://www.theatlantic.com/business/archive/2016/08/consequences-of-ban-the-box/494435/>.

136 For a general discussion of how jurors use prior convictions to penalize defendants—what Professor Jeffrey Bellin calls the “prior offender penalty”—see Bellin, *supra* note 8, at 401–06. It should be noted that several scholars have called for the abolition of Rule 609—the rule that permits testifying defendants to be impeached with their prior convictions—precisely because it contributes to jurors convicting based on past behavior. See, e.g., Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977 (2016). However, the fact that jurors likely assume prior convictions in the case of minority defendants suggests that merely eliminating Rule 609 will be ineffective.

137 Kimani Paul-Emile, *Blackness as Disability?*, 106 GEO. L.J. 293, 299 (2018) (offering the normative and doctrinal apparatus of disability law to address systemic racial inequality and discrimination).

138 See, e.g., Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871 (2015). This goes beyond homophily, or the notion that we favor individuals like ourselves or who seem to be part of our tribe. Studies show that most groups, even outgroups such as racial minorities, internalize dominant norms and have implicit biases that favor majority groups.

unless the white applicant disclosed a prior arrest or conviction.<sup>139</sup> In Joshua Correll's shooter bias, the results showed not only that participants were more likely to mistakenly believe a black individual had a gun (i.e., a false positive), but also that participants were more likely to wrongly assume a white person did not (i.e., a false negative).<sup>140</sup> Similarly, Justin Levinson's narrative study, which found participants invented aggressiveness when the actor was black, found that participants actually failed to remember evidence of aggressiveness when the actor was white.<sup>141</sup> In short, it is not only in cases involving minority defendants where race matters. Race also matters in cases involving white defendants, whom jurors are more likely to view as presumptively innocent,<sup>142</sup> and cases involving white witnesses, whom jurors deem presumptively credible.<sup>143</sup>

The third point about race as evidence is this: jurors, most likely without realizing it, appear to use race as a measure of value and worth. Perhaps nowhere is this use of race more challenging and stark than in the death penalty context. The most well-known study is the Baldus study, which became the subject of the Court's decision in *McCleskey v. Kemp*.<sup>144</sup> The statistical study examined murder cases in Georgia to see what role, if any, race played in capital punishment determinations. The study concluded that far more important than the race of the defendant was the race of the victim. Even after taking into account thirty-nine nonracial variables, the study concluded that defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing black victims.<sup>145</sup> Subsequent studies have reached similar results.<sup>146</sup> Brandon Garrett's recent study of death penalty cases nationwide during the last twenty-five years also supports the argument that decisionmakers use race as a mea-

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139 See PAGER, *supra* note 132; Pager, *supra* note 133.

140 See Correll et al., *supra* note 116, at 1319.

141 Levinson, *supra* note 122, at 400–01.

142 Sheri Lynn Johnson made a similar observation. See Sheri Lynn Johnson, *Black Innocence and the White Jury*, in CRITICAL RACE THEORY 180, 181, 187 (Richard Delgado ed., 1995).

143 For more on the linkage of whiteness with credibility, see Gonzales Rose, *supra* note 25, at 2255, 2259–60; see also Chin, *supra* note 104, at 970–71.

144 481 U.S. 279, 286 (1987).

145 *Id.* at 287. Subsequent studies have revealed similar disparities. See, e.g., DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY (2018), <https://deathpenalty-info.org/documents/FactSheet.pdf>.

146 See, e.g., Barbara O'Brien et al., *Untangling the Role of Race in Capital Charging and Sentencing in North Carolina, 1990–2009*, 94 N.C. L. REV. 1997, 2000 (2016) (“The analysis here strongly suggests that in death-eligible murder cases with at least one white victim, defendants are more likely to be sentenced to death than all other cases.”). The role of race comes into play even when jurors are merely considering victim impact statements. Evidence suggests jurors are “less compelled by victim-impact statements made by black victims than by those made by white victims.” Jill Lepore, *The Rise of the Victims’-Rights Movement*, NEW YORKER (May 21, 2018), <https://www.newyorker.com/magazine/2018/05/21/the-rise-of-the-victims-rights-movement>.

sure of value and worth.<sup>147</sup> Even though the number of death sentences has steeply declined, for the death sentences that are still imposed, the race of the victim still seems to matter in the counties that impose death. Garrett calls this the “white lives matter more” effect.<sup>148</sup> In short, all other things being equal, jurors appear to use race as a proxy for measuring worth (of the victim) and harm (to the community). All of this is using race as evidence.

#### D. Other Examples

To be clear, the examples given above—modes of dress, demeanor, and race—are just a sampling of things jurors treat as evidence and yet routinely go unchecked by evidentiary rules. For example, jurors may rely on the presence of family members in the courtroom, either the defendant’s or a victim’s, in deciding whether to return a verdict of guilty, even though their presence is irrelevant to whether the government has proved the elements of the offense beyond a reasonable doubt.<sup>149</sup> Similarly, studies show that jurors find male experts more authoritative than female experts;<sup>150</sup> there is even evidence that jurors are less likely to credit witnesses who use “up-speak”—the rising intonation at the end of an utterance—often associated with the voice patterns of women.<sup>151</sup> We may even give deeper voices more attention than higher voices, again, associated with women.<sup>152</sup> Speaking of women, research indicates that jurors view male and female attorneys differently, more often seeing female attorneys as “shrill, irrational, and unpleasant” for expressing the same emotions that, when expressed by male attorneys, are

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147 BRANDON L. GARRETT, *END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE* 84, 192 (2017).

148 *Id.* at 84.

149 For example, it is generally assumed that the presence of spectators played a role in the acquittal of CEO Richard Scrusby in the face of overwhelming evidence that he was part of a \$2.7 billion accounting fraud at HealthSouth. For more on this point, see Pamela H. Bucy, *Courtroom Conduct by Spectators*, 48 U. LOUISVILLE L. REV. 579 (2010); Simon Romero & Kyle Whitmire, *Former Chief of HealthSouth Acquitted in \$2.7 Billion Fraud*, N.Y. TIMES (June 29, 2005), <https://www.nytimes.com/2005/06/29/business/former-chief-of-healthsouth-acquitted-in-27-billion-fraud.html>.

150 See, e.g., Nicole D. Galli & Marta L. Villarraga, *Does Your Expert’s Gender Matter? Explicit and Implicit Bias in the Courtroom*, AM. BAR ASS’N (Aug. 17, 2017), <https://www.americanbar.org/groups/litigation/committees/woman-advocate/articles/2017/does-your-experts-gender-matter-explicit-implicit-bias-in-courtroom/>.

151 Yasuhiro Ozuru & William Hirst, *Surface Features of Utterances, Credibility Judgments, and Memory*, 34 MEMORY & COGNITION 1512, 1513 (2006); John Baldoni, *Will ‘Upspeak’ Hurt Your Career?*, FORBES (July 30, 2015), <https://www.forbes.com/sites/johnbaldoni/2015/07/30/will-upspeak-hurt-your-career/#3f96f3ab4edc>; Ken Broda-Bahm, *Avoid Rising Intonation?*, PERSUASIVE LITIGATOR (May 26, 2014), <https://www.persuasivelitigator.com/2014/05/avoid-rising-intonation.html> (summarizing studies finding that rising intonation or upspeak negatively impact perceptions of credibility).

152 See, e.g., Thomas Page McBee, *My Voice Got Deeper. Suddenly, People Listened*, N.Y. TIMES (Aug. 9, 2018), <https://www.nytimes.com/2018/08/09/style/transgender-men-voice-change.html>.

interpreted as appropriate, all of which can impact the outcome of cases.<sup>153</sup> A recent empirical study suggests that even the Supreme Court is not immune from finding women less deserving of attention.<sup>154</sup>

Other examples abound. There is evidence to suggest that jurors consider attractiveness—of the defendant and the victim—in determining their verdicts<sup>155</sup> and that male jurors are significantly more likely to judge overweight women guilty, using their weight to impute character traits of greediness, selfishness, and lack of impulse control.<sup>156</sup> Similarly, there is evidence that jurors consider the fact that a defendant is listening to the trial through an interpreter as a negative and give less credibility to witnesses who speak with an “outsider” accent, while giving extra credibility to those witnesses who speak with an “insider” or even British accent.<sup>157</sup> Juries may even use the existence of a tattoo or a natural hairstyle like cornrows as evidence.<sup>158</sup> Even “jury notice” evidence—the idea that jurors are permitted to use “facts within the common knowledge of the community”<sup>159</sup>—could be put into this category of other evidence. Again, all of this matters. A case in point is the highly publicized trial of George Zimmerman for shooting Trayvon Martin, an unarmed black teenager. The testimony of Martin’s friend, Rachel Jeantel, was key to the prosecution. However, to many onlookers her testi-

153 Lara Bazelon, *What It Take to be a Trial Lawyer if You’re Not a Man*, ATLANTIC (Sept. 2018), <https://www.theatlantic.com/magazine/archive/2018/09/female-lawyers-sexism-courtroom/565778/>.

154 See Tonja Jacobi & Dylan Schweers, *Justice, Interrupted: The Effect of Gender, Ideology, and Seniority at Supreme Court Oral Arguments*, 103 VA. L. REV. 1379, 1482–83 (2017).

155 Norbert L. Kerr et al., *Effects of Victim Attractiveness, Care and Disfigurement on the Judgements of American and British Mock Jurors*, 24 BRIT. J. SOC. PSYCHOL. 47, 54 (1985); Evelyn M. Maeder et al., *The Influence of Defendant Race and Victim Physical Attractiveness on Juror Decision-Making in a Sexual Assault Trial*, 21 PSYCHOL. CRIME & L. 62, 77 (2015); Marc W. Patry, *Attractive But Guilty: Deliberation and the Physical Attractiveness Bias*, PSYCHOL. REP. 727, 731 (2008); see also *McCleskey v. Kemp*, 481 U.S. 279, 317 n.43 & 44 (1987) (citing studies).

156 N.A. Schvey et al., *The Influence of a Defendant’s Body Weight on Perceptions of Guilt*, 37 INT’L J. OBESITY 1275, 1279 (2013); Katy Waldman, *Male Jurors More Likely to Find Fat Women Guilty, According to Depressing Study*, SLATE (Jan. 10, 2013), [http://www.slate.com/blogs/xx\\_factor/2013/01/10/no\\_justice\\_for\\_fat\\_women\\_male\\_jurors\\_more\\_likely\\_to\\_find\\_obese\\_women\\_guilty.html](http://www.slate.com/blogs/xx_factor/2013/01/10/no_justice_for_fat_women_male_jurors_more_likely_to_find_obese_women_guilty.html).

157 FRICKER, *supra* note 129, at 17 (“Not only does accent carry a social charge that affects how a hearer perceives a speaker (it may indicate a certain educational/class/regional background), but very often it also carries an epistemic charge.”); DOUGLASS A. KIBBEE, LANGUAGE AND THE LAW: LINGUISTIC INEQUALITY IN AMERICA 53–82 (2016); LANGUAGE AND THE LAW (John Gibbons ed., 2014) (citing studies); Lara Frumkin, *Influences of Accent and Ethnic Background on Perceptions of Eyewitness Testimony*, 13 PSYCHOL. CRIME & L. 317 (2007); Samantha Anderson et al., *How Accents Affect Perception of Intelligence, Physical Attractiveness, and Trustworthiness of Middle-Eastern-, Latin-American-, British- and Standard-American-English-Accented Speakers*, 3 INTUITION: BYU UNDERGRADUATE J. PSYCHOL. 5 (2007); Alexandra Kozlowski, *The Influence of Accents on Social Perception*, INKBLot, Sept. 2015, at 12.

158 See, e.g., PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE (2009).

159 CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 324, at 691 & n.11 (1954). For more on “jury notice,” see John H. Mansfield, *Jury Notice*, 74 GEO. L.J. 395 (1985).

mony was less trustworthy because she was a “large, dark skinned teenage girl” who spoke nonstandard English—her background is Haitian Creole—and “whose language was peppered with slang.”<sup>160</sup> It is impossible to say whether her dialect in fact contributed to Zimmerman’s acquittal. But it is safe to say it made crediting the defendant, who spoke “standard” English, easier. Borrowing again from Professor Fricker’s terminology, Jeantel likely faced a “credibility deficit.”<sup>161</sup> Meanwhile, the defendant Zimmerman likely received a “credibility excess.”<sup>162</sup>

### E. *The Shadow of Trial*

All of this suggests other evidence is likely a major factor during plea negotiations,<sup>163</sup> and given that approximately ninety-four percent of all state convictions are the result of pleas, the consequence of this use of other evidence is considerable.<sup>164</sup> In negotiating a disposition by plea, prosecutors necessarily factor in the strength of their evidence and the likelihood of securing a conviction. Indeed, in the federal system the Department of Justice guidelines expressly instruct prosecutors to consider this.<sup>165</sup> But in factoring in the strength of the evidence, what is left unsaid is the weight given to what this Article calls other evidence. Prosecutors and defense lawyers know that other evidence—whether it is dress or demeanor, an accent or upspeak, or race or gender—matters. They know, too, that there is no need to marshal arguments to get this evidence admitted. This other evidence will simply pass by the evidentiary gatekeepers, unchecked and unremarked upon. This impacts which cases are taken to trial. It also impacts the types of pleas that are negotiated in lieu of trial. In sum, even for the cases that are disposed of by plea or settlement, whether civil or criminal, other evidence matters.

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160 Carlin, *supra* note 128, at 452; see also Marguerite Rigoglioso, *Stanford Linguist Says Prejudice Toward African American Dialect Can Result in Unfair Rulings*, STAN. NEWS (Dec. 2, 2014), <http://news.stanford.edu/news/2014/december/vernacular-trial-testimony-120214.html>. For more on this dynamic in the Zimmerman trial, see Jelani Cobb, *Rachel Jeantel on Trial*, NEW YORKER (June 27, 2013), <https://www.newyorker.com/news/news-desk/rachel-jeantel-on-trial>; John McWhorter, *Rachel Jeantel Explained, Linguistically*, TIME (June 28, 2013), <http://ideas.time.com/2013/06/28/rachel-jeantel-explained-linguistically/>.

161 FRICKER, *supra* note 129, at 17.

162 *Id.*

163 See, e.g., BESIKI KUTATELADZE ET AL., VERA INST. OF JUSTICE, RACE AND PROSECUTION IN MANHATTAN (2014), <http://www.vera.org/sites/default/files/resources/downloads/race-and-prosecution-manhattan-summary.pdf> (finding race to be a factor in case outcomes); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 15 (1998); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 816–18 (2012).

164 *Missouri v. Frye*, 566 U.S. 134, 143 (2012).

165 OFFICE OF THE U.S. ATTORNEYS, U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 9-27.420 (listing among factors to be considered in negotiating a plea the likelihood of obtaining a conviction at trial).

Consider just race. The Baldus study cited in *McCleskey v. Kemp* not only concluded that jurors were more likely to recommend death in capital cases involving black defendants and white victims. It also found that prosecutors were most likely to seek the death penalty in cases involving black defendants and white victims (seeking the death penalty in seventy percent of these cases). It found too that prosecutors are least likely to seek the death penalty in cases involving black defendants and black victims (seeking the death penalty in only fifteen percent of those cases).<sup>166</sup>

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The above Sections have attempted to make the argument that unchecked evidence has real consequences. The next Part gestures toward solutions.

### III. RETHINKING THE RULES OF EVIDENCE

The preceding Parts argued that what we tell ourselves about the Rules of Evidence—that they serve as a vigilant gatekeeper, screening the evidence that comes before jurors for relevance and trustworthiness, and insuring that it is not overly prejudicial or privileged—falls far short of the truth. The Rules of Evidence may screen a subset of evidence, such as witness testimony and exhibits formally offered into evidence. But equally important evidence passes by the evidentiary gatekeepers unseen and unchecked. Even more troubling, this other evidence can have far reaching consequences. Jurors use this other evidence to decide whether to find for a plaintiff or defendant; whether a defendant should go free or be deprived of liberty; even whether the defendant is deserving of life or death. If the Rules of Evidence exist to make sure jurors only hear and see evidence that is relevant, trustworthy, and not unfairly prejudicial, we should be deeply troubled when jurors base their decisions on evidence that has not been screened; that has entered unnoticed and unchecked; and that may be irrelevant, untrustworthy, and very much prejudicial.

There is another aspect that makes this state of affairs more troubling still. Once a verdict has been reached, we generally decline to look behind the curtain to ask what evidence the jury considered. At least since 1785, dating back to the English case *Vaise v. Delaval*,<sup>167</sup> common-law rules have made challenging a verdict based on juror deliberations—what evidence they

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166 See *McCleskey v. Kemp*, 481 U.S. 279, 287 (1987). Indeed, Professor Randall Kennedy has argued that one of the most troubling aspects of the Baldus study is the devaluation of black lives. See Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1395 (1988). Similar race-of-the-victim disparities have been found in rape prosecutions. See, e.g., GARY LAFREE, RAPE AND CRIMINAL JUSTICE 135–40 (1989).

167 (1785) 99 Eng. Rep. 944; 1 T.R. 11 (Eng.); see also Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 863 (2017) (tracing the no-impeachment rule to *Vaise v. Delaval*).

considered, and what they did not—all but impossible.<sup>168</sup> Now, Rule 606(b) of the Federal Rules of Evidence codifies this blindness, barring inquiry into internal jury deliberations.<sup>169</sup> Consider what this means. Applying Rule 606(b) or its common-law precursor, courts have barred inquiry where one of the jurors was likely suffering from schizophrenia and admitted to having visions,<sup>170</sup> and even where jurors confessed that almost all of the jurors had shared illegal drugs and were “flying” throughout the trial.<sup>171</sup> The effect of Rule 606(b) is clear: even in situations where it becomes evident that jurors relied on other, unscreened evidence in reaching their verdict, this will not be grounds for challenging the verdict. The one exception, other than the narrow exceptions provided in Rule 606(b) itself, is when juror statements reflecting racial prejudice suggest a violation of a defendant’s Sixth Amendment right to an impartial jury. This is what happened in the recent case *Peña-Rodriguez v. Colorado*,<sup>172</sup> which involved evidence that one of the jurors, an ex-law enforcement officer, expressed anti-Hispanic bias toward the defendant and his alibi witness, even stating that “I think he did it because he’s Mexican,” and opining that the alibi witness was not credible because he was likely “illegal.”<sup>173</sup> The Court, faced with this obvious use of race as evidence, added an exception to Rule 606(b) to allow impeachment of the verdict in such circumstances. However, this exception is a narrow one indeed, a point the Court made by deed, if not by words, when it more recently declined to disturb the verdict in a case involving juror antigay animus rather than anti-Hispanic animus.<sup>174</sup> As such, absent the transparent use of race as evidence, what happens in the jury room is likely to stay in the jury room. Indeed, Professor George Fisher has argued our “unwillingness to look past the jury’s verdict to expose whatever flaws in reasoning or understanding might lie behind the curtain of the deliberation room” is all the more reason to be “especially vigilant to ensure the evidence they hear is useful and

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168 *Tanner v. United States*, 483 U.S. 107, 117 (1987) (observing that “near-universal and firmly established common-law rule[s] in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict”).

169 See FED. R. EVID. 606(b). Most states follow Rule 606(b). However, a handful of states follow the “Iowa rule,” which is less restrictive. See *Peña-Rodriguez*, 137 S. Ct. at 863–65; *Wright v. Ill. & Miss. Tel. Co.*, 20 Iowa 195 (1866).

170 *United States v. Dioguardi*, 492 F.2d 70, 75 (2d Cir. 1974) (involving postverdict inquiry into validity of verdict denied even where juror claimed to have “eye and ears that . . . see things before [they] happen” and that “a curse was put upon [her eyes] some years ago”).

171 *Tanner*, 483 U.S. at 116.

172 *Peña-Rodriguez*, 137 S. Ct. 855.

173 *Id.* at 861–82.

174 *Rhines v. South Dakota*, 519 U.S. 1013 (1996), *denying cert. to* 548 N.W.2d 415 (S.D. 1996) (denying certiorari in a case involving allegations that a juror argued that death was more appropriate than a prison sentence, because the defendant, as a gay man, would probably enjoy being surrounded by men in prison).

fair.”<sup>175</sup> And yet vigilance is not what happens in reality. It is the opposite of what happens in reality.

The remainder of this Article argues that this state of affairs is not inevitable. Change is possible. Section III.A begins with a modest proposal, a simple jury instruction and directive. Section III.B then proposes a solution that is anything but modest—a radical rethinking of the Rules of Evidence.

#### A. *A Modest Proposal: A Jury Instruction and Directive*

One way to address the fact that jurors consider evidence that has not been screened—modes of dress, nontestifying witness demeanor, and race are again just a few examples—is to instruct jurors that they may not consider this unscreened evidence at all. This proposal can be characterized as modest because, to a large extent, it merely improves and elaborates upon instructions that are already given to jurors in some cases. For example, a pattern instruction from the Tenth Circuit instructs jurors as follows:

You must make your decision based only on the evidence that you saw and heard here in court. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of court influence your decision in any way.

The evidence in this case includes only what the witnesses said while they were testifying under oath, the exhibits that I allowed into evidence, the stipulations that the lawyers agreed to, and the facts that I have judicially noticed.

Nothing else is evidence. The lawyers’ statements and arguments are not evidence. Their questions and objections are not evidence. My legal rulings are not evidence. And my comments and questions are not evidence.<sup>176</sup>

The Ninth Circuit offers a similar jury instruction:

The following things are *not* evidence, and you must not consider them as evidence in deciding the facts of this case:

- (1) statements and arguments of the attorneys;
- (2) questions and objections of the attorneys;
- (3) testimony that I instruct you to disregard; and
- (4) anything you may see or hear when the court is not in session even if what you see or hear is done or said by one of the parties or by one of the witnesses.<sup>177</sup>

Such instructions are a start, but they suffer from the flaw of mixed messages. They seem to permit jurors to base their decision on the evidence they “saw and heard” in court (granting them broad leeway), while barring them from considering certain enumerated nonevidence, such as lawyers’ questions (imposing an underinclusive narrow bar). Without more, jurors

175 FISHER, *supra* note 14, at 6 (emphasis added).

176 CRIMINAL PATTERN JURY INSTRUCTIONS § 1.06 (CRIMINAL PATTERN JURY INSTRUCTION COMM. OF THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT 2018).

177 MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS § 1.4 (NINTH CIRCUIT JURY INSTRUCTIONS COMM. 2010).



may interpret such instructions as giving them tacit approval to consider anything they hear or see—including the dress of witnesses, the presence of supporting family members, or the defendant’s demeanor even if he does not testify—so long as they do not consider as evidence anything the court explicitly prohibited, such as the questions of lawyers.

This Section accordingly proposes a stronger instruction, one that makes clear that, in reaching their verdict, jurors may only consider evidence that has been expressly ruled upon and admitted by the court. Such an instruction might read as follows:

Your decision today must be based solely on the evidence that was explicitly offered and accepted into evidence by me during this trial. That includes the answers given by witnesses, except where their answers were stricken. It includes the demeanor of witnesses who testified. And it includes the exhibits that were admitted into evidence. Nothing else may be considered by you. Allow me to repeat that. Nothing else may be considered by you.

For example, the questions made by lawyers are not evidence and may not be considered by you. The same goes for their actions in the courtroom. Nor may you consider the presence of spectators in the courtroom. Our system of justice depends on you giving your attention to the evidence I have admitted into evidence, and nothing else. Not race or gender or class. Not whether a witness is tall or short, or attractive or not. Not whether a witness, or the defendant for that matter, was wearing an expensive suit or a cheap suit or no suit at all. And certainly not on your preconceptions about people like a particular witness, or like the defendant. You are to consider the witnesses you heard in this courtroom, and the exhibits that were marked and accepted into evidence, and nothing else. That is what justice requires.

To be sure, this proposed jury instruction may not completely solve the problem of jurors considering unscreened evidence. But instructions do matter.<sup>178</sup> Indeed, though it is fashionable to claim jurors disregard instructions, recent evidence suggests instructions can matter, at least when the instructions are delivered throughout the trial and their rationale is

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178 Importantly, instructions matter, and the Court has long stressed their importance and assumed that jurors follow them. *See, e.g.,* Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 861 (2017) (“[E]xperience shows that fair and impartial verdicts can be reached if the jury follows the court’s instructions and undertakes deliberations that are honest, candid, robust, and based on common sense.”); *see also* Weeks v. Angelone, 528 U.S. 225, 234 (2000); Richardson v. Marsh, 481 U.S. 200, 211 (1987).

explained.<sup>179</sup> And this proposed instruction can make a significant difference and get us closer to verdicts based only on admitted evidence.<sup>180</sup>

There is one final aspect to this modest proposal. In addition to giving jurors a stronger instruction about what they can and cannot consider when they deliberate, courts should provide jurors with something likely to have a far greater impact: an evidence checklist and directive. After all of the evidence has been heard, the summations made, and the jury instructions given, the court should provide jurors one final document to take with them in the deliberation room: a document listing the witnesses who testified, and listing the exhibits admitted into evidence. This checklist should be accompanied by a strong directive, both orally and in writing on the checklist itself, that this stipulated list of the evidence they heard and saw comprises the entirety of the evidence they may consider when they deliberate, and that their verdict must be based on evidence from this list and nothing else. It is a simple solution. But its simplicity is what very well might make it particularly effective.

### B. *Rethinking the Rules of Evidence*

As previously noted, the above proposal—a jury instruction and an evidence checklist and directive—is relatively modest in scope. In part, this is because the proposal is predicated on the assumption that evidence that has not been screened by evidentiary rules should not be considered by jurors. However, stating the assumption this way points to a less modest but more generative solution. If the issue is jurors considering unscreened evidence, then why not bring the rules to the evidence, so that the rules cover all evidence? Thus, the larger proposal is this: to rethink the Rules of Evidence. We should think of the Rules of Evidence as covering not simply what, out of habit and tradition and inertia, is thought of as evidence—witness testimony and formally offered exhibits—but also what *functions* as evidence in the minds of jurors. If the overarching goal of the Rules of Evidence is “to administer every proceeding fairly . . . to the end of ascertaining the truth

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179 See, e.g., David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 415, 439, 452–53 (2013) (examining past studies and concluding the evidence belies the view that evidentiary instructions are exercises in futility, and further noting that even partial compliance with instructions can be important); see also Elizabeth Ingriselli, Note, *Mitigating Jurors' Racial Biases: The Effects of Content and Timing of Jury Instructions*, 124 YALE L.J. 1690, 1729–30 (2015) (conducting study of mock jurors and concluding that giving debiasing instructions before jurors heard evidence had significant effect on jury verdicts). Instructions, especially those that are explained, also deter jurors from making improper arguments during deliberations. See generally MIRJAN R. DAMASKA, EVIDENCE LAW ADRIFF (1997).

180 Sklansky, *supra* note 179, at 416 (“[T]he growing body of research on debiasing gives reason to think that evidentiary instructions could do exactly what we want them to do, if what we want them to do is make it less likely that jurors will overrely on particular kinds of evidence or react emotionally to it.”).

and securing a just determination,”<sup>181</sup> then the way to do that is to expand the gatekeeping function.

Imagine the sea change that could be effected if the Rules of Evidence, which curiously contain no definition of “evidence,”<sup>182</sup> included the following definition: *Evidence includes anything that may come to a juror’s attention and factor into a juror’s deliberation.* This simple definition could do immeasurable work in focusing litigators, and in turn judges, to think more broadly about the things jurors consider to be evidence. Such a definition would also encourage litigators to recognize that this evidence too should be checked for relevance and trustworthiness, and screened for unfair prejudice.

Consider how this could play out with respect to dress at a sexual assault trial. It is hard to imagine any probative value in how a rape victim is dressed for trial; however, even assuming *arguendo* there were some probative value, clearly any value is outweighed by the risk of unfair prejudice under Rule 403, especially since unfair prejudice includes confusing the issues. A similar Rule 401/Rule 403 balancing could be done with respect to a law enforcement officer who testifies in uniform, or a surgeon witness in a medical malpractice case who wears, or does not wear, her white surgical coat. In all these instances, bringing the Rules of Evidence to such evidence might warrant an instruction to the jury reminding them that their assessment of each witness should be based on the witness’s testimony, and not the clothes they wear.<sup>183</sup>

Bringing the Rules of Evidence to other evidence could also do much-needed work in concretizing the harms of other evidence. Consider the presence of a cadre of uniformed police officers in the galley at a police brutality trial, or family member spectators wearing buttons depicting the victim at a homicide trial, or spectators at a rape trial wearing buttons that say “Women Against Rape.” Instead of having only the high hurdle of the Due Process Clause to determine whether the presence of the buttons deprives the defendant of a fair trial,<sup>184</sup> the litigants and court would also have recourse under the Rules of Evidence. After all, the spectators are not witnesses with personal knowledge,<sup>185</sup> and certainly are not subject to the oath of truthfulness testifying witnesses must make.<sup>186</sup> The buttons that say “Women Against Rape” have little if any probative value<sup>187</sup> and are certainly prejudicial.<sup>188</sup>

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181 FED. R. EVID. 102.

182 Evidence is not even defined in the definitions section. *See id.* 101(b).

183 This analysis would also be applicable in the case of a witness wearing a crucifix, yarmulke, or some other clothing protected by the First Amendment. The court, while recognizing the First Amendment concerns, could instruct the jury along the lines of Rule 610, telling the jury that they should not use the presence of religious garb as a factor in assessing the witness’s credibility. *See* FED. R. EVID. 610.

184 On the Court’s reluctance to turn to due process these last few decades, see Tracey L. Meares, *What’s Wrong with Gideon*, 70 U. CHI. L. REV. 215, 216–20 (2003).

185 *See* FED. R. EVID. 602.

186 *See id.* 603.

187 *See id.* 401.

188 *See id.* 403.

The jurors may even think the spectators are privy to evidence—from the media or from pretrial hearings—that has been closed to the jurors.<sup>189</sup> A similar analysis could be done with respect to the presence of family members or friends in the courtroom. There are both First Amendment and policy reasons why a defendant's family members and friends should be permitted in the courtroom.<sup>190</sup> Even still, viewed through the lens of the rules governing the balancing of probative value against the risk of unfair prejudice,<sup>191</sup> it should be clear that the presence of family members has little probative value at all in most cases, but carries with it the risk of unfair prejudice. Indeed, the presence of family members also raises the specter of improper character evidence<sup>192</sup> to the extent their presence communicates that they are vouching for the character of the defendant, and believe the defendant is incapable of having committed the charged crime. None of this is to suggest that society would be better if spectators were excluded. As Professor Jocelyn Simonson observes, spectators serve an important function, providing support to the accused and serving as a bulwark against the outsized power of the state.<sup>193</sup> As such, this proposal does not challenge the presence of spectators. It does, however, suggest that the Rules of Evidence can play an important role in focusing attorneys and judges on the danger of unfair prejudice and the benefit of a jury instruction barring jurors from using spectators *as* evidence.

Lastly, consider race, or for that matter gender or any other protected characteristic. If brought to bear upon race or gender, the Rules of Evidence could even further the goal of equal justice before the law. Certainly race alone should have no probative value;<sup>194</sup> surely considering race—whether to tip the scales against or in favor of a defendant—is invariably prejudicial. More to the point, the implicit association of blackness or brownness with criminal acts violates the ban on character evidence to show propensity.<sup>195</sup> As such, the Rules of Evidence would warrant steps to dissuade jurors from using race as evidence. At a minimum, it would authorize the judge to give

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189 In addition, the buttons should be inadmissible under the rules barring hearsay, since such actions amount to nonverbal statements offered for the truth of the matter asserted, that the defendant is guilty. *See* FED. R. EVID. 801–802. At a minimum, the presence of the spectators at a rape trial wearing such buttons implies that a rape *has* taken place—an issue for the fact finder. It is also likely to be interpreted as communicating that the jurors should find the defendant guilty.

190 *See* Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173 (2014).

191 *See* FED. R. EVID. 401, 403.

192 *See* FED. R. EVID. 404–405.

193 *See* Simonson, *supra* note 190.

194 I am excluding situations where race is part of the description of a suspect and for that reason has probative value. I am also excluding situations where race is relevant for some other non-unfairly prejudicial reason, such as to explain why a black youth's flight from the police might be probative of fear of the police, rather than of consciousness of guilt. *See* Gonzales Rose, *supra* note 25.

195 *See* FED. R. EVID. 404.

an instruction barring jurors from considering race (or for that matter gender) as evidence, and even warning jurors about implicit biases by making race salient, as scholars such as Cynthia Lee,<sup>196</sup> L. Song Richardson,<sup>197</sup> and Josephine Ross<sup>198</sup> recommend. Indeed, at least one federal judge has already begun giving implicit bias instructions to jurors.<sup>199</sup> In some situations, particularly situations involving interracial crime, it could even strengthen the argument for permitting a party to ask race-sensitive questions during voir dire,<sup>200</sup> or for requiring implicit bias orientation before empanelment,<sup>201</sup> or for introducing expert testimony on implicit biases under Rule 702. Attending to race is even consistent with the Court's recent aspiration in *Peña-Rodriguez v. Colorado*: "It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons."<sup>202</sup>

While jury instructions and similar tools may seem at first blush ineffective weapons against jurors using race as evidence, consider the research.

196 Lee, *supra* note 122.

197 Richardson, *supra* note 112.

198 Josephine Ross, *Cops on Trial: Did Fourth Amendment Case Law Help George Zimmerman's Claim of Self-Defense?*, 40 SEATTLE U. L. REV. 1 (2016).

199 Judge Mark Bennett of the Northern District of Iowa has begun instructing jurors as follows:

Do not decide the case based on "implicit biases." As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, "implicit biases," that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.

Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 859 (2012) (quoting from Judge Bennett's instruction). The California Model Instructions also include an instruction on implicit biases. See CAL. FORMS OF JURY INSTRUCTION § 113 (2012).

200 The Court has long held that a criminal defendant does not have an automatic right to ask race-sensitive questions during voir dire; rather, the right is guaranteed only in limited circumstances, such as when the case involves a victim of a different race or it is a capital case. See *Rosales-Lopez v. United States*, 451 U.S. 182 (1981) (holding court must make voir dire inquiry into racial prejudice when "defendant and victim are members of different racial or ethnic groups"); *Ham v. South Carolina*, 409 U.S. 524 (1973) (holding trial judge was required to interrogate jurors on racial prejudice after defendant's timely request). Absent such circumstances, the use of race-sensitive questions during voir dire is committed to the discretion of the trial court. See *Ristaino v. Ross*, 424 U.S. 589 (1976).

201 Along these lines, Anna Roberts has argued for educating potential jurors about biases while they wait to be empaneled. See Roberts, *supra* note 199.

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

Focusing briefly on implicit biases, several studies have concluded that a specialized jury instruction designed to mitigate implicit racial bias “tempered . . . racial disparity” in outcomes between black defendants and white defendants when the victim in both scenarios was black.<sup>203</sup> One study even demonstrated that debiasing instructions presented before a trial commenced had a significant debiasing impact on guilt determinations by jurors who were aversive racists.<sup>204</sup>

To be sure, there will be situations where other evidence is hard to exclude entirely, either because of constitutional or practical concerns. After all, witnesses must wear some type of clothing. Family members, of both the defendant and any victim, have a right to attend trial. Race and gender are perhaps impossible to not see.<sup>205</sup> But even when the presence of other evidence is unavoidable, calling attention to it as evidence is important. It can prompt judges to give instructions, pursuant to Rule 102, to ensure that jurors do not misuse this evidence.<sup>206</sup> And it can get us closer to verdicts untainted by improper considerations.

There are three more things to be said about this proposal. The first anticipates a straightforward question: If jurors are so flawed, why not abandon the jury system altogether? Setting aside the obvious hurdle—the constitutional right to a jury trial in felony cases—the more complete answer is that judges are likely no better.<sup>207</sup> At least not now. The solution, therefore, is important in jury trials and in bench trials. In both instances, some effort must be made to bring the Rules of Evidence to bear on all of the evidence the fact finders consider, including what this Article terms “other evidence.”

The second anticipates another straightforward question: Why does any of this matter? Put differently, the response to this proposal might be: What is wrong with jurors considering evidence outside the rules? Maybe jurors *should* consider how a witness is dressed. And a defendant’s demeanor. And race and gender. In short, maybe the status quo is fine. To borrow from

203 JENNIFER K. ELEK & PAULA HANNAFORD-AGOR, NAT’L CTR. FOR STATE COURTS, CAN EXPLICIT INSTRUCTIONS REDUCE EXPRESSIONS OF IMPLICIT BIAS? NEW QUESTIONS FOLLOWING A TEST OF A SPECIALIZED JURY INSTRUCTION (2014); see Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621, 633 (2005).

204 See Ingriselli, *supra* note 179, at 1729–30, 1738.

205 Indeed, as Professor Osagie Obasogie has demonstrated, even blind individuals “see” race. See OSAGIE K. OBASOGIE, BLINDED BY SIGHT: SEEING RACE THROUGH THE EYES OF THE BLIND (2014). For a discussion of evidence that jurors “see” race, even when race is not mentioned, see John M. Conley et al., *The Racial Ecology of the Courtroom: An Experimental Study of Juror Response to the Race of Criminal Defendants*, 2000 WIS. L. REV. 1185, 1213–14.

206 As Judge Weinstein observed in *United States v. Jackson*, “Rule 403, read in light of Rule 102, contemplates a flexible scheme of discretionary judgments by trial courts designed to minimize the evidentiary costs of protecting parties from unfair prejudice.” 405 F. Supp. 938, 945 (E.D.N.Y. 1975).

207 See James R. Steiner-Dillon, *Epistemic Exceptionalism* (Aug. 5, 2018) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3130745](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3130745) (using empirical research to debunk the assumption that judges are more “objective” or “rational” than jurors).

Professor Patricia Williams, because “subject position is everything in my analysis of the law,”<sup>208</sup> my response is deeply personal. I am not just a scholar who writes and teaches in the areas of evidence and criminal justice. I am also a black man. The status quo might be fine for some. But it is not fine when I think of the cases I tried as a federal prosecutor or the cases I now teach. It is certainly not fine when I think about who is found guilty, and who is not; who is believed, and who is not; who receives lenient plea offers and who does not. And who is not charged at all. If nothing else, we should at least be able to justify why the Rules of Evidence apply to some things the jurors consider—evidence that, out of blind habit and custom, is formally announced and offered as evidence—and why it does not apply to other things that jurors consider. Allow me to take this a step further. One of the tenets of Critical Race Theory is that we “ask the other question.”<sup>209</sup> I do so here. Who benefits from the status quo when we pretend dress does not matter, or demeanor does not matter, or the presence of family members does not matter, or language ability or upspeak or race or gender does not matter? Who benefits? And who does not?

The third thing to be said is this: while this proposal is forward-looking in its ambition, it is also backward-looking. A recent biography of John Henry Wigmore, our “dean of evidence,”<sup>210</sup> makes clear that Wigmore was not a rigid legal formalist, as originally assumed. Rather, Wigmore embraced contingency and flexibility. Particularly in the context of criminal trials, Wigmore embraced scientific knowledge and urged judges to accept contributions from the social sciences.<sup>211</sup> In many respects, this project is of a piece with Wigmore’s approach to evidence, allowing judges to respond to not only what was traditionally thought of as evidence, but to respond as well to what social science tells us jurors think of as evidence. In a sense, this intervention is another step in the project Wigmore began in late 1800s.

In the end though, it is the forward-looking aspect of this project that is most important. Some years ago, Professor John Langbein wrote:

From the Middle Ages to our own day, the driving concern animating the Anglo-American law of evidence has been to protect against the shortcomings of trial by jury. Despite its merits, jury trial has always been fraught with danger. . . .

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208 PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 3 (1991) (“Since subject position is everything in my analysis of the law, you deserve to know that it’s a bad morning.”).

209 Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 *STAN. L. REV.* 1183, 1189 (1991).

210 Franklin Strier, *Making Jury Trials More Truthful*, 30 *U.C. DAVIS L. REV.* 95, 113 n.54 (1996); see also John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 *COLUM. L. REV.* 1168, 1170 (1996) (describing Wigmore as our “pioneering scholar of the history of the law of evidence”).

211 William R. Roalfe, *John Henry Wigmore—Scholar and Reformer*, 53 *J. CRIM. L. CRIMINOLOGY & POLICE SCI.* 277, 281–82 (1962).

. . . Accordingly, our law of evidence strives to prevent error by excluding from jurors information that might mislead them.<sup>212</sup>

This project strives to prevent error by pointing a much-needed light on so many of the other things that function as evidence. The hope is that when jurists and litigators *see* this other evidence for what it is—evidence too—they will recognize that this evidence also needs to be screened for relevance and prejudice.

#### CONCLUSION

Imagine again walking through a busy courthouse. The sexual assault trial is still going on in Courtroom One—the alleged victim is on the stand, modestly dressed, while the defendant sits at the defense table in a prep school blazer—but this time the judge, after weighing the probative value against the risk of prejudice, pauses to remind jurors that the evidence is the testimony they will hear from the witness, and that how she is dressed in court, or indeed how the defendant is dressed, should not factor into their deliberations. In Courtroom Two, an insurance fraud case, the defendant's wife and three small children still sit in the gallery, but this time the judge begins with some preliminary instructions to the jury. They include an instruction that their job is to decide the facts of the case based on evidence, not sympathy. The judge adds that the presence of the defendant's family members is not evidence and should not weigh in their determinations. In Courtroom Three, the gun possession case, the judge has already admonished the jurors that they should judge the uniformed officer's testimony just as they would any witness's testimony—the uniform is not like Wonder Woman's lasso of truth, the judge jokes—and now, with the jurors excused, the prosecutor and defense lawyer, attuned that jurors may be using race as evidence, are trying to reach agreement about the best way to minimize any race-based implicit biases or assumptions jurors might have about the black defendant's character or criminal history, or about any witness's character for truthfulness. At the end of the trial, the judge will reemphasize this point by instructing the jurors on what is not evidence and by providing them a checklist of the witnesses who testified, the exhibits that were admitted, and directing the jurors to base their verdict solely on the listed evidence and nothing else.

There are other courtrooms where jury selection is just beginning, where witnesses are already testifying and exhibits are being authenticated and offered into evidence, where jurors are being instructed on the law, and where jurors are returning from deliberations, ready to state their verdict in open court. And not just other courtrooms. There are law firm conference rooms where lawyers are hammering out settlements in civil cases, and busy hallways where prosecutors and defense lawyers are negotiating pleas, all in the shadow of trial as they consider how their cases will play to jurors if they do not reach a disposition. Except now they know that all evidence—includ-

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212 Langbein, *supra* note 210, at 1194–95.



ing the types of evidence that have normally gone unchecked by evidentiary gatekeepers—will be tested for its relevance and trustworthiness, and screened for its unfair prejudice. They will be able to argue about it, and even sometimes have it excluded.

And throughout all of it, we will know that even though there is much work to be done before we have a perfect system, we have at least improved it. We are at least closer to getting judgments and dispositions that can give us epistemic comfort that the right result will be reached. This has been the ambition of this Article: to rethink the Rules of Evidence so that they address all evidence.

