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Antiracist Expert Evidence

ABSTRACT. Since 2020, when mass protests against racism swept across the United States, scholars, lawyers, and the general public have become increasingly aware that racism permeates society and the criminal legal system, from overt racial animus to the nuanced effects of structural racism. Demonstrating the influence of racism is therefore vital to the practice of criminal defense, yet many attorneys do not know how to prove racism in court. We surveyed over seven hundred criminal-defense attorneys across the United States, and nearly half had never heard of expert witnesses testifying or submitting written reports on racism—what we call "antiracist expert evidence." This finding would be unremarkable if such experts were unhelpful, but nearly ninety percent of surveyed attorneys expected that antiracist expert evidence would benefit their criminal-defense practices.

This Article is the first to provide an empirical, theoretical, and doctrinal examination of the use of expert testimony to prove racism. It first conceptualizes, categorizes, and instantiates six different expressions, manifestations, or mechanisms of racism relevant to criminal defense: (1) racist affiliations and views; (2) racist language, sounds, and imagery; (3) racial stereotypes; (4) racial disparities; (5) implicit racial bias; and (6) the impact of racism on health and behavior. It next presents and analyzes survey results showing criminal-defense attorneys' levels of familiarity with antiracist expert evidence, their perceptions of its utility, and the barriers they anticipate to its introduction. This Article then examines these barriers and identifies means of overcoming them. By elevating the voices of criminal defenders and reviewing federal and state case law, we seek to spark the collective imagination about how antiracist expert evidence can help level the evidentiary playing field for criminal defendants.

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INTRODUCTION

Evidence law has long imposed unequal evidentiary burdens on people of color by silencing proof of their experiences of racism. In the nineteenth century, many states had race-based witness-competency rules that prevented Black, Indigenous, Mexican, and Asian people from testifying at trial either entirely or against white parties.[1] Similarly, enslaved people could not testify against white people.[2] The evidence provisions of the Federal Fugitive Slave Act of 1850 prohibited alleged fugitive enslaved people from testifying in any trial or fugitive-slave hearing.[3] Without the ability to testify, people of color were deprived of evidence to support their claims of and defenses against horrific racial wrongs like hate violence and enslavement. This deprivation meant that parties of color and those representing their interests had a significantly harder time meeting their evidentiary burden—the obligation to produce evidence to raise and prove issues at trial. While race-based witness-competency rules and the Fugitive Slave Act have long since been abolished, parties of color still experience an unequal evidentiary burden when they want to prove the existence, effect, or impact of racism.

One explanation for this unequal evidentiary burden is the role white normativity plays in law enforcement and criminal prosecution. Experiences or perspectives traditionally associated with being white are assumed to be the norm that applies to everyone.[4] Evidence that accords with these experiences or perspectives receives implicit judicial notice or is accepted with less searching scrutiny, while evidence that does not must overcome rigorous and, at times, misapplied evidentiary standards.[5]

Here are six examples of white-normative assumptions, followed by a counter perspective that accounts for the pervasive experiences of Black, Brown, and Indigenous people in the United States.

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1. *See* Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2245-48 (2017); Alfred Avins, *The Right to Be a Witness and the Fourteenth Amendment*, 31 MO. L. REV. 471, 473-77 (1966); *see also* S. REP. NO. 38-25, at 2-6 (1864) (collecting race-based witness-competency statutes).

2. Thomas D. Morris, *Slaves and the Rules of Evidence in Criminal Trials*, 68 CHI.-KENT L. REV. 1209, 1209 (1993).

3. Fugitive Slave Act of 1850, ch. 60, § 6, 9 Stat. 462, 463 (repealed 1864); DON E. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY 231-32 (Ward M. McAfee ed., 2001).

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

5. Gonzales Rose, *supra* note 1, at 2285-87 (discussing how judges often presume that a defendant's flight from police is abnormal, an example of "white racialized reality evidence" improperly being given "implicit judicial notice").

Assumption	Counter Perspective
Only the guilty run from the police.	People of color might flee the police to avoid police violence or racial profiling.
A reasonable person would feel free to walk away from a police encounter.	People of color might feel afraid to walk away due to prior police interactions or exposure to police violence against people of color on the news or social media.
Certain language and symbols, like the OK hand sign, are race-neutral and innocuous.	The coded language or symbol may relate to white supremacy.
Rap lyrics written by a defendant are confessions or indicate a criminal lifestyle.	The lyrics might be fictive, metaphorical, or otherwise consistent with the genre's traditions and personae.
A police interaction—such as a pat-down search—is a race-neutral, one-off happenstance.	The action may be part of an established pattern of conduct against people of color.
Witness identifications are highly reliable.	Witnesses may misidentify people of races different from their own, and people of color may be perceived as all looking the same.

Prosecutors might present each of these white-normative assumptions to a court or jury as commonsense conclusions without presenting evidence. One of us has argued that when judges automatically accept these racialized assumptions, they take "implicit judicial notice" of them.[6] By contrast, when people of color want to prove the fact of their racialized realities—proof of their lived experiences of racism—they must secure and introduce evidence.[7] This amounts to an unequal evidentiary burden regarding fundamental questions of fact.

Indeed, the assumptions provided above raised several factual questions:

- Did a defendant avoid police due to fear of racial profiling or violence?

6. *See id.* at 2285-86.

7. *See id.*

- Who is a "reasonable person," and how do they act in police encounters?
- Do certain symbols or language indicate racial bias?
- Do rap lyrics tend to prove criminal activity, or is the prosecution playing on racial stereotypes?
- Was a police search or interaction racially motivated or indicative of systemic bias?
- Are cross-racial witness identifications reliable?
- Has racism—whether individual or structural—impacted the underlying facts, policing, or prosecution in the case? (This is a fundamental question, implicit in the questions above.)

Each of these questions calls for evidence of racism to be presented and explained to the jury.

Evidence of racism can come in different forms. Judicial notice is appropriate when the fact of racism is so indisputable that the court can enter it into the record without any formal presentation of evidence.[8] Courts have taken judicial notice of racism in some cases, such as a history of Black people's exclusion from craft unions,[9] the Ku Klux Klan's history of violence and racial harassment,[10] the "social consequences of ethnic humor,"[11] the existence of racial hatred in a county,[12] and a history of racial discrimination in voting.[13] For facts that do not meet the bar for judicial notice, evidence of racism can be presented through fact witnesses, lay witnesses, and expert witnesses. Fact witnesses can testify about things they have observed or experienced, including racism. Lay witnesses can testify about opinions they have formed based on their perceptions, such as those formed through lived experiences of racism or within a community of color.[14] And finally, expert-witness evidence is allowed when specialized knowledge would help the factfinder understand the evidence or determine a fact at issue.[15] Each of these forms of evidence is important and—as a matter of constitutional

8. *See, e.g.*, FED. R. EVID. 201(b) ("The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.").

9. United Steelworkers of Am. v. Weber, 443 U.S. 193, 198 n.1 (1979).

10. Marshall v. Bramer, 828 F.2d 355, 357-58 (6th Cir. 1987).

11. Snell v. Suffolk County, 782 F.2d 1094, 1105 (2d Cir. 1986).

12. *Id.* at 1105-06 (holding judicial notice by a district-court judge to be unrequired but "at best constitut[ing] harmless error").

13. Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1, 831 F. Supp. 1453, 1459 (E.D. Ark. 1993), *aff'd*, 56 F.3d 904 (8th Cir. 1995).

14. FED. R. EVID. 701.

15. FED. R. EVID. 702.

due process and fairness—should be made available to criminal defendants where warranted.

This Article focuses on the use of expert evidence to prove racism because it is underexplored in scholarship, is underutilized by counsel, and in some cases may be needed to help juries understand racism. For instance, in the six situations detailed above, a Black, Latine, Indigenous, or similarly racially minoritized criminal defendant might need an expert witness to explain:

- studies that show how the prevalence of racial profiling and police violence in a community engender negative police-community relations, which might clarify the reasons for a defendant's flight from a police officer;
- how racial trauma related to prior police encounters might influence a defendant's behavior during a police interaction;
- how a police officer's tattoo or social-media memes indicate affiliation with a white-supremacist group;
- how the genre of rap music utilizes metaphor, alter-ego personification, and exaggeration, which are unfairly mistaken as evidence of involvement in crime;
- statistics and policy analysis that demonstrate that a police department disproportionately targets people of color for stops and searches; or
- the potential unreliability of cross-racial eyewitness identification.

Experts from the social sciences, humanities, behavioral-health sciences, or other academic or practice areas could provide data, research, or an explanation of evidence that counters white-normative assumptions or that otherwise tends to prove the existence, effect, or impact of racism in a case.

Since the summer of 2020, when mass protests against racism reverberated across the country, scholars, lawyers, and the general public are increasingly aware that racism exists in the criminal legal system and broader society in a variety of individual and structural forms.[16] Yet many attorneys do not know

16. *See* Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, BRENNAN CTR. FOR JUST. (May 21, 2021), https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder [https://perma.cc/Z8LV-NUHS] (describing how policymakers agreed to the demands of community-led movements inspired by George Floyd's murder but followed through inconsistently); Adam D. Fine, Thiago R. Oliveira, Jonathan Jackson, Ben Bradford, Rick Trinker & Krisztián Pósch, *Did the Murder of George Floyd Damage Public Perceptions of Police and Law in the United States?*, 62 J. RSCH. CRIME & DELINQ. 333, 356 (2024) ("Respondents reported more negative perceptions of

how to prove racism in court. Attorneys are particularly unfamiliar with using expert witnesses to prove racism—what we call "antiracist expert evidence." This is cause for concern because racism too often impacts the context, underlying facts, investigation, policing, prosecution, and sentencing in criminal cases.

We surveyed over seven hundred criminal-defense attorneys across the United States, and aside from implicit-bias evidence, nearly half of the respondents had never heard of the types of antiracist expert evidence we asked them about.[17] This would be unremarkable if such experts were not considered helpful, but most attorneys surveyed—approximately 90%[18]—stated that antiracist expert evidence would benefit their criminal-defense practice.

This Article is the first piece of scholarship to provide a theoretical, doctrinal, and empirical examination of the use of expert witnesses to prove racism. It presents and analyzes survey results exploring criminal-defense attorneys' knowledge about antiracist expert evidence, their perceptions of its utility, and the barriers they anticipate to its introduction. This Article aims to spark the collective imagination about the potential uses of such evidence to bring about more racial equity in trial outcomes. To this end, the Article conceptualizes, categorizes, and instantiates antiracist expert evidence. It also identifies potential obstacles to the introduction of such evidence and provides suggestions that could make antiracist expert evidence more accessible.

Although the surveyed defense attorneys overwhelmingly believed that antiracist expert evidence could benefit their criminal-defense practices, they also recognized several potential barriers to its use. These obstacles included cost, availability, jurors' resistance, judges' attitudes, and overly narrow judicial interpretations of the rules and standards of admissibility for expert evidence, especially the relevance of evidence of racism. These voices from the trenches of criminal defense illustrate that evidence of racism—particularly in its more structural, unconscious, and covert forms—is difficult for criminal defendants to introduce at trial, despite its utility. This evidentiary imbalance reinforces racial disparities outside the courtroom and is disconcertingly evocative of historical evidentiary practices that silenced and prevented people of color from proving racism in court.

The Article proceeds in three Parts. In Part I, we provide a taxonomy of our subject. Antiracist expert evidence stands to prove at least six different

police and more negative perceptions of the legitimacy of the law following Floyd's murder."); Cynthia J. Najdowski & Margaret C. Stevenson, *A Call to Dismantle Systemic Racism in Criminal Legal Systems*, 46 LAW & HUM. BEHAV. 398, 398, 403-07 (2022) (proposing policy changes to accompany the October 2021 American Psychological Association resolution to "dismantle systemic racism in criminal legal systems").

17. *See infra* Table 6.

18. *See infra* Table 6.

expressions, manifestations, or mechanisms of racism: (1) racist affiliations and views; (2) racist language, sounds, and imagery; (3) racial stereotypes; (4) racial disparities; (5) implicit racial bias; and (6) the impact of racism on health and behavior. We outline how expert witnesses have already been used to introduce and explain these types of antiracist evidence in state and federal trials, and we highlight the relevance of this evidence to issues of fact in the cases where it was introduced. Then, in Part II, we lay out the findings of our national survey of criminal-defense attorneys. In addition to exploring attorneys' familiarity with and perceptions of the utility of antiracist expert evidence, we use examples shared by the attorneys to highlight the scope and value of such evidence. Finally, in Part III, we examine barriers to the introduction of antiracist expert evidence, as illustrated through survey responses and case law. We offer recommendations to overcome these barriers and promote wider use of antiracist expert evidence.

I. AN ILLUSTRATIVE TYPOLOGY OF ANTIRACIST EXPERT EVIDENCE

This Part categorizes six types of expert-testimony content, each addressing a distinct expression, mechanism, or manifestation of racism. It explores how antiracist expert testimony has already been used in court and could be further expanded in the pursuit of fairer processes and outcomes. As our national survey will show in Part II, antiracist expert evidence is not yet well known, and so there are limited examples of its usage in existing case law and scholarship. This Part's overview of antiracist expert evidence, therefore, should not suggest that its admission is already widespread, routine, or unimpeded.

An expert witness is a person who possesses specialized knowledge, skill, or experience in a particular field or subject matter relevant to a legal case.[19] To be admissible, an expert's testimony must meet the criteria of relevance,[20] reliability,[21] and usefulness.[22] Expert witnesses provide testimony and write reports for court proceedings to help factfinders (whether juries or judges in a bench trial) understand complex matters or determine the facts at issue.[23] Generally, parties

19. *See* FED. R. EVID. 702.

20. *See* FED. R. EVID. 401.

21. *See* FED. R. EVID. 702(b)-(d).

22. *See* FED. R. EVID. 702(a).

23. *See* Nat'l Inst. of Just., *Expert Witnesses*, OFF. JUST. PROGRAMS (Aug. 7, 2023), https://nij.ojp.gov/nij-hosted-online-training-courses/law-101-legal-guide-forensic-expert/introduction-law-101/expert-witnesses [https://perma.cc/E44E-5YW2].

seek, select, and introduce their own expert witnesses, but in some rare circumstances, a court may also appoint an expert.[24]

Demonstrating racism can be complicated. Since jurors are disproportionately white,[25] they may not be familiar with how racism is experienced, or they may deny that racism persists in the United States. They may believe that racism only manifests itself in overt expressions of disdain or animus rather than in more structural and covert forms. For the average juror of any racial background, the history, context, and implications of a racist action, policy, or practice may be unknown and need explanation. Racial disparities could be made apparent through data that require explanation if laypeople are to understand them. The physical, mental, and emotional impacts of racism, and their consequent effects on conduct, might need to be assessed and described by a health professional. Racism is a complex social phenomenon, and those who study or work to address racism could assist a jury in contextualizing its implications within a given case.

Before proceeding, it is critical to define what we mean by racism and antiracism. Racism is the idea that one racialized group is superior or inferior to another,[26] and it is also the conduct, policies, or practices that exclude or harm a racialized and typically marginalized group.[27] Scholars have theorized that

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24. *See* Daniel L. Rubinfeld & Joe S. Cecil, *Scientists as Experts Serving the Court*, 147 DAEDALUS 152, 152, 155 (2018) (stating that the "common law tradition of the United States relies on the litigating parties to . . . select[] witnesses" and that those parties have "far greater leeway in shaping the evidence presented by expert witnesses" than other kinds of witnesses, later explaining that "[a]ppointment of experts by the federal courts under Rule 706 is rare"); FED. R. EVID. 706.

25. *See* Hiroshi Fukurai, Edgar W. Butler & Richard Krooth, *Where Did Black Jurors Go? A Theoretical Synthesis of Racial Disenfranchisement in the Jury System and Jury Selection*, 22 J. BLACK STUD. 196, 200-01 (1991); *see also generally* James E. Coleman, Jr., *The Persistence of Discrimination in Jury Selection: Lessons from North Carolina and Beyond*, CHAMPION, June 2018, at 28 (highlighting that the *Batson* framework has failed to root out racial bias in state-court jury selection).

26. *See Racism*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/racism [https://perma.cc/KS2Q-QFZZ] (defining racism as the "belief that race is a fundamental determinant of human traits and capacities and that racial differences produce an inherent superiority of a particular race"); *see also* Keith Lawrence & Terry Keleher, Chronic Disparity: Strong and Pervasive Evidence of Racial Inequalities 1 (2004) (unpublished manuscript), https://www.intergroupresources.com/rc/Definitions%20of%20Racism.pdf [https://perma.cc/T76E-A4K8] ("Structural Racism in the U.S. . . . is a system of hierarchy and inequity, primarily characterized by white supremacy—the preferential treatment, privilege and power for white people at the expense of Black, Latino, Asian, Pacific Islander, Native American, Arab and other racially oppressed people.").

27. *See* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 184 (4th ed. 2023) (defining racism as "[a]ny program or practice of discrimination, segregation, persecution, or mistreatment based on membership in a race or ethnic group").

racism is perpetuated through two mechanisms—people and structures[28]—and that structural racism encompasses two subtypes—institutional and systemic.[29] Individual racism can be interpersonal (between people) or intrapersonal (internalized)[30] and may be conscious or unconscious.[31] Structural racism is the overarching framework that shapes and legitimizes racial disparities and inequities throughout society—including through its systems and institutions.[32] Systems are interconnected networks and mechanisms that work together to achieve societal functions.[33] Therefore, systemic racism refers to the ways in which these systems—such as the legal, economic, and educational systems—shape and

28. *See generally* EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA (6th ed. 2022) (discussing how racism is perpetrated by individual actions like claiming color-blindness and by policies like redlining).

29. *See Critical Race Theory: Frequently Asked Questions*, LEGAL DEF. FUND, https://www.naacpldf.org/critical-race-theory-faq [https://perma.cc/5JR3-37BS] ("[R]acism goes far beyond just individually held prejudices, and . . . it is in fact a systemic phenomenon woven into the laws and institutions of this nation."); *see also Glossary for Understanding the Dismantling Structural Racism/Promoting Racial Equity Analysis*, ASPEN INST. [1], https://www.aspeninstitute.org/wp-content/uploads/files/content/docs/rcc/RCC-Structural-Racism-Glossary.pdf [https://perma.cc/B7X9-S7EG] (defining structural and systemic racism).

30. Mahzarin R. Banaji, Susan T. Fiske & Douglas S. Massey, *Systemic Racism: Individuals and Interactions, Institutions and Society*, 6 COGNITIVE RSCH. 82, 83 (2021) (discussing how individual human beings perpetuate racism not only by interacting with others, but also by being alone, as attitudes, beliefs, and behaviors are "intrinsically enmeshed into the foundation of the mental systems").

31. *See Forms of Racism: Individual vs. Systemic*, CALGARY ANTI-RACISM EDUC. COLLECTIVE, https://www.aclrc.com/forms-of-racism [https://perma.cc/ND42-EGPH] ("Individual racism refers to an individual's racist assumptions, beliefs or behaviours and is 'a form of racial discrimination that stems from conscious and unconscious, personal prejudice'" (quoting FRANCES HENRY & CAROL TAYLOR, THE COLOUR OF DEMOCRACY: RACISM IN CANADIAN SOCIETY 329 (2006))); Banaji et al., *supra* note 30, at 83 (noting that racism and bias can be "explicit and conscious" or may occur through "implicit cognition" as people "may not be aware of the harm they cause").

32. *See generally* Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOCIO. REV. 465 (1997) (proposing an idea of "racialized social systems"); Lawrence & Keleher, *supra* note 26 (proposing an idea of "Structural Racism" that "lies *underneath, all around and across society*," "encompass[ing]: (1) history, which lies *underneath* the surface, providing the foundation for white supremacy in this country. (2) culture, which exists *all around* our everyday lives, providing the normalization and replication of racism and, (3) interconnected institutions and policies, the[] key relationships and rules across society providing the legitimacy and reinforcements to maintain and perpetuate racism").

33. *See* Banaji et al., *supra* note 30, at 86 (discussing the racial impacts that institutionalized practices have on society, such as "Black segregation levels steadily climbing through the 1920s" due to actions of the real-estate industry).

legitimize racial disparities and inequities.[34] Institutions, on the other hand, are specific organizations or entities that have defined roles within society.[35] Accordingly, institutional racism refers to the ways in which these institutions — such as courts, police departments, banks, and schools — shape and legitimize racial disparities and inequities.[36]

Antiracism is the active effort to counter and dismantle racism, promote racial equity, and foster racial justice.[37] In the evidence-law context, racism can be countered by revealing its existence, explaining how it manifests itself and operates, and elucidating how it plays out in or impacts the underlying facts, investigation, or prosecution of a case. Antiracist expert evidence consists of testimony or reports that are provided by a person with specialized knowledge about racism and that identify, explain, and address the presence and impact of racism in a case. It educates juries, judges, and attorneys with the goal of mitigating the influence of racism in criminal trials. In this way, antiracist expert evidence advances fairness, equity, and justice, instead of perpetuating societal subordination.[38]

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34. *See* Gilbert C. Gee & Chandra L. Ford, *Structural Racism and Health Inequities: Old Issues, New Directions*, 8 Du Bois Rev. 115, 124-25 (2011) (describing how contemporary disparities can be considered "the cumulative effects of macrolevel systems interacting with one another in ways that generate and sustain racial inequalities"); *see also* Shreya Atrey, *Structural Racism and Race Discrimination*, 74 Current Legal Probs. 1, 2 (2021) (describing the structural view of racism in discrimination law).

35. *See* Banaji et al., *supra* note 30, at 2-4, 17-18.

36. *See* Lawrence & Keleher, *supra* note 26, at 1 ("Institutional racism occurs *within and between institutions*. Institutional racism is discriminatory treatment, unfair policies and inequitable opportunities and impacts, based on race, produced and perpetuated by institutions (schools, mass media, etc.).").

37. *See* Alastair Bonnett, Anti-Racism 3 (2000) ("A minimal definition of anti-racism is that it refers to those forms of thought and/or practice that seek to confront, eradicate and/or ameliorate racism."). For an overview on the different ways antiracism is interpreted, see generally Yin Paradies, *Whither Anti-Racism?*, 39 Ethnic & Racial Stud. 1 (2016).

38. While antiracist expert evidence may counter and mitigate the impact of racism and produce fairer outcomes in criminal cases, it ultimately cannot dismantle racism. The criminal legal system replicates and perpetuates racial hierarchy and subordination and will continue to do so even if antiracist expert evidence were to become commonplace. Because antiracist expert evidence works within the existing legal system, it has a complicated relationship to abolitionist goals. When utilized pragmatically for criminal defense, such evidence can help produce incremental change and is not inconsistent with abolition and liberation movements. But when utilized by the prosecution in the context of hate or racially motivated crimes, the punitive and carceral nature of prosecution could conflict with core abolitionist values, even as the evidence is being used to combat racist or bigoted harm. We recognize that some consider the prosecution of hate and racially motivated crimes (including police violence) to be antiracist and that others, particularly abolitionists, do not. This is a constructive debate. *See,*

As this is the first piece of scholarship on the use of experts to prove racism, and in light of the scarcity of examples of antiracist expert evidence in use, we did not limit ourselves to the context of criminal defense. Because this Article aims to illustrate how racism can be proven in court, we highlight examples of how racism has actually been proven in real cases, whether by criminal-defense attorneys, prosecutors pursuing bias-crime charges,[39] or civil plaintiffs bringing civil-rights suits. While antiracist expert evidence is certainly underutilized, it does exist. By analyzing these existing forms of evidence, we aim to inspire defenders to consider how they might use expert evidence for antiracist purposes in a variety of contexts.

We delineate six classifications of expert-testimony content, which correspond to key expressions, mechanisms, or manifestations of racism: (1) racist affiliations and views; (2) racist language, sounds, and imagery; (3) racial stereotypes; (4) racial disparities; (5) implicit racial bias; and (6) the impact of racism on health and behavior, including racial trauma. Of course, some of these categories may overlap.[40]

A. Racist Affiliations or Views

Racist affiliations or views might be material in a variety of cases. The fact that a person holds racist beliefs about the inferiority or superiority of certain groups, or is affiliated with white nationalist, supremacist, or separatist groups

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e.g., Shirin Sinnar, *Hate Crimes, Terrorism, and the Framing of White Supremacist Violence*, 110 CALIF. L. REV. 489, 491-94 (2022) (analyzing and criticizing the framing of white-supremacist violence as a hate crime); James A. Tyner, *Hate-Crimes as Racial Violence: A Critique of the Exceptional*, 17 SOC. & CULTURAL GEOGRAPHY 1060, 1072 (2016) ("[A]n exclusive focus on individual-based hate-crimes as incidents of exceptional violence will draw attention away from those who promote and benefit from the systemic, *exemplary* inequalities of society . . . .").

39. The choice to include prosecutorial bias-crime evidence is also practical because cases involving the prosecution's use of such evidence are more prevalent. This is because prosecutors have greater access to experts and their expert evidence is admitted by courts more readily than when experts are sought and offered by the defense. *See* Jennifer L. Groscup & Steven D. Penrod, *Battle of the Standards for Experts in Criminal Cases: Police vs. Psychologists*, 33 SETON HALL L. REV. 1141, 1150, 1155 (2003) (examining data from 1,800 cases and finding that "prosecution experts were admitted significantly more often than defense proffered experts"); D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 104-12 (2000); Peter J. Neufeld, *The (Near) Irrelevance of* Daubert *to Criminal Justice and Some Suggestions for Reform*, 95 AM J. PUB. HEALTH S107, S109 (2005). These evidentiary inequities are examined in Part III.

40. In our survey, we also asked about "structural racism" and "racial trauma." Since structural racism encompasses multiple categories and racial trauma reflects the impact of racism on health and behavior, both are subsumed within the six categories taxonomized in this Section. *See infra* Part II.

or ideologies, could support an inference that this person's actions were racially biased or motivated. For instance, evidence of a person's racist affiliation or belief could explain why they targeted someone with harmful or violent action. At times, an actor—say, a hate-crime perpetrator, an arresting officer, or a complainant who was the initial aggressor—might explicitly state their racist motivations. More often, however, their true intent will need to be proven circumstantially through a showing that the actor has racist beliefs, views, or affiliations. This explanation may require specialized knowledge from an expert.

Lawyers have introduced expert evidence about the meaning of visual symbols to support an inference that the defendant bearing those symbols acted with racial bias. A recurring scenario involves tattoos. In *United States v. Diggins*, two white men were convicted of hate crimes after they shouted racial slurs at a Black man and then physically attacked him.[41] The prosecution introduced Christopher Magyarics, a senior investigative researcher with the Anti-Defamation League's Center on Extremism, to testify about the racist meaning of tattoos on defendant Diggins's body.[42] These tattoos included swastikas and "SS bolts" (symbols affiliated with Nazism), the phrase "Dirty White Boy" (referencing a prison gang), and a white-supremacist slogan, "We must secure the existence of our people and a future for white children."[43] The court found the expert testimony admissible "because it is unlikely that the jury would [otherwise] understand the significance of at least some of Diggins's tattoos, including the SS bolts and the 'Dirty White Boy' tattoo."[44] The expert's specialized knowledge would help the jury assess whether the defendant acted because of racial animus, which was relevant to the defendant's culpability for a hate crime.[45] In other cases, expert witnesses have testified about defendants' potential membership in racist

41. Emily Allen, *Judge Awards $1.2 Million to Victim in Biddeford Hate Crime*, Portland Press Herald (Nov. 14, 2023), https://www.pressherald.com/2023/11/14/judge-awards-1-2-million-to-victim-in-biddeford-hate-crime [https://perma.cc/24KC-CYVQ].

42. United States v. Diggins, No. 18-cr-00122, 2020 WL 1066979, at *2-3 (D. Me. Mar. 5, 2020), *aff'd*, 36 F.4th 302, 304 (1st Cir. 2022).

43. *Id.* at *1; *see Decoding Hate: A Short Guide to Extremist Codes, Symbols + Images*, Simon Wiesenthal Ctr. Rsch. Dep't 1, 8 (2021), https://www.wiesenthal.com/assets/pdf/decoding-hate-report-2021.pdf [https://perma.cc/V58J-QXNY]; *see also Last of 89 Members/Associates of Aryan Brotherhood of Texas and Aryan Circle Sentenced to 20 years in Federal Prison; Represents the Largest Case Prosecuted in US Focusing on White Supremacist Prison Gang Members*, U.S. Immigr. & Customs Enf't (Aug. 10, 2017), https://www.ice.gov/news/releases/last-89-membersassociates-aryan-brotherhood-texas-and-aryan-circle-sentenced-20-years [https://perma.cc/7B4U-43MH] (describing the Dirty White Boys as a violent white-supremacist gang).

44. *Diggins*, 2020 WL 1066979, at *2-3.

45. *See id.* at *1-2.

groups such as the Aryan Brotherhood or skinhead gangs by testifying about their tattoos or paraphernalia.[46]

Expert testimony on racist affiliations or beliefs has also been used in similar ways by the defense. In *Commonwealth v. Hinds*, a Black defendant claimed he acted in self-defense because he was the target of a racially motivated attack.[47] At trial, the defendant attempted to introduce two experts to testify about the racist meaning of the accuser's tattoo—that the number 211 is associated with a white-supremacist prison gang—but the lower court excluded the experts on reliability grounds.[48] The Massachusetts Supreme Judicial Court found that the exclusion of one of these experts was prejudicial error because her testimony would have provided a factual basis for the jury to understand the accuser's anti-Black affiliation, ultimately supporting the defendant's affirmative self-defense argument.[49]

In addition to proving racist affiliations, expert testimony might be employed to negate racist assumptions about an accused person's group affiliation. A particularly promising use of such evidence is in defense of overpoliced students. Law-enforcement officers and school administrators have too often assumed that students are gang members because of their race or immigration status. Databases of gang members label individuals as threats to public safety,

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46. *See* People v. Slavin, 807 N.E.2d 259, 265 (N.Y. 2004) (noting that the customary meaning of tattoos, which included a swastika and skinhead figures, could be explained by an expert witness because it potentially reflected the defendant's "subjective knowledge or thought processes"); People v. Young, 445 P.3d 591, 623-24 (Cal. 2019) (finding that an expert witness explaining the meaning behind the defendant's swastika and skinhead tattoos was unduly prejudicial because it was offered not for the purpose of demonstrating the neo-Nazi group's purpose and racist mission but instead to refute character evidence of the defendant's good character); King v. Horel, No. 06-2606, 2008 WL 4937814, at *5-6 (N.D. Cal. Nov. 17, 2008) (finding that expert-witness testimony that the defendant was an associate of the Aryan Brotherhood based on body tattoos was properly admitted because it was relevant to establishing intent and motive); United States v. Skillman, 922 F.2d 1370, 1374 n.4 (9th Cir. 1990) (describing the testimony of a special agent explaining skinhead beliefs); United States v. Mills, 704 F.2d 1553, 1559-60 (11th Cir. 1983) (affirming the admission of "quasi expert" testimony and other fact witnesses about the nature of the Aryan Brotherhood); Mason v. State, 905 S.W.2d 570, 577 (Tex. Crim. App. 1995) (finding that the trial court did not err in admitting testimony by an expert witness on the Aryan Brotherhood).

47. 166 N.E.3d 441, 446-47 (Mass. 2021).

48. *Id.* at 449-50.

49. *Id.* at 450-58; *see also* Commonwealth v. Hinds, 219 N.E.3d 252 (unpublished table decision), 2023 WL 5023449, at * 5 (Mass. App. Ct. 2023) (stating that the incorrectly excluded expert witness testified at the second trial), *rev'd*, 241 N.E.3d 721 (Mass. 2024); *Hinds*, 241 N.E.3d at 724 (admitting evidence that the defendant himself had used racial epithets against the accusers on social media). We do not focus here on the strengths of parties' claims related to racial harm and instead analyze the trial court's incorrect decision to exclude expert testimony about the accuser's tattoos.

sometimes based on daily activities such as "standing on a street corner."[50] Similarly, schools have criminalized students for allegedly drawing gang signs and have profiled and disciplined them for wearing "clothing brands associated with MS-13 [but commonly worn by non-gang members], including Versace belts, Nike shoes and Chicago Bulls jerseys,"[51] and even rosary beads.[52]

Expert witnesses could rebut these harmful assumptions about Latine, Indigenous, and Black culture, urban style, and everyday socializing. Experts could explain how certain clothing and tattoos are related to fashion rather than gang affiliation and that rosary beads are sacred items reflecting faith, not criminality. They could explain how hanging out in the park and other public areas branded as gang territory, or with family members or neighbors who are in overinclusive gang databases, is an unavoidable feature of living in overpoliced majority-minority neighborhoods, rather than something nefarious and indicative of gang affiliation.[53] They could expose how prosecutors' use of these kinds of evidence

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50. Maurizio Guerrero, *How Police "Gang Databases" Are Being Used to Wage War on Immigrants*, In These Times (Apr. 29, 2021), https://inthesetimes.com/article/gang-databases-ice-immigration-sanctuary-cities [https://perma.cc/BR59-4TUB] (quoting Press Release, Nat'l Immigr. Project, We Cannot Celebrate a Bill That Perpetuates the Criminalization of Our Communities (Mar. 3, 2021), https://nipnlg.org/news/press-releases/we-cannot-celebrate-bill-perpetuates-criminalization-our-communities [https://perma.cc/YY49-3NRQ]).

51. Joel Rose & Sarah Gonzalez, *Sports Jersey or Gang Symbol? Why Spotting MS-13 Recruits Is Tougher than It Seems*, NPR (Aug. 18, 2017), https://npr.org/2017/08/18/544365061/identifying-ms-13-members [https://perma.cc/Z45K-JSA5] (noting that these prohibitions are discriminatorily applied to Latino students); *accord* Nadra Nittle, *How Kids' Obsession with Air Jordans Helped Lead to School Uniforms and Stricter Dress Codes*, Vox (Oct. 10, 2018, 4:50 PM EDT), https://www.vox.com/the-goods/2018/10/10/17961124/air-jordans-sneaker-violence-black-youth-school-dress-codes-school-uniforms [https://perma.cc/N79T-DCVY] (observing how such prohibitions target Black teenagers "portrayed as thieving, murdering thugs" for "crav[ing] Air Jordans").

52. *See, e.g.*, Logan Smith, *School Bans Rosary Beads, Claims They're Gang Symbols*, WIS 10 (Sept. 26, 2008, 2:35 PM EDT), https://www.wistv.com/story/9035333/school-bans-rosary-beads-claims-theyre-gang-symbols [https://perma.cc/3DVF-BEPB].

53. *See* Caitlin Cahill, Brett G. Stoudt, María Elena Torre, Darian X, Amanda Matles & Kimberly Belmonte, *"They Were Looking at Us Like We Were Bad People": Growing Up Policed in the Gentrifying, Still Disinvested City*, 18 ACME 1128, 1133-34 (2019) (detailing how the constant presence of police "in the most intimate spaces of young people's everyday lives" in predominately Black and Latine neighborhoods was part of the community's experience of surveillance, creating feelings of unsafety); Joan Moore, *Bearing the Burden: How Incarceration Weakens Inner-City Communities*, *in* The Unintended Consequences of Incarceration 67, 69 (1996) (detailing how the criminalization of inner-city communities' economies has led to high imprisonment rates and how high unemployment in those neighborhoods "means that people remain at home, living with their families, and on the streets of their neighborhood much of their time" since "[t]he gradual infantilization of the labor market places more emphasis on friendship and kinship networks"); Rasul Mowatt, *Fear City, Cop City and Other Tales, a Call*

is a type of "racial character evidence" used for "racial stereotype emphasis"—that is, to inflame racist assumptions and sentiments, rather than to persuade through legitimate evidence.[54]

B. Racist Language, Sounds, or Imagery

Experts are equipped to shed light on how linguistic expressions of racism have influenced defendants' cases. For instance, in *People v. Pugh*, four Black defendants charged with gang-related murders sought relief under the California Racial Justice Act,[55] a groundbreaking piece of legislation enacted in 2020 that enables a defendant to challenge their conviction or sentence by providing a broad range of evidence that racial bias significantly influenced their case during the investigation, prosecution, or sentencing.[56] To prove that the investigating law-enforcement agents' racial bias had infected their cases, defense counsel introduced testimony by Claire Jean Kim, a social scientist and professor of political science and Asian American studies, whose research and scholarship has focused on race and politics.[57] She examined text messages between the police officers who used racist slurs, terms, and imagery to describe the Black defendants and a Black police chief.[58] Kim testified that she found more than a dozen uses of the n-word

for Police Research, LEISURE SCIS., Oct. 20, 2023, at 1, 11 ("The history of youth development and play is one of policing. The unruly urban youth, Black, Brown, and immigrant would be dealt with by the police. The history of city parks is one of policing."). *See generally* Amy Andrea Martinez, *Toward a Decolonial Imaginary to Reexamine and Redefine Mainstream Definitions of "Gangs" and "Gang Members" in America*, *in* CRITICAL AND INTERSECTIONAL GANG STUDIES 67, 69-70 (Jennifer M. Ortiz ed., 2023) ("[R]esearchers, society, and law enforcement need to recognize how the labeling and criminalization of individuals as 'gang members' serves as an extension of the historical project of coloniality that consequently has subjected gang members to a racialized rightlessness and human devaluation as it negates the sociopolitical, historical, and cultural contexts that shape and influence their emergence and persistence.").

54. *See* Jasmine B. Gonzales Rose, *Racial Character Evidence in Police Killing Cases*, 2018 WIS. L. REV. 369, 405-08 (describing the emphasis on racial stereotypes in the context of the defense or "begrudging[]" prosecution of white people who kill members of racial minority groups, as in the case of Trayvon Martin).

55. CBS/Bay City News Serv., *Expert Testimony Compares Antioch Police Behavior to 'Lynchings,'* CBS NEWS (Sept. 15, 2023, 3:30 PM PDT), https://www.cbsnews.com/sanfrancisco/news/expert-testimony-compares-antioch-police-behavior-to-lynchings [https://perma.cc/TL4U-995G].

56. *See* California Racial Justice Act of 2020, ch. 317, § 3, 2020 Cal. Stat. 3705, 3708-09 (codified as amended at CAL. PENAL CODE § 745(c)(1)) (providing the mechanism to challenge the convictions by presenting expert testimony).

57. CBS/Bay City News Serv., *supra* note 55; *see Claire Jean Kim*, UNIV. CAL. IRVINE, https://www.faculty.uci.edu/profile/?facultyId=2453 [https://perma.cc/D9ES-2EAN].

58. CBS/Bay City News Serv., *supra* note 55.

preceded by the words "ungrateful," "body bag," and "huckleberry."[59] Her expert declaration described how "[t]he officers' messages display[ed] racial bias and animus in three main ways that implicated racist language: a) use of the N-word; b) dehumanizing Black people through comparisons to animals; and c) invoking additional well-established tropes for denigrating, demeaning, and asserting dominance over Black people."[60]

Kim further explained how the officers' terms and tropes were connected to legacies of slavery and lynching.[61] For example, the "police officers compared Black people, including the defendants, to animals such as monkeys and water buffalos,"[62] and sent each other "photos of gorillas, gorilla emojis, and comments about gorillas."[63] She showed how comparing Black people to animals originated in and was used to rationalize slavery, "where slaves were variously described as oxen who wouldn't work without the lash, and dangerous beasts deserving of harsh control."[64] She concluded that the officers "showed clear and undeniable racial bias and animus toward Black people in general, and the defendants in particular, on multiple occasions."[65]

Sentiments of racial superiority or disdain can underpin certain words and phrases, but this meaning might not be fully ascertainable without an expert's explanation. Courts often admit expert testimony to explain the meaning of coded language to juries in prosecutions for organized crime[66] and drug distribution.[67] In much the same way, experts can assist in cases involving white-supremacist organizations and their coded language.[68] For instance, during the prosecution of white defendants who organized and conspired to commit violence at the Charlottesville Unite the Right rally, sociologists Kathleen Blee and Peter Simi testified about coded racist language and imagery used by members of white-supremacist groups.[69] They explained the meaning of images

59. *Id.*

60. Supplemental Declaration of Claire Kim, Ph.D., in Support of Defendant Pugh's Motion Pursuant to the California Racial Justice Act at 2, People v. Pugh, No. 1-197638-0 (Cal. Super. Ct. Sept. 8, 2023) (on file with authors).

61. *See id.* at 2, 5.

62. *Id.* at 3.

63. *Id.*

64. *Id.*

65. *Id.* at 6.

66. *See, e.g.*, United States v. Tocco, 200 F.3d 401, 419 (6th Cir. 2000).

67. FED R. EVID. 702 advisory committee's notes to 2000 amendment (discussing the use of experts to show how drug dealers "regularly use code words to conceal the nature of their activities").

68. *See, e.g.*, Sines v. Kessler, No. 17-cv-00072, 2021 WL 1431296, at *6-7 (W.D. Va. Apr. 15, 2021).

69. *Id.* at *1-2.

associated with pre-Christian Nordic religions, which "may appear innocuous to outsiders but are 'associated with sectors of white supremacism that adopt traditions of ancient Aryan spirituality,'" and the dual meaning behind the anthropomorphic frog cartoon called Pepe, a seemingly benign meme that was used on "white supremacist communication forums . . . 'repeatedly to signify the ideas of racism and anti-Semitism.'"[70] Blee and Simi also explained "double-speak" or "just joking" strategies employed online and in person to convey racist and violent messages while sounding innocent.[71] Ultimately, their report concluded that defendants were active in the white-supremacist movement before the Unite the Right rally, and that the rally was organized to promote the white-supremacist movement's agenda.[72] As some prominent white-supremacist groups eschew traditional symbolism and rebrand to make extreme racism more palatable to the mainstream,[73] expert-witness testimony can help juries understand new or resurgent racist language and imagery.

C. Racial Stereotypes

Parties have used experts to challenge profiling based on racial stereotypes. For instance, in *NAACP v. City of Myrtle Beach*, plaintiffs sued Myrtle Beach after it imposed a relatively restrictive traffic plan during Black Bike Week,[74] a prominent annual African American motorcycle rally,[75] as compared to its more lenient traffic plan during Harley Week, a biking event attended mostly by white

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70. *Id.* at *5 (quoting Expert Report of Kathleen Blee and Peter Simi at 11-12, *Sines*, No. 17-cv-00072 (W.D. Va. Apr. 15, 2021)); *see also WilmerHale Assists Pepe the Frog Creator in Enforcing IP, Striking Back at Islamophobic Children's Book*, WilmerHale (Aug. 29, 2017), https://www.wilmerhale.com/en/insights/news/2017-08-29-wilmerhale-assists-pepe-the-frog-creator-in-enforcing-ip-striking-back-at-islamophobic-childrens-book [https://perma.cc/V82U-Z6XR] (describing how Pepe the Frog was appropriated by Eric Hauser in his children's book *The Adventures of Pepe and Pede* to espouse "racist, Islamophobic, and hate-filled themes" with "allusions to the alt-right movement").

71. *Sines*, 2021 WL 1431296, at *5-6.

72. *Id.* at *2.

73. *Id.* at *5.

74. 504 F. Supp. 3d 513, 517-18 (D.S.C. 2020).

75. Jeffrey Gettleman, *Suit Charges Bias at Rally for Black Bikers*, N.Y. Times (May 21, 2003), https://www.nytimes.com/2003/05/21/us/suit-charges-bias-at-rally-for-black-bikers.html [https://perma.cc/6ZHY-N8JJ] (characterizing Black Bike Week as "the biggest African-American biker rally in the country"); Bridget Callahan, *Bike Weeks in 'Black' and 'White,'* StarNews Online (Nov. 3, 2017, 10:00 AM ET), https://www.starnewsonline.com/story/entertainment/local/2017/11/03/doc-looks-at-how-myrtle-beach-treats-bike-weeks-differently/17369345007 [https://perma.cc/QP3X-V7TX].

people.[76] The plaintiffs' expert sociologist, Charles Gallagher, testified that racial stereotypes shape beliefs about racial groups, which may lead to discriminatory behavior.[77] Gallagher "observed behavior by alleged decisionmakers that indicate[d] racial bias" and opined that the traffic plan instituted during Black Bike Week "should be evaluated in light of an established body of research on how the dominant group . . . [sought] to minimize the presence of African Americans and maintain an environment that is majority white and under white control."[78] He used sociological research on racial stereotyping and discrimination to show how "documented types of racial bias influenced the City's treatment of Black Bike Week."[79] This civil case demonstrates how expert evidence about racial stereotypes may influence judicial determinations of culpability or of the legality of law-enforcement conduct during a criminal investigation.

A recurrent scenario involving racial stereotypes—and the most studied of those discussed in this Section—is prosecutors' use of rap lyrics as evidence in criminal trials.[80] Rap music has long been a subject of anti-Black stereotyping and suspicion, perceived as more aggressive or dangerous than other musical genres.[81] One prominent study asked participants to read identical violent lyrics, with one set labeled rap lyrics and the other set labeled country music.[82] The study found that each item was more negatively perceived when it was characterized as rap lyrics, as opposed to country music,[83] illustrating how stereotypes and biases are triggered by the mere label "rap." This stereotyping, in turn, has contributed to widespread criminalization of rap lyrics. The project Rap on Trial reports that in about seven hundred criminal cases since the late 1980s, "[rap] lyrics were presented as evidence at trial; in many others, the lyrics were used to justify charging a suspect, to secure an indictment, to compel a plea bargain, and/or to justify sentencing recommendations."[84]

Antiracist expert evidence can expose prosecutors' reliance on racial stereotypes about rap. They can counter prosecutors' experts, who tend to be law-

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76. Callahan, *supra* note 75.

77. NAACP v. City of Myrtle Beach, 504 F. Supp. 3d at 515-16.

78. *Id.* at 516.

79. *Id.* at 517-18.

80. *Lyrics Are Art. Art Is Not Evidence.*, Rap on Trial, https://www.rapontrial.org [https://perma.cc/B6WJ-CF3K].

81. Carrie B. Fried, *Who's Afraid of Rap: Differential Reactions to Music Lyrics*, 29 J. Applied Soc. Psych. 705, 708 (1999).

82. *Id.* at 709-10.

83. *Id.* at 711.

84. *Lyrics Are Art. Art Is Not Evidence.*, *supra* note 80.

enforcement officers,[85] when they make inaccurate claims about this art form. Andrea Dennis has long argued that expert testimony is a suitable vehicle to counter the weaponization of rap lyrics against criminal defendants: "An expert might offer testimony revealing that defendant-authored rap music lyrics are . . . fantastical or fictional. Such testimony might undercut the assumption that defendant-authored rap music lyrics are autobiographical confessions . . . or an expression of mindset. Furthermore, expert testimony might reveal the character-based and inflammatory nature of rap music lyrical evidence."[86]

For an example of the successful use of expert-witness testimony in this context, consider *United States v. Williams*.[87] The prosecution argued that the defendant's rap lyrics detailed offenses the defendant planned to commit and constituted admissions of criminal activity.[88] The defense introduced the testimony of Erik Nielson, a humanities professor, who testified about the history of rap music and situated it within a broader cultural movement.[89] To challenge stereotypes, he gave an example of how the rapper Rick Ross focused on the criminal underworld in his music, even as he went to college, served as a corrections officer, and was not involved in the criminal underworld.[90] Nielson's testimony characterized gangsta rap as a sometimes misunderstood form of fiction that employs literary devices present in traditional poetry.[91]

Nielson's expert testimony was not a one-off. He also testified in the trial of another rap artist, Drakeo the Ruler, who was accused of several crimes but was acquitted by the jury.[92] His attorney attributed the acquittal in part to Nielson's expert testimony, which built on themes like those he presented in *Williams*.[93] Experts can counteract racial biases surrounding rap by demonstrating its legitimacy as a musical genre, explaining its conventions to judges and jurors, and interrupting or even expressly highlighting the prosecution's reliance on racial stereotypes.

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85. *See* Joëlle Ann Moreno, *What Happens When Dirty Harry Becomes an (Expert) Witness for the Prosecution?*, 79 TUL. L. REV. 1, 18-21 (2004); Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 2 n.3, 35-39 (2007).

86. Dennis, *supra* note 85, at 32.

87. 663 F. Supp. 3d 1085, 1093 (D. Ariz. 2023).

88. *Id.* at 1095.

89. *Id.* at 1100-04.

90. *Id.* at 1102-03.

91. *Id.* at 1104.

92. *See* Erik Nielson, *Expert or Advocate? The Role(s) of the Expert Witness When Rap Is on Trial*, 41 POPULAR MUSIC 446, 446-47 (2022).

93. *See id.* at 447.

D. Racial Disparities

Evidence of racial disparities can help prove structural racism in a variety of criminal-defense contexts, such as jury selection, law-enforcement practices, and the imposition of death sentences. Expert testimony on racial disparities, including presenting or analyzing statistical evidence, can assist factfinders by demonstrating and explaining how structural racism played a role in a criminal investigation, prosecution, trial, or sentencing.

Consider structural racism in jury selection. As per the Sixth Amendment, criminal defendants have a fundamental right to a jury selected from a "fair cross section" of the community.[94] Pursuant to the Supreme Court's decision in *Duren v. Missouri*, to succeed in a fair-cross-section claim the defendant must show that a distinctive group — such as a racial group — is underrepresented in the jury pool due to systematic exclusion.[95] To demonstrate systematic exclusion under *Duren*, defendants typically use statistical analysis.[96] Social-scientist experts are able to generate statistics on racial disparities and explain both existing and new data to juries.[97] Nonquantitative social-scientist experts may also be useful in establishing a prima facie fair-cross-section violation: for example, a linguistics expert could identify and explain how ethnic surnames are disproportionately absent from a jury list, thereby suggesting a lack of representativeness of certain distinctive groups within the jury pool.[98]

Expert testimony on racial disparities can be valuable in demonstrating the racialized nature of law enforcement and prosecution practices. In these contexts, the persuasiveness of statistical evidence of racial disparities alone depends on the governing substantive law. The infamous 5-4 Supreme Court decision in *McCleskey v. Kemp* held that statistical evidence alone is insufficient to establish unconstitutional discrimination under the Fourteenth Amendment or to demonstrate irrationality, arbitrariness, and capriciousness under the Eighth Amendment.[99]

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94. Duren v. Missouri, 439 U.S. 357, 359 (1979).

95. *Id.* at 364.

96. Stephen E. Reil, *Who Gets Counted? Jury List Representativeness for Hispanics in Areas with Growing Hispanic Populations Under* Duren v. Missouri, 2007 BYU L. Rev. 201, 224.

97. *Id.* at 223 n.151 (citing United States v. Esquivel, 88 F.3d 722, 726 (9th Cir. 1996)).

98. Mark A. Kornfeld, United States v. Gelb*: The Second Circuit's Disappointing Treatment of the Fair Cross-Section Guarantee*, 57 Brook. L. Rev. 341, 365 & n. 110 (1991) (citing United States v. Biaggi, 673 F. Supp. 96, 100 (E.D.N.Y. 1987)).

99. McCleskey v. Kemp, 481 U.S. 279, 293-97, 308-09 (1987).

McCleskey involved Fourteenth and Eighth Amendment challenges to the Georgia death-penalty system.[100] David Baldus, a social scientist and law professor, provided extensive statistical evidence showing that racial disparities manifested themselves in capital cases.[101] Most notably, the Baldus study revealed that Black defendants who had been convicted of killing a white person had a disproportionately greater likelihood of receiving the death penalty.[102] The Court found this evidence alone to be insufficient to show intentional discrimination in McCleskey's case[103] and indicated that statistical racial disparities raised questions that should be addressed through legislation rather than the court.[104] Although *McCleskey* did not exclude statistical-disparity evidence, but rather found it insufficient by itself to prove intentional discrimination, the introduction of racial-disparity statistical evidence post-*McCleskey* has been inordinately difficult.[105]

In light of *McCleskey*, effective antiracist expert evidence in Fourteenth and Eighth Amendment challenges to criminal-justice policies and practices should draw on a range of forms of proof, beyond just statistical evidence. Proponents of statistical-disparity evidence should be prepared for opposition and be equipped to differentiate their body of evidence from that in *McCleskey*. A successful example of this occurred in *Floyd v. City of New York*, where plaintiffs challenged the New York Police Department's (NYPD's) stop-and-frisk policy, alleging violations of the Fourth and Fourteenth Amendments through systematic targeting of Black and Latino men.[106] Plaintiffs introduced an expert, criminologist and law professor Jeffrey Fagan, who conducted regression analyses to assess the impact of race on various outcomes, including the likelihood of being stopped, frisked, or subjected to force during an arrest.[107] Fagan's regressions accounted for non-race factors and controlled for the fact that in New York City, Black and Hispanic people tended to live in higher-crime neighborhoods than

100. *Id.* at 282-83.

101. *Id.* at 286.

102. *Id.* at 287.

103. *Id.* at 297.

104. *Id.* at 319.

105. *See* William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 KY. L.J. 1, 9 (2011) (explaining how social-scientific work on racial bias, like statistical evidence of structural racism, has not had "any apparent impact on the Supreme Court"); *35 Years After* McCleskey v. Kemp*: A Legacy of Racial Injustice in the Administration of the Death Penalty*, DEATH PENALTY INFO. CTR. (Sept. 25, 2024), https://deathpenaltyinfo.org/news/35-years-after-mccleskey-v-kemp-a-legacy-of-racial-injustice-in-the-administration-of-the-death-penalty [https://perma.cc/5F2T-2MQN].

106. 861 F. Supp. 2d 274, 278 (S.D.N.Y. 2012).

107. *Id.* at 281.

white people.[108] He concluded that "NYPD stops-and-frisks are significantly more frequent for Black and Hispanic residents than they are for White residents" despite controlling for other predictive factors and that "Black and Hispanic individuals are treated more harshly during stop-and-frisk encounters . . . than Whites who are stopped on suspicion of the same or similar crimes."[109] The court deemed Fagan's testimony on the statistical disparities in stop-and-frisk practices admissible and accepted, albeit with some ordered modifications, his methods for concluding that the defendants engaged in a pattern of stopping and frisking New Yorkers without reasonable suspicion.[110]

In addition to statistical evidence, plaintiffs' body of evidence included testimony from individuals who had experienced or witnessed discriminatory stop-and-frisk tactics, expert analysis on racial profiling and the impact of these policies on communities of color, and internal NYPD documents revealing patterns of racial bias in stop-and-frisk practices.[111] Ultimately, the court held that the NYPD stop-and-frisk program was unconstitutional because it relied on racially profiling Black and Latino men.[112] *Floyd* illustrates how antiracist expert evidence of structural racism—through the demonstration of racial disparities in law-enforcement practices—can be effective in challenging the unfair criminalization of people of color, potentially preventing them from being unfairly policed or prosecuted in the first place.

In addition to challenging racial disparities through antiracist expert evidence within existing constitutional frameworks, legislation can establish causes of action or legal grounds for appeal where such evidence is useful. The *McCleskey* Court advised that the Baldus study's findings about the disproportionate imposition of the death penalty on Black defendants and those accused of killing white victims were better suited for legislative consideration.[113] Specifically, Justice Powell directed that legislatures "are better qualified to weigh and 'evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.'"[114] Three states—

108. *Id.*

109. *Id.* at 282.

110. *Id.* at 292.

111. *See id.* at 291 (explaining how the statistical "data will not be presented in a vacuum-it will be accompanied by the testimony of numerous witnesses and the presentation of much other documentary evidence").

112. Floyd v. City of New York, 959 F. Supp. 2d 540, 666-67 (S.D.N.Y. 2013) ("The City and the NYPD's highest officials also continue to endorse the unsupportable position that racial profiling cannot exist provided that a stop is based on reasonable suspicion. This position is fundamentally inconsistent with the law of equal protection . . . .").

113. McCleskey v. Kemp, 481 U.S. 279, 319 (1987).

114. *Id.* (quoting Gregg v. Georgia, 428 U.S. 153, 186 (1976)).

Kentucky, North Carolina, and, most recently and expansively, California—have acted on the Court's invitation.

After commissioning its own study,[115] which replicated the Baldus study's findings, Kentucky passed the Kentucky Racial Justice Act in 1998, which provides that "[n]o person shall be subject to or given a sentence of death that was sought on the basis of race."[116] The Kentucky Racial Justice Act explicitly allows statistical racial-disparity evidence.[117] Similarly in 2009, North Carolina passed the North Carolina Racial Justice Act, which allowed people to challenge their death sentences if race was a significant factor in their cases and permitted defendants to use statistical evidence to demonstrate that their death sentences were pursued or imposed because of racial bias.[118] Although the North Carolina Racial Justice Act was repealed in 2013,[119] the North Carolina Supreme Court ruled in 2020 that individuals who filed claims before the repeal could still have their cases heard, enabling a limited number of ongoing challenges to death sentences based on racial bias.[120]

Most recently, in 2020, California enacted the California Racial Justice Act,[121] which is far broader than the Kentucky and North Carolina laws in both scope and application. California's law, unlike the others, extends beyond the death-penalty context and allows defendants to challenge any aspect of their case where racial bias may have influenced decisions, including arrest, charging, jury

115. Thomas J. Keil & Gennaro F. Vito, *Race and the Death Penalty in Kentucky Murder Trials, 1976-1991: A Study of Racial Bias as a Factor in Capital Sentencing*, 20 AM. J. CRIM. JUST. 17, 17 n.* (1995) (noting that this article was "based upon a report that was developed in response to Kentucky Senate Bill 8 - *Bias Related Crime Reporting* passed by the 1992 Kentucky General Assembly"); Editorial, *Who Gets to Death Row*, COURIER-J. (Louisville), Mar. 8, 1996, at A10, A10; *see also* Justin R. Arnold, *Race and the Death Penalty After* McCleskey*: A Case Study of Kentucky's Racial Justice Act*, 12 WASH. & LEE J. C.R. & SOC. JUST. 93, 98-101 (2005) (explaining that the Kentucky General Assembly commissioned a study searching for racial disparities in prosecutors' decisions to ask for the death penalty).

116. Kentucky Racial Justice Act, ch. 252, § 1, 1998 Ky. Acts 941, 941 (codified as amended at KY. REV. STAT. ANN. § 532.300(1) (West)).

117. KY. REV. STAT. ANN. § 532.300(3) (West 2025) ("Evidence relevant to establish a finding that race was the basis of the decision to seek a death sentence may include statistical evidence . . . that death sentences were sought significantly more frequently . . . [u]pon persons of one race than upon persons of another race; or . . . [a]s a punishment for capital offenses against persons of one race . . . .").

118. North Carolina Racial Justice Act, ch. 464, § 1, 2009 N.C. Sess. Laws 1213, 1214 (repealed 2013).

119. Act of June 19, 2013, ch. 154, § 5.(a), 2013 N.C. Sess. Laws 368, 372.

120. State v. Ramseur, 843 S.E.2d 106, 107, 118-19 (N.C. 2020).

121. California Racial Justice Act of 2020, ch. 317, 2020 Cal. Stat. 3705 (codified as amended at CAL. PENAL CODE §§ 745, 1473, 1473.7).

selection, and sentencing.[122] Under the statute, criminal defendants can use statistical evidence to show that their conviction or sentence was influenced by racial bias.[123] In cases employing the California Racial Justice Act, expert witnesses are frequently sought in conjunction with evidence of statistical racial disparities and other such evidence to show that racial bias has influenced convictions and sentencing.[124] While the effectiveness of the California Racial Justice Act in mitigating racism has yet to be fully determined, the reform holds promise and should be closely monitored. Policymakers and advocates in other jurisdictions might consider the potential benefits of enacting similar legislation to address racial bias in criminal prosecution and sentencing. As new avenues for challenging racial bias in systems and institutions emerge, opportunities to utilize antiracist expert evidence increase.

E. Implicit Racial Bias

Implicit racial bias refers to the unconscious stereotypes or attitudes that an individual or group of individuals may hold toward a racial group.[125] Implicit racial bias manifests itself in various contexts, including employment, education, housing, and places of public accommodation.[126] Implicit biases can affect the

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122. *Compare* Ky. Rev. Stat. Ann. § 532.300(1) (West 2025) ("No person shall be subject to or given a sentence of death that was sought on the basis of race."), *and* N.C. Gen. Stat. § 15A-2010 (2009) (repealed 2013) ("No person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race."), *with* Cal. Penal Code § 745(a) (West 2025) ("The state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin.").

123. Cal. Penal Code § 745(c)(1) (West 2025).

124. *See* Finley v. Super. Ct., 312 Cal. Rptr. 3d 907, 911, 915-17 (Ct. App. 2023) (ruling that the defendant had a valid prima facie discrimination case under the California Racial Justice Act where the defendant relied on "statistics purportedly showing that Black people are more likely to be stopped by police" and testimony from an "expert on policing and antiracism"); Young v. Super. Ct., 294 Cal. Rptr. 3d 513, 532-33 (Ct. App. 2022) (ruling the attorney general was obliged to provide the defendant with statistics on racial disparity charging statistics where the defendant alleged that racial bias in traffic stops caused his arrest); *see also supra* notes 55-65 and accompanying text (discussing the use of expert testimony about linguistics in *People v. Pugh*).

125. *See* Jerry Kang, *Implicit Bias: A Primer for Courts*, Nat'l Ctr. for State Cts. and Race & Ethnic Fairness in the Cts. 1 (Aug. 2009), https://www.courts.ca.gov/documents/BTB_XXII_WEDF_3.pdf [https://perma.cc/AX8R-JUCU].

126. *See* Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 Ann. Rev. Socio. 181, 186-93 (2008) (providing an overview of findings on racial discrimination in employment, housing, credit markets, and consumer interactions and discussing how implicit racism contributes to this

criminal legal system by influencing, among other things, jury determinations, prosecutorial decision-making, and judicial sentencing determinations.[127] For instance, research has proven that stereotypes linking Blackness to criminality have broad influence, even unconsciously.[128] Implicit biases such as these lead to unfair outcomes for defendants of color,[129] which can potentially be mitigated through expert evidence.

In the implicit-bias context, experts can show how cross-racial identifications are unreliable. Research indicates that witnesses struggle to make accurate cross-racial identifications.[130] This is particularly true for white witnesses, who are especially likely to fail to differentiate between nonwhite faces.[131] Implicit bias can play a role in racial isolation and self-segregation, which leads to unfamiliarity among people of different races.[132] Given that white Americans are the most racially isolated and self-segregated population in the United States, it is unsurprising that they are the least familiar with people of different racial

discrimination); Mark J. Chin, David M. Quinn, Tasminda K. Dhaliwal & Virginia S. Lovison, *Bias in the Air: A Nationwide Exploration of Teachers' Implicit Racial Attitudes, Aggregate Bias, and Student Outcomes*, 49 EDUC. RESEARCHER 566, 566 (2020). For an updated overview of implicit-bias research in education, see Xiaodan Hu & Ange-Marie Hancock, *State of the Science: Implicit Bias in Education 2018-2020*, KIRWAN INST. (May 22, 2024, 3:00 PM ET), https://kirwaninstitute.osu.edu/research/state-science-implicit-bias-education-2018-2020 [https://perma.cc/BH8U-RGTA]. For examples of prominent incidents, see Darran Simon, *LA Fitness Apologizes After Racial Profiling Allegations at Club*, CNN (Apr. 20, 2018, 11:57 AM), https://www.cnn.com/2018/04/20/us/la-fitness-apology/index.html [https://perma.cc/ABN8-4R32]; Yon Pomrenze & Darran Simon, *Black Men Arrested at Philadelphia Starbucks Reach Settlements*, CNN (May 2, 2018, 10:40 PM), https://www.cnn.com/2018/05/02/us/starbucks-arrest-agreements/index.html [https://perma.cc/468C-AD3N]; and Brakkton Booker, *Amy Cooper, White Woman Who Called Police on Black Bird-Watcher, Has Charge Dismissed*, NPR (Feb. 16, 2021, 1:21 PM), https://www.npr.org/2021/02/16/968372253/white-woman-who-called-police-on-black-man-bird-watching-has-charges-dismissed [https://perma.cc/4Y63-7LCK].

127. *See* Jerry Kang, Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1135-52 (2012) (discussing the effects of implicit bias throughout the course of a criminal case).

128. *See* Jennifer L. Eberhardt, Phillip Atiba Goff, Valeria J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 885-91 (2004) (examining the influence of racial stereotypes on visual processing by police officers).

129. *See* Kang et al., *supra* note 127, at 1150-52.

130. *Cf.* Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCH. PUB. POL'Y & L. 3, 13, 21 (2001) (analyzing thirty-nine studies — involving ninety-one samples and almost 5,000 subjects — to find a statistically significant bias toward correctly identifying suspects of one's own race).

131. *See* Steven O. Roberts & Michael T. Rizzo, *The Psychology of American Racism*, 76 AM. PSYCH. 475, 478-79 (2021).

132. Gonzales Rose, *supra* note 1, at 2293.

backgrounds.[133] This in turn shapes the way people conceptualize, process, and perceive the faces of people from other racial groups.[134] Implicit prejudice in white individuals has been positively associated with readiness to perceive Black faces as angry and dangerous.[135] Such bias also contributes to white witnesses misidentifying and attributing criminality to minorities whom they perceive not only to look the same but also to be predisposed to criminality.[136] Unsurprisingly, cross-racial witness misidentifications have led to wrongful convictions of many people of color.[137]

The law of admission of expert evidence on cross-racial eyewitness identifications differs by jurisdiction. George Vallas has identified four jurisdictional approaches: favoring admission, favoring exclusion, applying blanket exclusions, or relying solely on discretion.[138] Such experts have been excluded for a few different reasons, including that their testimony is within the common knowledge of the juror;[139] may confuse jurors;[140] or would be a waste of time or duplicative of issues that arise on cross-examination, during closing arguments, or through jury instructions.[141] Courts that instead favor the admissibility of cross-racial identification experts focus on the probative value of such evidence, its ability to assist the trier of fact, and the need for such evidence to help the jury arrive at a just decision.[142]

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133. *Id.* at 2293-94.

134. *See* Ron Dotsch, Daniël H.J. Wigboldus, Oliver Langner & Ad van Knippenberg, *Ethnic Out-Group Faces Are Biased in the Prejudiced Mind*, 19 PSYCH. SCI. 978, 978-80 (2008).

135. Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCH. SCI. 640, 643 (2003).

136. *See* Joseph A. Vitriol, Jacob Appleby & Eugene Borgida, *Racial Bias Increases False Identification of Black Suspects in Simultaneous Lineups*, 10 SOC. PSYCH. & PERSONALITY SCI. 722, 730-32 (2019).

137. *See* Earl Smith & Angela J. Hattery, *Race, Wrongful Conviction & Exoneration*, 15 J. AFR. AM. STUD. 74, 84 (2011) ("[T]he vast majority of the exoneration cases involve a White victim who mis-identifies an African American man.").

138. George Vallas, *A Survey of Federal and State Standards for the Admission of Expert Testimony on the Reliability of Eyewitnesses*, 39 AM. J. CRIM. L. 97, 115-28 (2011).

139. *See, e.g.*, United States v. Baylor, No. 11-CR-64, 2011 WL 5910061, at *8 (E.D. Va. Nov. 28, 2011), *aff'd*, 537 F. App'x 149 (4th Cir. 2013); State v. Cromedy, 727 A.2d 457, 467-68 (N.J. 1999) ("[E]xpert testimony on this issue would not assist a jury . . . .").

140. *See, e.g.*, United States v. Lester, 254 F. Supp. 2d 602, 613 & n.9 (E.D. Va. 2003); *Baylor*, 2011 WL 5910061, at *7-8 (emphasizing that expert testimony on cross-racial identification creates a "high risk" of juror confusion).

141. *See, e.g.*, United States v. Jones, 689 F.3d 12, 19-20 (1st Cir. 2012); United States v. Rodriguez-Felix, 450 F.3d 1117, 1125-26 (10th Cir. 2006); Patterson v. United States, 37 A.3d 230, 236-40 (D.C. Cir. 2012); State v. Henderson, 27 A.3d 872, 924-25 (N.J. 2011).

142. *See* People v. LeGrand, 867 N.E.2d 374, 377 (N.Y. 2007); People v. McDonald, 690 P.2d 709, 727 (Cal. 1984); United States v. Smith, 736 F.2d 1103, 1106 (6th Cir. 1984).

For instance, Pennsylvania courts routinely excluded expert testimony about eyewitness identification until 2014, when the Pennsylvania Supreme Court reconsidered its stance in *Commonwealth v. Walker*.[143] The court found that such testimony can "permit jurors to engage in the process of making credibility determinations with full awareness of limitations that eyewitness testimony may present."[144] As the court recognized, expert testimony on implicit bias equips jurors with the tools to assess the credibility and trustworthiness of facts that are facially race-neutral and would otherwise receive minimal scrutiny from judges and jurors.[145]

Cross-racial witness identification aside, expert testimony has also shown the role of implicit bias in policing. For example, the Black defendant in *Bonds v. Superior Court* argued that a police stop was racially motivated.[146] The police officer claimed he did not know the defendant was Black when he stopped Bonds's car.[147] In challenging his conviction under the California Racial Justice Act, the defense introduced sociologist Karen Glover, who testified that the officer might have associated Bonds's hoodie with Black people, presumed Bonds's race, and made inferences about his criminality.[148] Along these lines, experts could be used to challenge decisions related to selective prosecution, charging, and sentencing.

F. Impact of Racism on Health and Behavior

Social-science and medical studies document the impact of racist policing on the mental, emotional, and physical health of people of color.[149] Police violence has psychological consequences and may lead to "distrust, fear, anger, shame, PTSD, isolation, and self-destructive behaviors."[150] These emotional and

143. 92 A.3d 766, 769 (Pa. 2014).

144. *Id.* at 784.

145. *Id.* at 786.

146. 318 Cal. Rptr. 3d 226, 227 (Ct. App. 2024).

147. *Id.*

148. *Id.* at 229.

149. *See, e.g.*, Richard Carbonaro, *System Avoidance and Social Isolation: Mechanisms Connecting Police Contact and Deleterious Health Outcomes*, 301 SOC. SCI. & MED. art. no. 114883, at 1 (2022); Jacob Bor, Atheendar S. Venkataramani, David R. Williams & Alexander C. Tsai, *Police Killings and Their Spillover Effects on the Mental Health of Black Americans: A Population-Based, Quasi-Experimental Study*, 392 LANCET 302, 307-09 (2018); Naomi F. Sugie & Kristin Turney, *Beyond Incarceration: Criminal Justice Contact and Mental Health*, 82 AM. SOCIO. REV. 719, 735-36 (2017); Alyasah Ali Sewell, Kevin A. Jefferson & Hedwig Lee, *Living Under Surveillance: Gender, Psychological Distress, and Stop-Question-and-Frisk Policing in New York City*, 159 SOC. SCI. & MED. 1, 9-10 (2016).

150. Thema Bryant-Davis, Tyonna Adams, Adriana Alejandre & Anthea A. Gray, *The Trauma Lens of Police Violence Against Racial and Ethnic Minorities*, 73 J. SOC. ISSUES 852, 866 (2017).

psychological effects also reveal themselves in other forms of police involvement, like *Terry* stops.[151] Scholars have argued that *Terry* stops cause psychological harm, breed feelings of resentment and distrust toward law enforcement, and discourage cooperation.[152]

In *Commonwealth v. Warren*, the Massachusetts Supreme Judicial Court recognized the psychological effects of racialized policing.[153] There, police stopped the defendant without reasonable suspicion and the defendant fled.[154] The court identified the psychological impact of racial profiling by police on a person of color's behavior as a central factor in assessing reasonable suspicion.[155] The court held:

> [F]light is not necessarily probative of a suspect's state of mind or consciousness of guilt. Rather, the finding that black males in Boston are disproportionately and repeatedly targeted for [field interrogation observation] encounters suggests a reason for flight totally unrelated to consciousness of guilt. Such an individual, when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity.[156]

The court's decision illustrates that considering a person's experiences of racism is necessary to understand their behavior. In accounting for the indignity Black people in Boston faced from racial profiling and policing, the court noted the psychological effects of policing on the defendant's conduct. Expert evidence could be employed to demonstrate the impact of this sort of systemic racism in other jurisdictions.

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151. Terry v. Ohio, 392 U.S. 1, 32-34 (1968) (holding that a police officer, if under a reasonable belief that a suspect is dangerous, may conduct a limited search of a suspect's outer clothing to discover weapons which may be used to assault the officer). The authority to conduct an investigative detention and frisk of a criminal suspect is now commonly known as a *Terry* stop. Steven L. Argiriou, Terry *Stop Update: The Law, Field Examples and Analysis*, Fed. L. Enf't Training Ctrs. [1], https://www.fletc.gov/sites/default/files/imported_files/training/programs/legal-division/downloads-articles-and-faqs/research-by-subject/4th-amendment/terrystopupdate.pdf [https://perma.cc/R47Q-EMFG].

152. Susan A. Bandes, Marie Pryor, Erin M. Kerrison & Phillip Atiba Goff, *The Mismeasure of* Terry *Stops: Assessing the Psychological and Emotional Harms of Stop and Frisk to Individuals and Communities*, 37 Behav. Scis. & L. 176, 184-87 (2019).

153. 58 N.E.3d 333, 342 (Mass. 2016).

154. *See id.* at 336, 340-41.

155. *Id.* at 339.

156. *Id.* at 342.

In civil cases, expert witnesses have been allowed to testify about the impact of racial trauma.[157] Expert testimony about racial trauma may be an effective tool in criminal contexts as well. This kind of testimony would tailor an existing practice, the use of posttraumatic stress disorder (PTSD) experts, to the context of racism. PTSD experts have been used in criminal trials and sentencing to argue that "anyone exposed to the trauma the defendant suffered might find themselves committing similar crimes under similar circumstances."[158] In much the same way, experts can link racial trauma to a defendant's conduct and draw on social-scientific findings to show how the effects of racism in a community or society apply to an individual defendant's case.

II. SURVEY RESULTS: CRIMINAL-DEFENSE ATTORNEYS CONSIDER ANTIRACIST EXPERT EVIDENCE

Part I's taxonomy demonstrates that, despite the breadth and usefulness of antiracist expert evidence, the body of relevant case law remains surprisingly limited. To evaluate criminal-defense attorneys' awareness of antiracist expert evidence and their views on its utility, we designed and conducted an original survey.

In this Part, we present the results of this survey, excepting one topic—barriers to using antiracist expert evidence—which we address in Part III. For each category of antiracist expert evidence, we review the respondents' familiarity with that type of evidence and examine their views on whether it could be useful in their own defense practice.

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157. *See, e.g.*, Bursch *ex rel.* T.B. v. Indep. Sch. Dist. 112, 619 F. Supp. 3d 886, 889-91 (D. Minn. 2022) (admitting expert-witness testimony on how the plaintiffs' anxiety and depression were linked to the racial harassment they faced at school); Brian L. McDermott & Susannah P. Mroz, *The Use of Experts in Employment Discrimination Litigation*, FED. LAW., June 2011, at 20, 20-21.

158. Liza H. Gold, *The Role of PTSD in Litigation*, 23 PSYCHIATRIC TIMES, Dec. 1, 2005, at 1, 1; *see also* Gerald Young, *PTSD in Court III: Malingering, Assessment, and the Law*, 52 INT'L J.L. & PSYCH. 81, 92 (2017) (showing the continued prevalence of the use of evidence related to posttraumatic stress disorder (PTSD) in court); Deirdre M. Smith, *Diagnosing Liability: The Legal History of Posttraumatic Stress Disorder*, 84 TEMPLE L. REV. 1, 41-51 (2011) (citing Clohessy v. Bachelor, 675 A.2d 852, 865 (Conn. 1996); Jarrett v. Jones, 258 S.W.3d 442, 449 (Mo. 2008); Alvarado v. Shipley Donut Flour & Supply Co., Inc., No. H-06-2113, 2007 WL 4480134, at *1, *3-7 (S.D. Tex. Dec. 18, 2007)) (discussing the widespread historical use of expert testimony on PTSD); Marjorie A. Shields, Annotation, *Posttraumatic Stress Disorder (PTSD) as Defense to Murder, Assault, or Other Violent Crime*, 4 A.L.R.7th Art. 5, § 14 (2015) (citing Moreno v. State, 586 S.W.3d 472 (Tex. Crim. App. 2019), as a recent example of a case where evidence of PTSD was held admissible).

A. Survey Methods

1. Design

The survey,[159] administered on Qualtrics between July 24 and September 19, 2023, opened with questions about the respondent's legal practice and general views about racism.[160] The remainder of the survey questions described each category of antiracist expert evidence, provided an example,[161] and asked whether the respondent had heard of this type of expert evidence and whether they believed that this type of evidence would be useful for their criminal-defense practice. The response options were "Yes," with a text box for specifics to be used if the respondent desired, and "No." An optional open-ended response field accompanied each of these questions. The survey then asked respondents whether there are "barriers to accessing and introducing expert evidence about racism," and those who responded "Yes" were asked what those barriers might be. After asking the respondents an open-ended question about whether there was anything else they would like to share on the topic, the survey concluded with basic demographic questions. We reproduce the text of the full survey in Appendix A.

2. Recruitment

To obtain geographic, experiential, and racial diversity within our sample, we shared information about the survey via email with the leadership of every

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159. The Boston University Charles River Campus Institutional Review Board approved this survey for exemption from IRB review on January 31, 2023 (IRB 6861X).

160. This project joins other research by legal scholars who have surveyed attorneys to reach insights about the role of racism in criminal trials. *See generally, e.g.*, Christopher Robertson, Shima Baradaran Baughman & Megan Wright, *Race and Class: A Randomized Experiment with Prosecutors*, 16 J. Empirical Legal Stud. 807 (2019) (studying the role of race and class in charging decisions in a randomized experiment); Sruthi Naraharisetti, *Public Defense Attorneys' Perception of Race and Bias*, Ctr. for Just. Innovation (July 2024), https://www.innovatingjustice.org/sites/default/files/media/document/2024/Public%20Defense%20Attorneys%27%20Perception%20of%20Race%20and%20Bias_07232024.pdf [https://perma.cc/YUA2-FW3Y] (studying public defenders' perception of racial equity in the defense field); Joseph J. Avery, Jordan Starck, Yiqiao Zhong, Jonathan D. Avery & Joel Cooper, *Is Your Own Team Against You? Implicit Bias and Interpersonal Regard in Criminal Defense*, 161 J. Soc. Psych. 543 (2021) (measuring the implicit bias of criminal-defense attorneys).

161. Since "antiracist expert evidence" is a term that we theorize in this project and it is unfamiliar to many, we chose to provide examples of each type of antiracist expert testimony in order to provide a starting point for participants to think about how this evidence could be used. This approach may, however, have influenced the manner in which participants think about each type of evidence. *See infra* Section II.A.4.

state criminal-defense-attorney organization or similar entity and asked them to share it with their associates and colleagues. We also shared our survey on several national and state criminal-defense listservs, including the national listservs operated by the National Association of Criminal Defense Lawyers (commonly known by the acronym NACDL) and the National Association for Public Defense (NAPD), which are both among the largest criminal-defense and public-defender organizations in the United States. Approximately one month after initial outreach, we emailed each state criminal-defense organization again. We also reached out to criminal-defense affinity associations such as the Black Public Defenders Association, the Hispanic National Bar Association, and the Diversity, Equity, Inclusion, and Justice arm of the NAPD.

Partway through response collection, we reviewed our sample for jurisdictional diversity and found that some states had relatively few respondents. In those states, we reached out to members of criminal-defender associations that we had not previously contacted, using publicly available contact information. We also contacted law professors in those states who write about or practice in criminal defense and asked them to share our survey with their defender networks.

We limited survey participation to individuals who self-identified as "currently practicing criminal defense attorneys" over the age of eighteen.

3. Sample Characteristics

We concluded data collection on September 19, 2023. At that time, 712 respondents had begun the survey, but as is common with survey research, many did not complete the full questionnaire, and some skipped certain questions.[162] We chose to include responses from attorneys who answered only some questions because this is the first survey on the subject, it was conducted for exploratory purposes, and we wanted to ensure retention of valuable data from all respondents. The typical number of responses to each question ranged between 500 and 600 respondents. All the percentages reported here have been calculated according to the number of participants who responded to a given question.

We asked about the focus of respondents' current practice, and a total of 586 attorneys responded to this question. We present these results in Table 1.

162. *See* Paul P. Beimer, *Total Survey Error: Design, Implementation, and Evaluation*, 74 PUB. OP. Q. 817, 824 (2010); Adam J. Berinsky, *Survey Non-Response*, *in* THE SAGE HANDBOOK OF PUBLIC OPINION RESEARCH 309, 312-13 (Wolfgang Donsbach & Michael W. Traugott eds., 2008) ("On any survey, some respondents will answer some questions, and abstain from others. The phenomenon of item non-response is widespread on surveys.").

TABLE 1. FOCUS OF CURRENT PRACTICE

Current Practice	Percentage of Respondents
Public Criminal Defense	62.63%
Private Criminal Defense	15.53%
Both Public and Private Criminal Defense	18.60%
Other	3.24%

Among the nineteen respondents who answered "Other," five respondents stated that they worked as clinical educators in criminal-defense clinics at law schools.

We asked participants about the types of courts they practiced in and directed them to select all that apply. A total of 587 participants responded to this question.[163] Their responses are presented in Table 2.

TABLE 2. TYPES OF COURT RESPONDENTS PRACTICE IN

Court Type	Number of Respondents Who Selected This Option	Percentage of Respondents
State	541	92.06%
Federal	162	27.59%
Tribal	11	1.87%
Municipal	96	16.36%
Juvenile	164	27.94%
Family	36	6.13%
Other	11	1.87%

We asked respondents for the jurisdictions in which they have practiced law and encouraged respondents to select all that apply. A total of 585 attorneys answered this question. All four major census regions were well represented, with 213 respondents practicing in the Northeast, 149 in the Midwest, 158 in the South, and 180 in the West.[164] At least one attorney practicing in each U.S. state, Puerto Rico, and Washington, D.C., began this survey. Out of all states, the

163. Since respondents were urged to "select all that apply," the percentage calculations appearing in column three are calculated based on the number of respondents who selected this option out of a total of 587.

164. The total number does not equal 585 because some attorneys practiced in more than one region and selected more than one option.

largest number of responses received were from attorneys who had practiced in Massachusetts (17.44%), California (14.02%), and New York (10.94%). The remaining 57.6% of respondents were from other states and territories. We received five responses or fewer from attorneys in Alaska (0.68%), Hawai'i (0.34%), Montana (0.68%), North Dakota (0.17%), South Dakota (0.51%), and West Virginia (0.34%).

We asked respondents how long they had worked in criminal defense. A total of 578 attorneys answered this question, and the distribution of their answers appears in Table 3.

TABLE 3. PERIOD OF PRACTICING CRIMINAL DEFENSE

Number of Years of Practice	Percentage of Respondents
0-5 years	12.28%
5-10 years	16.44%
10-25 years	36.68%
25-40 years	27.34%
Over 40 years	7.27%

We also collected demographic data from our survey respondents. Among 517 respondents, 42.75% identified as male, 53.77% identified as female, 0.39% self-described, and 3.9% preferred not to say. The age of our respondents ranged from 25 to 85, with a mean of 49 and a standard deviation of 13.

Finally, we inquired about the race of the respondents and encouraged them to "select all that apply." Five hundred five respondents answered this question, checking 538 boxes in total.[165] We present these results in Table 4.

TABLE 4. RACE OF RESPONDENTS

Race of Respondents	Percentage of Respondents
Alaska Native	0%
American Indian	1.45%
Asian, Asian American	2.72%
Black and African American	6.72%
Indigenous peoples, First peoples, First Nations, Aboriginal peoples, and Native peoples	0.54%

165. Since respondents were urged to "select all that apply," the percentage calculations appearing in column two are calculated based on the number of respondents who selected this option out of a total of 505.

Race of Respondents	Percentage of Respondents
Latino/a/x/e or Hispanic	8.17%
Middle Eastern, North African, or Arab American	1.63%
Native Hawaiian	0%
Pacific Islander	0.18%
Other	5.26%
White	73.32%
Total respondents	505

4. Limitations

Our sample, while diverse, may not be statistically representative of the population of criminal-defense attorneys in the United States. Survey respondents were not selected with equal probability from the population. It is possible that the results would differ if the survey were administered to a representative sample. In particular, it is possible that willingness to take the survey—or to complete the survey once starting it—is associated with interest in the topic. If so, the findings might overstate familiarity with antiracist expert evidence, perceptions of its usefulness, or both.

It is also possible that the wording of some of the questions led respondents to focus on certain kinds of antiracist expert evidence rather than others. That is, while we felt it was necessary to provide examples of different kinds of antiracist evidence for the benefit of those respondents who were not familiar with the topic, these examples may have become salient to the participants as they answered subsequent questions, shaping the content of the open-ended responses.

5. Analytic Approach

We conducted both quantitative and qualitative analyses. The quantitative analyses consisted of basic cross-tabulations presenting responses to the closed-ended questions. These paint a broad picture of criminal-defense attorneys' familiarity with, and their perceptions of the usefulness of, different types of antiracist evidence. The qualitative analyses enable us to detect broader themes from responses to the open-ended questions.

We used open coding, a process of "naming segments of data with a label that simultaneously categorizes, summarizes, and accounts for each piece of data,"[166] to identify themes within the responses.[167]

We present the qualitative comments, broken out by topic, in Table 5. This table sheds light on the subjects that attorneys referenced most frequently.

It is worth noting that many attorneys brought up the efficacy of antiracist expert witnesses at the pretrial and posttrial stages. For example, 225 respondents mentioned either the term "mitigation" or "sentencing" at some point in their open-ended responses. References to jury selection were common as well. That said, this Article is focused on the use of experts at trial. With respect to this, we see that attorneys often mentioned witness identification (eighty-six responses), bias (eighty-six responses), and the Fourth Amendment (sixty-four responses).

TABLE 5. MOST FREQUENTLY OCCURRING CODES IN SURVEY RESPONSES

Code	Explanation	Number of Times Mentioned
Mitigation and/or sentencing	Any mention of the words "mitigation" or "sentencing"	225
Identification, including cross-racial identification	Any mention of the words "identification," including in the context of cross-racial identification and false identification	86
Bias	Any mention of the term "bias," including in the context of implicit bias and explicit bias	86

166. Kathy Charmaz, Constructing Grounded Theory: A Practical Guide Through Qualitative Analyses 43 (2006).

167. Each response was coded and analyzed in NVivo. In the first iteration, coding and line-by-line analyses were performed by Asees Bhasin, who categorized qualitative data into discrete codes. Next, emergent themes and codes were discussed with Jasmine Gonzales Rose and finalized. Then, all responses were coded by two research assistants who had been trained in the process. Finally, any remaining differences in outcomes were reconciled by Asees Bhasin. If there were any categorization concerns, they were resolved upon discussion with Jasmine Gonzales Rose.

Code	Explanation	Number of Times Mentioned
Jury selection or voir dire	Any mention of the terms "jury selection" or "voir dire"	81
Prosecution attitudes	Any mention of the attitudes, behaviors, or beliefs of prosecutors	67
Fourth Amendment	Any mention of Fourth Amendment searches and seizures, including pretextual encounters and traffic stops	64

B. Defense Attorneys' Perceptions of Antiracist Expert Evidence

In this Section, we present summary data reflecting attorneys' familiarity with and perceptions of the usefulness of the different categories of evidence discussed in Part I.[168] In addition to survey questions about the six categories of evidence presented in Part I, we also separately asked defense attorneys about expert evidence on "structural racism" and "racial trauma" because of the emerging salience of these terms and phenomena.[169] As structural racism is an overarching concept under which multiple of the categories of evidence could fit, and since racial trauma is one impact of racism on health and behavior, these two subjects of expert testimony have been subsumed into the six categories taxonomized in Part I. Thus, while we asked survey takers about eight types of antiracist evidence, we ultimately categorized them into six groupings.

Table 6 shows the percentage of respondents who answered "Yes" to the question whether they were familiar with a certain type of expert evidence (column 1) and the question whether they would find such evidence useful in their own practice (column 2).[170]

168. The survey data, excluding responses to any open-ended questions, is available at the *Yale Law Journal*'s Dataverse at the following link: https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/XCBHJ1.

169. *See, e.g.*, *supra* notes 26-36 and accompanying text.

170. As denoted in Table 6, "n" represents the total number of respondents who answered each question.

TABLE 6. FAMILIARITY WITH AND PERCEIVED USEFULNESS OF ANTIRACIST EXPERT EVIDENCE

Type of Evidence	Familiarity Percentage of participants who answered "Yes"	Potential Usefulness Percentage of participants who answered "Yes"
Racist Affiliation or Views	45.74% (n=564)	89.15% (n=562)
Racist Language, Sounds, or Imagery	51.80% (n=556)	91.35% (n=555)
Racist Stereotypes	48.90% (n=544)	91.18% (n=544)
Structural Racism	54.30% (n=547)	89.76% (n=537)
Implicit Racial Bias	79.74% (n=543)	95.17% (n=538)
Racialized History or Application of Law, Policy, or Practice	38.36% (n=537)	83.52% (n=528)
Racial Trauma	51.21% (n=535)	89.75% (n=527)
Impact of Racism on Conduct, Behavior, or Attitude	51.60% (n=531)	92.02% (n=526)

The average percentage of participants who answered affirmatively to the question about familiarity across all categories was 52.70%. This statistic should be viewed in light of the fact that a high number of respondents (79.74%) indicated familiarity with evidence about implicit racial bias. The average percentage of participants who answered affirmatively to the question of the potential usefulness of evidence across all categories was 90.23%.

Future research might do well to examine the question of under what conditions some attorneys, and not others, become most familiar with or interested in this form of evidence. Our own analysis finds no associations between familiarity with antiracist expert evidence and the age, race, gender, or jurisdiction of the defense attorney. However, younger defense attorneys, white defense attorneys, and women defense attorneys all tend to express greater interest in the potential usefulness of antiracist evidence than their counterparts, as do those practicing in the West relative to those practicing in the South. These findings are based on multivariable ordinary-least-squares regression analyses in which the dependent variables are familiarity with and perceptions of the potential usefulness of antiracist evidence, respectively, while the independent variables are demographics and jurisdiction.[171]

Overall, the data disclose two notable overarching themes. First, respondents overwhelmingly reported that antiracist expert evidence would be useful in their practice. Second, attorneys' perceptions of the utility of antiracist evidence far exceeded their familiarity with that type of evidence. This provides critical information for scholars and advocates seeking to promote the use of antiracist evidence in the courts.

1. Racist Affiliations or Views

We defined evidence about racist affiliations or views as "expert evidence about associations, sympathies, group memberships, or alliances that may indicate racist allegiances."[172] One example we provided concerned expert evidence regarding an individual's membership in a white supremacist, nationalist, or separatist group.[173] Less than half, or 45.74%, of responses to this question expressed familiarity with this form of antiracist expert evidence (the remainder, 54.26%, indicated unfamiliarity).[174] Yet 89.15% of respondents stated that expert evidence of racist affiliations or views would be useful in their criminal-defense practice (9.85% responded that it would not be useful).[175] In the open-ended responses, attorneys discussed using experts for three purposes: to highlight racialized presumptions about gangs and gang members; to prove white-supremacist affiliations of bad-faith actors and perpetrators of hate crimes and hate-

171. See Appendix B, *infra*, for coefficient estimates.

172. *See infra* Appendix A.

173. *See infra* Appendix A.

174. *See supra* Table 6. In all analyses presented throughout this Section and in subsequent Sections, our calculations of percentages exclude those respondents who did not answer the question.

175. *See supra* Table 6.

motivated violence; and to show how law-enforcement officers had racist affiliations.

Attorneys discussed using experts to highlight the racialized presumptions about gangs and gang membership. Some respondents discussed the racism involved in prosecuting certain individuals as gang members. One stated:

> People of color are criminalized based on affiliations/friendships, neighborhood, music and other cultural manifestations such as how people who died are mourned. When the prosecution uses such evidence to prove gang membership/affiliation and asks jurors to convict based on it[,] [c]riminal defense attorneys need experts to contradict such racist tropes and stereotypes.[176]

Similarly, another respondent said: "The majority of my clients are indigenous and Hispanic and these youth are viewed as gang-affiliated, even where they are not. The Hispanic youth are also viewed as potentially undocumented, which some judges have (at least in the past) viewed as evidence of law-breaking tendencies."[177] These examples demonstrate how experts are needed to counter racial stereotypes.

A second set of responses focused on the need for expert testimony to prove white-supremacist group affiliations of bad-faith actors. One survey participant stated that experts could be needed in relation to "[e]vidence about KKK and structure."[178] Another participant shared:

> I had a judge once tell me that just because someone was part of a group like the proud boys, that didn't mean they would be biased in a trial where my client was Black. An expert would have been extremely beneficial in that scenario to explain why those jurors should have been kicked for cause.[179]

Attorneys also shared that experts could help inform people about gangs, such as racist prison gangs like the Aryan Brotherhood.[180] Finally, respondents mentioned needing experts to comment on law-enforcement officers' racist affiliations; one respondent highlighted how such evidence may be useful for impeachment:

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176. R_eKVY4Dsrzl4Bg6l. Here and in subsequent footnotes, we cite the alphanumeric identification code corresponding to individual survey respondents. A copy of the complete survey data is on file with the authors.

177. R_2zqltSbMIzqrd5Q.

178. R_DNoJDicHrJiR8u5.

179. R_2c6IpzoBGUz7gjH.

180. R_3D7uwofgSzgE4KI; R_3sgoIRo7luYAJKX; R_3lM3G5RfJEXetlp; R_3dDPrl58om1CP1C.

> Some police officers are known to be part of these [white-supremacist] groups (based on tattoos, social media post[s], etc.). If an officer denies what the group is, or that a particular symbol the officer wears or has tattooed, denotes association with a white supremacist group, an expert on the issue would be powerful impeachment evidence.[181]

2. Racist Language, Sounds, or Imagery

The survey defined this type of antiracist expert evidence as "expert evidence about terms, slurs, images, symbols, or sounds that indicate racist ideas, prejudice, or bias."[182] As an example, we offered expert evidence identifying a certain tattoo as a white-supremacist symbol.[183] In total, 51.80% of respondents expressed familiarity with this form of antiracist expert evidence, while 91.35% of respondents stated that it would be useful in their practice of criminal defense.[184]

In this category, respondents repeatedly asserted the need for experts to testify about imagery, given that law-enforcement officers discuss it in the courtroom. For example, respondents regretted how "[l]aw enforcement frequently testifies as 'experts' in what symbols, slang, and tattoos mean"[185] and referenced "[c]ops testifying about gang membership based on tats."[186] In these cases, respondents indicate that actual experts are needed to refute unfounded or otherwise-illegitimate law-enforcement testimony.

Respondents also said experts could help by identifying racist imagery used by police officers and law-enforcement personnel. For instance, one respondent shared that police officers "wear racist images on shirts."[187] Another stated that "[p]olice increasingly have tattoos that are white supremacist. Arizona Dep[artmen]t of Corrections had patches for all officers with skulls and light[]ning bolts."[188] Experts could be used "[m]aybe to show how things that a lot of people don't even know are racist are. Like certain crosses or numbers of gr[i]ff[i]ns. To show that some cops even have this stuff on them,"[189] and another suggested that experts could be used to analyze "[p]olice tattoos."[190] Taken together, these

181. R_3R3meyFiNwpaTMP.
182. *See infra* Appendix A.
183. *See infra* Appendix A.
184. *See supra* Table 6.
185. R_bPkwRlouUyCFKox.
186. R_3lErZ15fHMob1dh.
187. R_3jTN9iaOZlomLwG.
188. R_3dDPrl58om1CP1C.
189. R_YQaIhdT3w3Tvx1D.
190. R_3kAHvRPUTEJv93R.

comments show that criminal-defense attorneys identify two related forms of racism in the courtroom: on the one hand, defendants' tattoos are wrongly assumed to be evidence of gang membership; on the other, police officers' tattoos are not recognized or revealed as racist. Because law-enforcement officers regularly testify as fact and expert witnesses against criminal defendants of color, it is important to uncover potential witness bias. Experts could be useful in combating both forms.

Several criminal defenders also focused on using experts to resist the criminalization of rap lyrics and slang. In the context of rap lyrics, expert evidence could be used on "occasions where rap music has been used to show propensity to violence or gang affiliation."[191] A respondent provided a specific example of rap lyrics' weaponization:

> A lot of defendants adopt the names of "famous" rappers, and put those names in their phones, and their friends put the contact as "Killer Mike" and the DAs plant the idea in the jurors' heads that Killer Mike is just this one man's name. Most jurors don't understand gang lingo, and the DAs think they understand gang lingo. It's a problem.[192]

Attorneys revealed the need for experts to explain gang or slang terms, "particularly regarding use of urban language and the details surrounding meaning and intent."[193] One attorney shared that experts are needed "to explain language and te[rm]s used in social media or by clients that sound[] different and unus[u]al to jur[or]s. Most often we get prosecutors who have experts to explain terms used for guns, drugs[,] etc[.] but not for other benign terms."[194]

Two respondents used the same example of the "Lawyer Dog" case[195] to highlight the need for experts to explain certain slang words, dialects, or language preferences. One attorney said: "Perfect example was the case in Louisiana, where the defendant asked for 'a lawyer, dog' and the court said that he didn't really ask for his attorney, because there is no such thing as a [lawyer] dog without the comma in between."[196]

Attorneys also expressed that experts are needed to prove how seemingly innocuous language transmits racist ideas through coded words that trigger or

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191. R_1QMVhqVOwdMjLIb.

192. R_2QoLhToLdIyZXPm.

193. R_1rwzqSk96uNOwLG.

194. R_e5tiECPopghkt9L.

195. State v. Demesme, 228 So. 3d 1206, 1206-07 (La. 2017) (mem.) (Crichton, J., concurring in denial of certiorari).

196. R_3MEBO6rhg3xVHhi.

activate biases.[197] One attorney responded that "it would be very helpful to have someone who can explain dog[]whistles without offending the delicate sensibilities of those who don't know what they are."[198] Dog whistles "operate[] by appealing to deep-seated stereotypes of groups that are perceived as threatening. But they differ from naked racial terms in that they don't emphasize biology—so it's not references to brown skin or black skin."[199] Experts can help decode racism and stereotypes transmitted subliminally through such dog whistles.

In summary, the responses addressed two complementary forms of racism in the courtroom that experts could shed light on: the ways that normal language used by defendants of color is perceived as criminal, and the ways that racially hateful language does not register as a problem.

Finally, respondents also brought up racist imagery. One attorney wrote of prosecutors' characterization of defendants as animals: "I'm particularly interested in the use of animal imagery and neuropsychological evidence of its impact on death-qualified jurors and more generally on[] [j]urors who score high on measures of implicit bias."[200] Similarly, the respondent also discussed the importance of introducing "evidence that use of animal and other racist imagery stimulates portions of the brain that inherently interfere with juror factfinding and so should be presumed to be prejudicial."[201] Experts might be used to explain the potential impact of such imagery on trial outcomes.

3. Racial Stereotypes

In the survey, we informed respondents that evidence about racial stereotypes means expert evidence discussing social, historical, and linguistic context to explain why an idea, argument, or narrative draws on or promotes racial stereotypes.[202] We shared an example of expert evidence explaining how a prosecutor's use of evidence harnessed racial stereotypes.[203] In total, 48.90% of respondents expressed familiarity with expert evidence of racist stereotypes, and

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197. *See* Ian Haney López, Dog Whistle Politics: How Coded Racial Appeals Have Reinvented Racism and Wrecked the Middle Class 4 (2014) (defining dog whistles and discussing their use by politicians).

198. R_1jANWbK03mrJjJV.

199. German Lopez, *The Sneaky Language Today's Politicians Use to Get Away with Racism and Sexism*, Vox (Feb. 1, 2016, 4:30 PM EST), https://www.vox.com/2016/2/1/10889138/coded-language-thug-bossy [https://perma.cc/FLP6-WQZA] (quoting Ian Haney López, who was interviewed for the article).

200. R_3Otqe5tnrWM1fKF.

201. *Id.*

202. *See infra* Appendix A.

203. *See infra* Appendix A.

91.18% of respondents stated that such evidence would be useful in their practice of criminal defense.[204]

Many survey respondents discussed how racist stereotypes contributed to their clients' criminalization. One respondent wrote: "[T]here is lots of racism towards [N]ative [A]mericans in South Dakota. A bias of alcoholism and criminality. That is a hard issue to overcome for a [N]ative [A]merican client with a white jury."[205] Experts could be used to challenge presumptions of criminality.[206]

Respondents also noted that these stereotypes of dangerousness and criminality implicate Fourth Amendment rights. One respondent wrote:

> [B]lack people are often targets of police simply for racial stereotypes so it's important for a [j]ury to understand why an officer may have stopped someone under "suspicion" (for example) when that suspicion may be based solely upon a stereotype (i[.]e[.] a black teenage boy wearing a hoodie and a face mask).[207]

Similarly, another respondent wrote: "I've heard of attorneys attempting to get expert testimony admitted about stereotypes infecting reasonable suspicion, probable cause, and target-of-investigation determinations."[208] These responses suggest an important role that expert testimony can play. That said, one respondent cautions that expert testimony on this issue may not always be effective due to substantive law:

> I could see where you'd argue that a car stop was just a pretext for a racist assumption. E.g., in Maine . . . black people are bringing up drugs from southern states, but as long as police have the good sense to articulate a non-racist reason to stop someone, it's still a lega[l] stop.[209]

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204. *See supra* Table 6.

205. R_3nrDaxoLWYSxQpy.

206. *See* R_2qdAnSyOoTXgPzh ("In challenging handgun restrictions on people with felony convictions, I have used an expert to talk about the racist roots of gun ownership prohibitions that were tied to perceptions of dangerousness . . . ."); R_1mw8mGjwe6BZDb (addressing the need to draw out the effects of stereotyping on language "that is facially non-racist but seems designed to suggest our clients are subhuman in a way that has racist overtones (e.g. 'animal, savage, predator, beast')").

207. R_3HOp4yIBnrJnceL.

208. R_1mLh8NNoJue4NMU.

209. R_3iVVZJ7bHunbRBf.

4. Structural Racism

In asking respondents about "structural racism," the survey referenced evidence about racism within a particular system, racial disparities in access to resources, racially discriminatory policies or practices within an institution, and individual and community responses to any of the above.[210] We shared an example of expert evidence explaining how law-enforcement agents racially profile people from certain communities or backgrounds.[211] Slightly more than half, or 54.30%, of responses to this question indicated familiarity with antiracist expert evidence about structural racism, and 89.76% of responses stated that such evidence would benefit their practice.[212]

One response noted a variety of ways in which structural racism influences criminal-justice outcomes:

> I've had more black and brown kids treated as adults when it is [a] discretionary judge. Even with a[] [j]udge of color the white kids get to stay in juvenile court almost all of the time, they have more resources usually to put themselves in a better position to show they can obtain adequate treatment and supervision in juvenile court, the parents and family present better, white families tend to have less fear and suspicion of the justice system so they are more likely to participate in a positive way with probation and other [j]ustice personnel and so that puts out a better impression and creates the idea that they will cooperate with the[] system and be easy to work with. White families usually don't come to the table antagonistic and argumentative which is what happens with black and brown people who have grown up with institutional/structural racism. Some brown people from other countries just aren't savvy and/or are afraid to do anything, don't know what to do and so in that way they are hurt by race and cultural/linguistic differences.[213]

According to another attorney, expert testimony could draw out the impacts of structural racism, including

> expert testimony that [a] mentally ill Black defendant had harder time accessing treatment because he was Black; testimony about historical exclusion of Black people from juries; [a] Black defendant unable to prove claim of intellectual disability in death penalty case because he attended

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210. *See infra* Appendix A.

211. *See infra* Appendix A.

212. *See supra* Table 6.

213. R_1CkFYMurAzRsXTL.

> a segregated school which had no access to a psychologist and therefore no IQ testing; [a] Black client [that] did not get the special education services he needed because he attended a poor, majority Black school system.[214]

As these excerpts illustrate, attorneys identify a variety of arenas that are powerfully influenced by structural racism. Central to their discussions is the role of police. One attorney wrote that experts may be needed to explain "the disproportionate enforcement of certain laws against certain ethnic or racial minorities and in the areas populated by certain minorities—for example 'saturation patrols' that tend to occur only in disproportionately black and brown neighborhoods."[215] Another respondent wrote that an expert could "counteract the idea that many tend to have that whatever the law enforcement officer says happened is true and the person of color must be lying."[216]

Pretextual police stops were a related area where attorneys wished to see expert testimony. One respondent argued that "experts should help defense attorneys think creatively about how to get around really bad Supreme Court precedent holding that pre-textual stops are permissible because that [jurisprudence] effectively sanctions racial profiling as legal."[217] A few responses focused on *Commonwealth v. Long* in Massachusetts.[218] Under *Long*, a defendant can file a motion to suppress evidence seized pursuant to a traffic stop by raising a "reasonable inference of racial profiling by demonstrating consistent patterns of racially disparate traffic enforcement by the officer involved," or by raising a "reasonable inference that a stop was racially motivated based on the totality of the circumstances surrounding the particular traffic stop at issue."[219] A defendant may support these contentions with antiracist expert testimony; after they make this prima facie showing, the burden shifts to the Commonwealth to rebut this inference.[220] In identifying the role of the expert in *Long* motions, one respondent said: "[I]t requires use of statistical analysis and stop data from the officers compared to the population of the particular area where the person was stopped."[221] Statistical experts are therefore needed to conduct and explain this data analysis.

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214. R_2uhze74cYt6Zypj.

215. R_3frPCmudNmmIT1G.

216. R_xfustlRe9DfwYKt.

217. R_2eVjTHAaDQFX6Xv.

218. 152 N.E.3d 725 (Mass. 2020).

219. *Id.* at 733.

220. *Id.* at 735, 747.

221. R_2QFmJKZVQGXG1Us.

5. Implicit Racial Bias

In the survey, we highlighted that evidence about implicit racial bias included expert evidence about unconscious biases.[222] As an example of this kind of evidence, we offered expert evidence about the unreliability of cross-racial eyewitness identification.[223] Out of all the forms of evidence the survey asked about, evidence about implicit bias was the most familiar to respondents: 79.74% of responses to this question expressed awareness of implicit-bias evidence.[224] Meanwhile, 95.17% of responses indicated that this form of evidence would be useful to their practice.[225]

Several respondents echoed our example, demonstrating the need for expert testimony to call into question cross-racial identifications. In fact, cross-racial identification is one of the most widely recurring themes in our data—appearing in 86 responses. This is unsurprising given growing acceptance of this type of evidence and its successful usage in exonerating wrongfully incarcerated individuals.[226] In fact, respondents mentioned that expert testimony on cross-racial identifications has increasingly been accepted, so much so that in some jurisdictions there are now model jury instructions on eyewitness identification.[227]

Other responses discussed how implicit bias "[a]ffects police and witnesses."[228] In this vein, one attorney identified a need for "testimony regarding the adultification of black youth, in particular black male youth who are treated more harshly and perceived as older and more threatening than their peers of other skin colors."[229] Attorneys also highlighted the need for experts to help combat implicit bias at the sentencing stage. For instance, one attorney discussed the need for experts in "capital cases for arguments that [the] death penalty is applied unevenly based on race and in Batson cases."[230]

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222. *See infra* Appendix A.

223. *See infra* Appendix A.

224. *See supra* Table 6.

225. *Supra* Table 6.

226. *See, e.g.*, Vallas, *supra* note 138, at 98-99.

227. *See, e.g.*, R_11YN66pwPgACsH9.

228. R_1jANWbK03mrJjJV.

229. R_3CNnjF7a8ybcwhi.

230. R_2pQp4ZoU9vEYDhy; *see* U.S. Gov't Accountability Off., GGD-90-57, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities 5 (1990); David C. Baldus, Charles Pulaski & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. Crim. L. & Criminology 661, 664-65 (1983); *Race and the Death Penalty*, ACLU (Feb. 26, 2003), https://www.aclu.org/documents/race-and-death-penalty [https://perma.cc/NAV8-76Q2]; Ronald F. Wright, Kami

6. Racialized History, Policy, or Practice

In the survey, we noted that this category of expert evidence included evidence about the racialized history, context, application, or implications of a particular law, policy, or practice.[231] Respondents were less familiar with this form of evidence than the others mentioned in the survey—only 38.36% expressed familiarity with it—while 83.52% responded that they would find it useful.[232]

Responses covered a wide range of themes. With respect to legislation, one attorney referenced "Thomas Frampton's work on non-unanimous jury statutes as [a] product of Jim Crow."[233] Another identified a need for experts regarding motions to dismiss charges under 8 U.S.C. § 1326, a law with racist origins that prohibits the "reentry of removed aliens."[234] A respondent practicing in Virginia observed that their clients were "still being prosecuted under laws enacted to prevent freed slaves from possessing guns."[235]

With regard to racialized policies and practices, one attorney shared an example in which such expert evidence had already proven useful: "[D]uring a federal habeas evidentiary hearing, my team and I called a social worker to testify about the history of racial violence in the client's community that was occurring regularly during his childhood."[236] Another attorney discussed how in a hearing,

Chavis & Gregory S. Park, *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. ILL. L. REV. 1407, 1409-11; *Race and the Jury: Illegal Discrimination in Jury Selection*, EQUAL JUST. INITIATIVE 57-68 (2021), https://eji.org/wp-content/uploads/2005/11/race-and-the-jury-digital.pdf [https://perma.cc/57KN-N2QV].

231. *See infra* Appendix A.

232. *See supra* Table 6.

233. R_2uhze74cYt6Zypj.

234. R_pGkott4pEZxWjW9 (referring to 8 U.S.C. § 1326 (2018)); *see* United States v. Machic-Xiap, 552 F. Supp. 3d 1055, 1061 (D. Or. 2021) ("Mr. Machic-Xiap [the defendant] has presented strong and disconcerting evidence about the role that racism has played in the enactment, reenactment, and revision of the nation's immigration laws, especially those passed in the first three decades of the 20th century."); Nat'l Immigr. Project, *Equal Protection Challenges to Prosecutions Under 1325 & 1326: The Groundbreaking Decision in* United States v. Carrillo-Lopez, NAT'L LAWS. GUILD 1-3 (Dec. 2021), https://nipnlg.org/sites/default/files/2023-03/2021_21Dec-1325-6-Handout%20%281%29.pdf [https://perma.cc/JP9V-56EE]; Brenda Pfahnl, *Protecting American Blood from "Alien Contamination": Should Strict Scrutiny Apply to the Racist Roots of 8 U.S.C. § 1326?* United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996 (D. Nev. 2021)*, 49 MITCHELL HAMLINE L. REV. 316, 342 (2023) ("Because the roots of Section 1326 are steeped in significant racial animus to a degree that is shocking to the senses, it is unconscionable to entirely bypass the constitutional interests of equal protection and due process found in the Fifth Amendment as part of this balancing. It is precisely Section 1326's dark history of racial animus that underscores why the extreme deference to the plenary power of Congress in immigration matters should not be allowed to extend to the criminal courts.").

235. R_1PbLDFAlVjoHDDo.

236. R_25Rvd5KDdYGUs4i.

"one expert present[ed] the 100-year history of the death penalty being disproportionately applied against Black men."[237] Experts could also testify about other racialized practices in the criminal legal system, including "cocaine/crack disparit[ies]"[238] (referring to sentencing disparities for possession or distribution of powder cocaine and crack cocaine), and peremptory strikes, for which expert historical evidence could be used to show that "their purpose has always been discrimination."[239]

7. Racial Trauma

In the survey, we defined evidence about racial trauma as evidence that addresses traumatic stress resulting from racism.[240] The example we provided was of expert evidence regarding racial trauma experienced by a person who was subjected to or witnessed police brutality.[241] As with many of the questions, just over half—in this case 51.21%—of respondents were familiar with this evidence type.[242] Substantially more, 89.75%, of respondents indicated that such evidence would be useful to them.[243]

In analyzing the responses, some prominent repeated themes were racial trauma, PTSD, and other related psychological conditions. Indeed, across thirty-eight responses concerning racial trauma, the term "PTSD" is mentioned ten times. Regarding racial trauma, one attorney wrote: "[H]ere, multigenerational trauma inflicted by particular members of the District Attorney's office has been the subject of bragging by those deputies."[244] Usually expert evidence concerning racial trauma was discussed as being used to explain the conduct of a defendant, particularly in setting up "affirmative defense[s],"[245] which help negate criminal liability.[246] These include defenses related to mental health—what courts may

237. R_3dDPrl58om1CP1C.

238. R_bPkwRlouUyCFKox.

239. R_2uhze74cYt6Zypj.

240. *See infra* Appendix A.

241. *See infra* Appendix A.

242. *See supra* Table 6.

243. *See supra* Table 6.

244. R_2P7Foz5cRoomowh.

245. R_3JmTlQjOl7R7cCG.

246. *Affirmative Defense*, Legal Info. Inst. (June 2022), https://www.law.cornell.edu/wex/affirmative_defense [https://perma.cc/R993-ZQGC].

call insanity or diminished capacity.[247] Expert testimony may show how racial trauma caused or contributed to a condition that allows an individual to invoke the affirmative defense of insanity or diminished capacity, or to demonstrate mitigating factors.

In particular, attorneys discussed the need for experts on racial trauma to explain defendants' flight from or nervousness around law enforcement. One respondent wrote: "This kind of evidence could be particularly useful in rebutting the common 'why would they run from police if they are not guilty' argument."[248] Experts may also explain why a defendant's hands may shake and why they may look around nervously when pulled over by police due to fear of law enforcement rather than consciousness of guilt.[249] Presumably commenting on a defendant's fear or skepticism of the police, one attorney wrote that expert evidence "would be helpful as mitigation in sentencing to help explain to judges why people of color may be more self[-]reliant/turn to things like possessing weapons rather than relying on law enforcement."[250]

8. Impact of Racism on Conduct, Behavior, or Attitude

The survey highlighted that this category of evidence includes expert evidence about how racism affects people of color (including but not limited to criminal defendants) and influences their conduct, behavior, or attitude.[251] We provided an example: expert evidence regarding the possibility that an accused's flight from law enforcement is an attempt to avoid police brutality rather than a sign of a guilty conscience.[252] Once again, just over half, in this case 51.60%, of responses indicated familiarity with this type of evidence.[253] Meanwhile, the vast majority, 92.02%, reported that such evidence would benefit their practice.[254]

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247. For a description of the insanity or diminished-capacity defense, see Randy Borum & Solomon M. Fulero, *Empirical Research on the Insanity Defense and Attempted Reforms: Evidence Toward Informed Policy*, 23 LAW & HUM. BEHAV. 375, 376-378 (1999).

248. R_xxToxvJPrfUj2lr.

249. R_2QFmJKZVQGXG1Us; R_11YN66pwPgACsH9; *see* Cynthia J. Najdowski, Bette L. Bottoms & Phillip Atiba Goff, *Stereotype Threat and Racial Differences in Citizens' Experiences of Police Encounters*, 39 LAW & HUM. BEHAV. 463, 464 (2015) ("[S]tereotype threat might cause Blacks to feel anxious and engage in self-regulatory efforts . . . when interacting with the police. As a consequence, Blacks may be more likely than Whites to behave in ways that police commonly perceive as indicative of deception . . . .").

250. R_1GB41Xra4MMxM87.

251. *See infra* Appendix A.

252. *See infra* Appendix A.

253. *See supra* Table 6.

254. *Supra* Table 6.

As with responses to the question about racial trauma, attorneys predominantly focused on the need for experts to explain defendants' conduct during interactions with law enforcement. One attorney wrote that expert evidence could be provided to show "why a client did not feel going to the police was an option for them."[255] Another stated that an expert could help show "why a black person doesn't come forward as a witness or doesn't speak to the police is important in providing the full picture of what happened."[256] One respondent observed that expert evidence "[e]xplains how people of color react to show[s] of authority [like 'they] didn't look me in the eye' etc."[257]

Some responses within this category focused specifically on flight from police. One attorney discussed *Commonwealth v. Warren*,[258] a "Massachusetts case about weighing 'flight as consciousness of guilt' evidence differently for black men because of racially discriminatory policing."[259] Another respondent wrote that expert witnesses would be helpful "[t]o expand [Commonwealth v.] Warren."[260]

III. BARRIERS AND INTERVENTIONS: EXPANDING ACCESS TO ANTIRACIST EXPERT EVIDENCE

We now turn to obstacles to the introduction and admissibility of antiracist experts. We highlight potential barriers revealed by our survey and review of the case law, and we suggest strategies to overcome these hurdles.

In our survey of criminal-defense attorneys, we asked whether there were barriers to accessing and introducing expert evidence about racism. An overwhelming percentage of respondents—93.80%—answered "Yes" to this closed-ended question; the remainder answered "No." Next, we asked what these barriers were and shared a list of nonexclusive options, including an open-ended response field for those who selected "Other." This list of options was based on potential barriers that we identified during our research and conversations with criminal defenders during the survey-design phase. Table 7 presents the percentage of respondents who selected each option. There were 502 total respondents who answered this question, and they were encouraged to "select all that apply."

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255. R_1kFSqpoXSAcMX6b.

256. R_3HOp4yIBnrJnceL.

257. R_3nj8wBFcrfEkTBF.

258. 58 N.E.3d 333, 342 (Mass. 2016).

259. R_1IZeiDOJJuJnyH4.

260. R_bQ5Eua6gmHW5uqB.

TABLE 7. BARRIERS TO THE INTRODUCTION OF ANTIRACIST EXPERT EVIDENCE

Barrier	Percentage of Respondents Who Perceived This Barrier
Judges determine that such evidence is not relevant	82.67% (n=415)
Attitudes of judges towards evidence related to racism	73.51% (n=369)
Difficulty finding experts	68.53% (n=344)
Attitudes of opposing counsel towards evidence related to racism	58.37% (n=293)
Judges determine that such evidence is not reliable	55.18% (n=277)
Lack of experts	50.40% (n=253)
Cost to party	44.02% (n=221)
Lack of training for experts on issues of racism	31.08% (n=156)
Cost to counsel/firm/organization	30.48% (n=153)
Other	10.96% (n=55)

The most commonly identified barriers involved judges, with 82.67% citing the risk of judges deeming the evidence irrelevant and 73.51% highlighting judicial attitudes resistant to evidence related to racism. Another judge-related barrier was judges determining that antiracist expert evidence is not reliable (55.18%). As Table 7 shows, the least frequently selected barrier (aside from "Other") was "cost to counsel/firm/organization" (30.48%). This is striking

because it has been suggested that cost is one of the primary obstacles to criminal-defense attorneys utilizing expert witnesses,[261] but our results suggest that in the antiracist-evidence context there are several more significant barriers related to judges: namely, their attitudes toward such evidence and the uncertainty that they will find such evidence relevant and reliable.

The "Other" option was selected by 10.96% of respondents. We received fifty-four open-ended responses to this question, most of which elaborated on the barriers provided. Additional barriers identified by respondents who selected "Other" included: attorneys' lack of familiarity with antiracist expert evidence; attorneys' hesitancy due to their lack of knowledge about experts' subject-matter expertise or feeling ill-equipped to work with experts; attorneys' own racial bias or lack of recognition of racism; time limitations; and concerns about how the judge, jury, or prosecution might respond (e.g., take offense or fight harder) or view the criminal-defense attorney (e.g., as "woke" or playing the race card).[262]

The barriers identified in the survey and through our case law research can be classified into four categories: financial barriers, availability barriers, attitudinal barriers, and interpretive barriers. We detail how the first two categories, financial and availability barriers, could be addressed or mitigated through institutional reforms, infrastructure building, and mutual aid within the defense bar. Regarding the third category, attitudinal barriers of officers of the court, we emphasize the need for judges, attorneys, and jurors to address their implicit biases and attitudes toward race and racism. Finally, we explore how the fourth category, interpretive barriers, can best be addressed through judges' self-aware, fair, transparent, and equal application of Rule 702 and the *Daubert*/*Frye* standards (for expert witnesses), as well as Rules 401 (on relevance) and 403 (on prejudice). The reforms this Article proposes would not only ensure that antiracist expert evidence is available to criminal defendants but would also increase the fairness of our criminal legal system generally. Institutional reforms, such as equalizing funding between prosecutorial and defense agencies and ensuring that juries are inclusive and representative of the community, are needed to ensure fairer outcomes in our criminal legal system. Reducing implicit racial bias in the bench, bar, and jury box is imperative to achieving criminal defendants' equal treatment under the law.

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261. *See* Bureau of Just. Assistance, U.S. Dep't of Just., NCJ 161570, Trial Court Performance Standards with Commentary 9 (July 1997), https://www.ojp.gov/pdffiles1/161570.pdf [https://perma.cc/3PPT-24X8].

262. *E.g.*, R_1Fgpt36lLU3prWE; R_SAZw2bSMiEx4Bz3; R_2pQp4ZoU9vEYDhy. Some responses addressed the persuasiveness of expert evidence and focused on jurors being unpersuaded by expert evidence due to their racial biases. *E.g.*, R_1doTrgm9kdxIkVm.

A. Financial Barriers

In the survey we asked about two financial barriers: the cost to legal providers and the cost to parties. Just under one-third of respondents—30.48%—identified the cost of experts to the counsel, firm, or organization as a barrier.[263] And 44.02% found that cost to the party (i.e., the defendant) was a barrier.[264] Survey respondents also mentioned affordability concerns throughout their responses to a variety of open-ended questions.

Some attorneys shared their struggles in securing funding to hire an expert. One attorney wrote that "[a]ppointed cases don't receive money for these types of experts."[265] Another attorney noted: "I know of at least one case where North Carolina Indigent Defense Services refused to fund an expert who[se] purpose was to testify about barriers to mental health care for a Black defendant."[266]

These reflections are not surprising, given the current state of indigent defense. The Brennan Center for Justice has identified a number of factors impairing defendants' right to adequate counsel, including limited resources among defender offices and comparatively ample resources among prosecutor offices.[267] Expert witnesses are usually paid a high hourly rate.[268] As of 2021, the median expert-witness hourly rate was $400 for case review and preparation, $475 for a deposition, and $500 for testifying in court.[269] The median retainer fee per expert was $2,600.[270] While the total cost of experts differs by case, expert, and industry, the median "[t]ypical [t]otal [b]illings" for a single case was $7,000.[271]

At the federal level, the disparity in funding between public defenders and prosecutors is colossal. In March 2023, the Biden Administration's budget request allocated $2.9 billion to the U.S. Attorneys' Offices[272]—a figure that did

263. *See supra* Table 7.

264. *See supra* Table 7.

265. R_2qEElojLlOcBgBa.

266. R_2uhze74cYt6Zypj.

267. Bryan Furst, *A Fair Fight: Achieving Indigent Defense Resource Parity*, BRENNAN CTR. FOR JUST. 2 (Sept. 9, 2019), https://www.brennancenter.org/our-work/research-reports/fair-fight [https://perma.cc/P76E-RSJQ].

268. James J. Mangraviti, Kelly J. Wilbur & Nadine Nasser Donovan, *2021 Survey of Expert Witness Fees: Summary of Results*, SEAK 2 (2021), https://seak.com/wp-content/uploads/2021/03/2021-EW-Fee-Survey-Summary-Report.pdf [https://perma.cc/X29E-5LWB].

269. *Id.* at 5.

270. *Id.*

271. *Id.*

272. The final amount allocated to the U.S. Attorneys' Offices was $2.611 billion—over $250 million less than President Biden's request, but still over $1 billion more than federal public

not include funding to the Federal Bureau of Investigation, Drug Enforcement Agency, and several other agencies that investigate cases alongside them.[273] Meanwhile, federal public defenders were fighting in November 2023 to prevent their budget from being reduced.[274] A final spending bill for fiscal year 2024 was not passed until March 23, 2024,[275] leaving federal public-defender offices in a hiring freeze for over eight months while they waited to find out if they would have to lay off 9-12% of their workforce.[276] The final bill allocated $1.45 billion,

defenders were allocated. *See* Consolidated Appropriations Act, 2024, Pub. L. No. 118-42, 138 Stat. 25, 135; *A Review of the President's Fiscal Year 2024 Funding Request for the U.S. Department of Justice: Hearing Before the Subcomm. on Com., Just., Sci., & Related Agencies of the S. Comm. on Appropriations*, 118th Cong. 2-3 (2023) (statement of Merrick B. Garland, Att'y Gen. of the United States); *The Judiciary Fiscal Year 2024 Congressional Budget Summary*, ADMIN. OFF. OF THE U.S. CTS., at i-iii (Mar. 2023), https://www.uscourts.gov/sites/default/files/FY%202024%20Congressional%20Budget%20Summary.pdf [https://perma.cc/4FZE-PS9Q].

273. *A Review of the President's Fiscal Year 2024 Funding Request for the U.S. Department of Justice: Hearing Before the Subcomm. on Com., Just., Sci., & Related Agencies of the S. Comm. on Appropriations*, *supra* note 272, at 2-3 (statement of Merrick B. Garland, Att'y Gen. of the United States).

274. *See The Judiciary Fiscal Year 2024 Congressional Budget Summary*, *supra* note 272, at i-iii; Ryan Tarinelli, *Federal Public Defenders Warn Proposed Funding Would Cause Layoffs, Court Delays*, ROLL CALL (Oct. 13, 2023, 12:08 PM), https://rollcall.com/2023/10/13/federal-public-defenders-warn-proposed-funding-would-cause-layoffs-court-delays [https://perma.cc/5CNP-9QJR] ("The Senate proposal would freeze funding at $1.38 billion for defender services, while the House number would increase it to $1.41 billion. But defenders and judiciary officials say both those proposed figures for fiscal 2024 would in effect represent a funding shortfall.").

275. Press Release, U.S. Senate Comm. on Appropriations, Senate Approves Final FY24 Funding Package in Overwhelming 74-24 Vote (Mar. 23, 2024), https://www.appropriations.senate.gov/news/majority/senate-approves-final-fy24-funding-package-in-overwhelming-74-24-vote [https://perma.cc/MLR9-QYNY].

276. *See* Tarinelli, *supra* note 274; Benjamin S. Weiss, *Federal Public Defenders Among Those at Risk Amid Planned Judiciary Budget Cuts*, COURTHOUSE NEWS SERV. (Aug. 1, 2023), https://www.courthousenews.com/federal-public-defenders-among-those-at-risk-amid-planned-judiciary-budget-cuts [https://perma.cc/8G34-JXAV] ("Such a budget shortfall would force the judiciary's public defender's office to downsize significantly, the judicial conference officials cautioned—under the House plan, the program would have to do away with the equivalent of 368 full-time positions, or about 9% of its workforce. Under the more austere Senate bill, that figure would rise to as much as 493 full-time positions, or a 12% decrease."); Press Release, U.S. Senate Comm. on the Judiciary, Durbin, Welch, Ossoff, Booker, and Hirono Lead 18 of Their Colleagues in Letter to Senate Appropriations Committee Leaders Urging Corrections to Proposed Federal Defenders' Funding (Oct. 10, 2023), https://www.judiciary.senate.gov/press/releases/durbin-welch-ossoff-booker-and-hirono-lead-18-of-their-colleagues-in-letter-to-senate-appropriations-committee-leaders-urging-corrections-to-proposed-federal-defenders-funding [https://perma.cc/8D2X-FDT8].

avoiding layoffs but still cutting the budget by over $100 million.[277] The federal courts requested $1.69 billion in funding for federal public defenders in 2025, but the House of Representatives responded by proposing only $1.5 billion.[278] Similarly large, if not more pronounced, disparities exist at the state level.[279] It follows that there is a significant disparity between prosecutors' and defenders' expert-witness budgets.[280] This determines who can afford to hire expert witnesses, which in turn impacts whether a criminal defendant can afford a robust defense.

It is imperative to allocate federal and state funds equitably to the public and court-appointed defenders representing indigent defendants to ensure that they have resources like expert-witness funding that allow them to advocate for their clients effectively. Legislative efforts should be pursued to facilitate this funding allocation. On the federal level, legislation like the Ensuring Quality Access to Legal Defense (EQUAL) Act would be a step in the right direction.[281] The EQUAL Act aimed to "improve access to counsel by providing $250 million in funding for public defense grants . . . address[ing] workload limits, establish[ing] pay parity between public defenders and prosecutors within five years,

277. *See* Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, 138 Stat. 460, 539-40; Press Release, Off. of Sen. Peter Welch, Welch Raises Concern over Proposed Cuts to the Federal Defender Budget in Senate Judiciary Hearing (Sept. 8, 2023), https://www.welch.senate.gov/welch-raises-concern-over-proposed-cuts-to-the-federal-defender-budget-in-senate-judiciary-hearing [https://perma.cc/69LU-YGZV] ("The Federal Public and Community Defenders recently warned that Congress's current spending proposals would result in a budget shortfall of over $100 million, threatening to reduce the Federal Defenders' workforce by over 10%, at a time when the agency is already understaffed.").

278. *Statement of ABA President Mary Smith Re: Increased Funding for Federal Public Defenders*, Am. Bar Ass'n (July 12, 2024), https://www.americanbar.org/news/abanews/aba-news-archives/2024/07/statement-of-aba-president-re-funding-federal-public-defenders [https://perma.cc/V3CN-5FMY].

279. *Compare* Bureau of Just. Stat., U.S. Dep't of Just., NCJ 234211, Prosecutors in State Courts, 2007—Statistical Tables 2, 4 tbl.2 (Dec. 2011), https://bjs.ojp.gov/content/pub/pdf/psc07st.pdf [https://perma.cc/W2MU-WGQQ] (finding that in 2007, state prosecutors' offices across the country had a total operating budget of over $5.8 billion), *with* Bureau of Just. Stat., U.S. Dep't of Just., NCJ 250249, State-Administered Indigent Defense Systems, 2013, at 1, 8 tbl.5 (May 3, 2017), https://bjs.ojp.gov/content/pub/pdf/saids13.pdf [https://perma.cc/Q9MT-DMPC] (finding that in 2013, total revenue received by state indigent-defense systems, located in twenty-eight states and Washington, D.C., ranged from $121,000 to around $203 million).

280. *See* Furst, *supra* note 267, at 9.

281. *See Federal Support for Improving Public Defense Quality: The EQUAL Defense Act*, Nat'l Legal Aid & Def. Ass'n 2 (Feb. 2022), https://www.nlada.org/sites/default/files/Issue%20Brief%20-%20Equal%20Defense%20Act%20%28Feb%202022%29.pdf [https://perma.cc/7F24-EWC6].

and more."[282] However, despite its admirable goals, the EQUAL Act failed in the Senate and House when it was introduced in 2019[283] and failed again in the House in 2021,[284] 2022,[285] and 2023.[286]

State and local governments need to rectify indigent-defense funding shortages. A report by David Carroll of the Sixth Amendment Center revealed that only twenty-seven states fully funded their public-defense services, while twelve states provided "minimal state funds," relying almost entirely on local governments.[287] The report concluded that "local governments have significant revenue-raising restrictions" and that "the jurisdictions often most in need of indigent defense services are . . . least likely to be able to . . . afford it."[288] State legislators could vote to provide funding themselves or to supplement funding in the counties that need it most.

Litigation can be a powerful tool to secure additional funding for public defense. For example, in *Hurrell-Harring v. New York*, the New York Court of Appeals held that arraignment is a "critical stage" at which criminal defendants are entitled to counsel.[289] That ruling's implementation not only created another responsibility for public defense but also led to state-funded caseload-relief initiatives.[290] Further, federal, state, and local legislatures can pass laws to increase indigent-defense funding. Criminal defendants and underfunded counties can sue state governments for the funding they are constitutionally entitled to. And organizers can work to ensure the funding gap, and the legislation written to address the funding gap, are visible and urgent. While these reforms do not directly address expert-witness funding per se, increased funding could expand

282. *See* Press Release, Rep. Suzanne Bonamici, Bonamici Introduces Bill to Address Public Defense Shortage (Nov. 17, 2022), https://bonamici.house.gov/media/press-releases/bonamici-introduces-bill-address-public-defense-shortage [https://perma.cc/2T6W-UFPV].

283. *See* S. 1377, 116th Cong. (2019); H.R. 2868, 116th Cong. (2019).

284. *See* H.R. 1408, 117th Cong. (2021).

285. *See* H.R. 9325, 117th Cong. (2022).

286. *See* H.R. 3758, 118th Cong. (2023).

287. David Carroll, *Right to Counsel Services in the 50 States: An Indigent Defense Reference Guide for Policymakers*, *in Liberty & Justice for All: Providing Right to Counsel Services in Tennessee*, INDIGENT REPRESENTATION TASK FORCE 96, 100 (Apr. 2017), https://www.tncourts.gov/sites/default/files/docs/irtfreportfinal.pdf [https://perma.cc/N4LF-CT5J].

288. *Id.* at 101.

289. 930 N.E.2d 217, 223 (N.Y. 2010).

290. Hurrell-Harring *Settlement Implementation*, N.Y. STATE OFF. INDIGENT LEGAL SERVS. (July 5, 2023), https://www.ils.ny.gov/node/56/hurrell-harring-settlement-implementation [https://perma.cc/7VFX-XJUX]; *Evaluating the Effectiveness of Caseload Standards in the* Hurrell-Harring *Settlement Counties 2021 Update*, N.Y. STATE OFF. OF INDIGENT LEGAL SERVS. 52 (Oct. 30, 2021), https://www.ils.ny.gov/files/October%202021%20Hurrell-Harring%20Caseload%20Report_Full_Amd_11_11_12.pdf [https://perma.cc/U2FB-6ENZ].

defense budgets and, in turn, access to antiracist expert testimony for indigent defendants.

B. Availability Barriers

In our national survey of criminal-defense attorneys, availability barriers included the lack of training for experts on issues of racism (perceived by 31.08% of respondents), the lack of experts (perceived by 50.40% of respondents), and the difficulty of ultimately finding the experts who exist (perceived by 68.53% of respondents).[291]

Fourteen open-ended responses to our survey focused on the need for available experts or the attorneys' inability to find experts willing to work on specific cases.[292] This was particularly true in California Racial Justice Act litigation, where experts are in high demand. One respondent wrote: "Virtually every [Racial Justice Act] claim we bring needs or could benefit from an expert but we are experiencing difficulty finding them."[293] Similarly, another respondent expressed: "A network of professors who could testify or write declarations in Racial Justice Act cases in California would be helpful. Especially when it comes to portrayal of Black and Latino people as violent or oversexualized."[294] These issues are pertinent outside the California context as well. One respondent stated:

> We don't have enough, we don't have access to enough experts; they are hard to reach; they aren't training in forensic testimony; hard to quali[f]y them as experts with no prior experience; but most of all, I think there are too many "armchair academics" who would rather teach, write and pontificate rather than deal with the real world and real consequences for real human beings.[295]

Individuals who are eligible to act as experts may hesitate to take on the role. One respondent wrote: "[A]t least for the state public defender's office, there are few experts willing to work on state public defender cases as an expert—though,

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291. *See supra* Table 7.

292. One respondent discussed this theme in three of their responses to different open-ended questions: R_33l3TKv7D5kXe00. Eleven respondents did so in one of their responses: R_Pt8NVRYgK0PgJHP; R_1I45CfFYUTGS7H8; R_3CNnjF7a8ybcwhi; R_3I049wYDpAnT1eO; R_2zYjVy8PY5ggZLT; R_2rqm309NebFWtbB; R_2qEElojLlOcBgBa; R_2uhze74cYt6Zypj; R_9TENtNjRwYK0C7n; R_UJSDQa3TWGx3Ojr; R_20MuTZMfGsRChOL.

293. R_33l3TKv7D5kXe00.

294. R_UJSDQa3TWGx3OJr.

295. R_9TENtNjRwYK0C7n.

they don't necessarily need to be based in [the state]."[296] The reluctance of experts to testify on behalf of criminal defendants limits access to justice. *United States v. Hayat*, a case involving a Pakistani American man convicted of providing material support to terrorists, exemplifies this problem.[297] The government expert testified that a note found in the defendant's wallet was an Islamic supplication that was "not peaceful" and would be carried by someone engaged in "holy war."[298] One issue in this case was that the defense attorney did not produce an Arabic-speaking expert to counter the prosecution's expert.[299] The defense attorney later shared that she looked for an expert but, in the aftermath of 9/11, she could not find anyone willing to testify on behalf of a Muslim person suspected of terrorism.[300] An expert's willingness to testify may be predicated on several factors, including not only the facts of the case and the expert's availability, but also structural bigotry and the political climate.

Some survey participants also discussed how demographic and geographic considerations influence experts' availability. One wrote: "We are lacking in professionals of color in our community, so it will be tricky to find appropriate experts. But I am close to some larger cities that may help."[301] While antiracist experts can come from any racial or ethnic background, the locations of the courthouse and the expert are not insignificant. One respondent observed:

> As a public defender, the biggest challenge here is identifying and getting access to experts. It would be rare for me to get budget approval to hire an expert for anything but the most serious of cases. In addition, the only experts I'm currently aware of would have to travel from a larger metropolitan area such as Washington DC or Chicago to testify which adds to the budget issue. I think about 2/3 of our judges would be open to such expert testimony if we could obtain it.[302]

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296. R_20MuTZMfGsRChOL.

297. 710 F.3d 875, 880 (9th Cir. 2013).

298. *Id.* at 911.

299. *See id.* at 902 (concluding that the district court did not abuse its discretion when it excluded the defense expert's testimony on the ground that the witness "was unqualified to evaluate the content of the writing because she did not know Arabic").

300. Jason Fagone, *The Man Who Paid for America's Fear*, S.F. Chron. (May 12, 2022, 2:19 PM), https://www.sfchronicle.com/projects/2022/hamid-hayat [https://perma.cc/E2D5-L4QH] ("Looking back on the trial now, Mojaddidi defends her efforts, saying she looked for experts but couldn't find anyone who wanted to stick their neck out for a terrorism suspect at a moment when so many Americans were afraid of Muslims.").

301. R_2rqm309NebFWtbB.

302. R_3CNnjF7a8ybcwhi.

The availability barrier is compounded by unequal access to experts. Prosecutors easily secure experts from law-enforcement agencies—for instance, government experts on rap lyrics, counterterrorism, and gangs—that work in tandem with prosecuting authorities.[303] Conversely, defense attorneys scramble to find suitable experts because they do not have established relationships or networks with academics and professionals who could serve as experts on behalf of the defense. This asymmetry in access to experts cements the already-existing disadvantage for criminal defendants.

The problem of finding antiracist experts may only become more pronounced in the present political climate, in which influential politicians seek to discourage students from learning about racism and, in particular, seek to silence the teaching of critical race theory and other scholarship or literature about racism.[304] These efforts hamper intellectual inquiry and disrupt the education of

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303. Paul C. Giannelli, *The Right to Defense Experts*, 5 PUB. DEF. REP., no. 6, 1982, at 1, 1 ("Obtaining the services of experts is not difficult for the prosecution. Typically, the prosecution has access to the services of state, county, or metropolitan crime laboratories."); *Organization and Functions Manual: 11. FBI Cooperative and Information Services*, U.S. DEP'T JUST., https://www.justice.gov/archives/usam/organization-and-functions-manual-11-fbi-cooperative-and-information-services [https://perma.cc/7K8N-GJSL] ("The FBI also provides, *without cost*, technical and scientific assistance, including expert testimony in federal or local courts, for all duly constituted law enforcement agencies, other organizational units of the Department of Justice, and other federal agencies, which may desire to avail themselves of the service." (emphasis added)). Courts often have a permissive attitude toward admitting a government's expert evidence. *See, e.g.*, Commonwealth v. Serge, 896 A.2d 1170, 1173-74, 1176 (Pa. 2006) (holding that a computer-generated animation (CGA) presented by the Commonwealth is admissible as demonstrative evidence); *see also infra* notes 377-392 and accompanying text (describing the courts' differing standards when evaluating a defendant's as compared to a prosecutor's expert).

304. *See* Woody Holton, *Chilling Affects: The Far Right Takes Aim at Black History*, 129 AM. HIST. REV. 199, 200-05 (2024); Patricia Mazzei & Anemona Hartocollis, *Florida Rejects A.P. African American Studies Class*, N.Y. TIMES (Jan. 19, 2023), https://www.nytimes.com/2023/01/19/us/desantis-florida-ap-african-american-studies.html [https://perma.cc/S97R-Z75X]; Press Release, NAACP, NAACP Files New Lawsuit Alleging Pickens County School Board Book Ban Is Unconstitutional and Politically Motivated (Apr. 26, 2023), https://naacp.org/articles/naacp-files-new-lawsuit-alleging-pickens-county-school-board-book-ban-unconstitutional-and [https://perma.cc/9PU6-LWVQ] (denouncing a South Carolina school district's decision to remove Jason Reynolds and Ibram X. Kendi's *Stamped: Racism, Antiracism, and You* from every school in the district); *PEN America Index of School Book Bans—2023-2024*, PEN AMERICA, https://pen.org/book-bans/pen-america-index-of-school-book-bans-2023-2024 [https://perma.cc/QC8X-PL2V]; Taifha Alexander, LaToya Baldwin Clark, Kyle Reinhard & Noah Zatz, *Tracking the Attack on Critical Race Theory*, CRT FORWARD 4 (2023), https://crtforward.law.ucla.edu/wp-content/uploads/2023/04/UCLA-Law_CRT-Report_Final.pdf [https://perma.cc/W5QZ-5JQN]; Chelsea Harvey & E&E News, *Trump Takes a 'Giant Wrecking Ball' to U.S. Research*, SCI. AM. (Feb. 18, 2025), https://www.scientificamerican.com/article/trump-takes-a-giant-wrecking-ball-to-u-s-research [https://perma

individuals who may wish to study race and racism, potentially hindering their capacity and willingness to serve as experts. And they may also chill the speech of potential antiracist experts if they anticipate backlash against their testimony.

Still, many universities have untapped resources. Scholars of various disciplines study, teach, and write about race and racism and could be qualified to serve as expert witnesses. Academics need to learn about what testifying as an expert entails and how they might contribute in criminal cases. Academics and criminal-defense agencies or associations could create a network of available individuals. The criminal-defense bar would benefit greatly from state and national databases of potential antiracist experts.[305] Law school clinics or experiential programs could develop and maintain these networks. Universities could recognize that serving as an expert in criminal cases is a valuable external service that could be considered in professors' annual, promotion, and tenure reviews. Professional organizations could similarly incentivize expert service by providing continuing-education credit to those who serve as expert witnesses. This credit is required in medical, behavioral-health, legal, and other professions to maintain licensure.[306]

Academics and professionals should be sought out and trained to serve as experts, but testifying as an expert is not only for people with doctorates and advanced professional degrees. Many potential experts are qualified because of their extensive professional and community experience working with populations of color on issues of racism.[307] Community members who decry racism in criminal cases could mobilize academics, professionals, and community organizers to serve as antiracist expert witnesses on a reduced-fee or pro bono basis. Participatory-defense hubs could play a key role in this effort; they assert that "marching in the streets to oppose police violence, and standing with the

.cc/7CBP-TZMQ]; Olga R. Rodriguez, Terry Chea & Makiya Seminera, *Trump's DEI Order Leaves Academic Researchers Fearful of Political Influence over Grants*, AP News (Feb. 8, 2025, 9:39 AM EDT), https://apnews.com/article/trump-academic-research-funding-dei-5c8f89118da6c9604329120a576ba183 [https://perma.cc/8UYF-ZXUH].

305. *See, e.g.*, *Bringing Social Science into the Courtroom*, Data for Defs., https://datafordefenders.org [https://perma.cc/4455-6HNT]. Data for Defenders serves as an example of a successful database that provides briefs, motions, and transcripts to expand public defenders' toolboxes.

306. Inst. of Med. of the Nat'l Acads., Redesigning Continuing Education in the Health Professions, at app. D (2010).

307. *See, e.g.*, Jocelyn Simonson, Radical Acts of Justice: How Ordinary People Are Dismantling Mass Incarceration 165-67 (2023) (discussing how Marcel Woodruff, a participatory-defense-hub member, serves as an expert witness "to explain that a young person's gang involvement should not mean that what they do is done for the benefit of that gang" and pointing out that his "'expertise,' though backed up by a master's degree, centers around his personal experiences in a gang, doing violence prevention work, and engaging in participatory defense").

community in the courtroom to challenge mass incarceration go hand in hand."[308] Efforts like this not only would help overcome some of the availability barriers we have detailed in this Section but may also serve decarceral aims by contesting legal constructions of what constitutes "expertise" and contributing to deeper explorations of what racial justice entails.[309]

C. Attitudinal Barriers of Officers of the Court

The attitudes and perceptions of various officers of the court can shape a defense attorney's decision to introduce antiracist expert evidence and the treatment it receives. We discuss the attitudes and perceptions of defense counsel, prosecutors, jurors, and judges in turn.

1. Defense Attorneys

Defense attorneys' own attitudes can stand in the way of introducing and using antiracist expert witnesses. As the survey results highlighted, about half of the defense attorneys surveyed were unfamiliar with most categories of antiracist expert evidence.[310] There are several reasons for this unfamiliarity. Most immediately and obviously are defense attorneys' blind spots: when a defense lawyer fails to recognize how racism impacts their client's case, that impedes their ability to identify a need for antiracist evidence and the introduction of expert testimony.

The attorneys we surveyed also reported that defense attorneys themselves display racial bias. One attorney opined that there are "too many white criminal defense lawyers who don't understand the impact of white supremacy on the criminal defense system and/or believe in colorblind justice and/or are afraid to confront racism in their cases because it is uncomfortable."[311] Similarly, another respondent discussed how "[c]lients of color may be adversely affected by defense counsel and defense teams that harbor cultural views of implicit bias,

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308. *About*, PARTICIPATORY DEF., https://www.participatorydefense.org/about [https://perma.cc/24H6-ZANW].

309. *See* Benjamin Levin, *Criminal Justice Expertise*, 90 FORDHAM L. REV. 2777, 2819-36 (2022) (explaining how lived experience can constitute or create expertise); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 424-25 (2018) (describing how "the Vision for Black Lives reorients more mainstream understandings of the problem of, and solutions to, racialized police violence"); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 829 (2021) (describing federal and local strategies for reclaiming power over the development of policing policies).

310. *See supra* Table 6.

311. R_3D7uwofgSzgE4KI.

which affects investigation of facts, investigation of mitigation, and presentation to a court."[312]

Scholars have studied racial bias among defenders.[313] For instance, L. Song Richardson and Phillip Atiba Goff have discussed how implicit bias colors public defenders' decision-making.[314] They place partial blame on the stressful environments in which public defenders operate, comparing their work settings to high-pressure emergency rooms where demands exceed available resources and urgent decisions must be made with incomplete information.[315] This creates conditions that are highly conducive to bias, as research indicates that individuals in stressful situations tend to experience heightened levels of implicit racial bias.[316]

Since the criminally accused are disproportionately people of color and criminal-defense attorneys are disproportionately white,[317] defense attorneys' understandings of people's experiences with racism and the ways it materializes may lag behind their clients' understandings.[318] It is imperative that criminal-defense attorneys examine their own biases, privilege, and assumptions about racism and address possible knowledge gaps. In law school and in continuing legal

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312. R_3dDPrl58om1CP1C.

313. *See* L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2628 (2013); *see also* Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1551-56 (2004) (discussing how race influences the automatic reactions of capital-defense attorneys and cautioning judges not to assume that counsels' actions are independent of racial considerations).

314. Richardson & Goff, *supra* note 313, at 2633.

315. *Id.*

316. Tiffani J. Johnson, Robert W. Hickey, Galen E. Switzer, Elizabeth Miller, Daniel G. Winger, Margaret Nguyen, Richard A. Saladino & Leslie R.M. Hausmann, *The Impact of Cognitive Stressors in the Emergency Department on Physician Implicit Racial Bias*, 23 ACAD. EMERGENCY MED. 297, 305 (2016) ("We provide new evidence that cognitive stressors can increase implicit bias . . . ."); *see also* Anton J. Dijker & Willem Koomen, *Stereotyping and Attitudinal Effects Under Time Pressure*, 26 EUR. J. SOC. PSYCH. 61, 72 (1996) ("[I]nformational overload led individuals to use their stereotypes and attitudes in processing social information."); Jordana R. Muroff, James S. Jackson, Carol T. Mowbray & Joseph A. Himle, *The Influence of Gender, Patient Volume and Time on Clinical Diagnostic Decision Making in Psychiatric Emergency Services*, 29 GEN. HOSP. PSYCHIATRY 481, 488 (2007) ("The results suggest that higher patient loads may be associated with diagnostic outcomes that fit social stereotypes.").

317. There is a dearth of data on the demographics of criminal-defense attorneys in the United States, and there is an urgent need for research that disaggregates the defense-attorney group by race. According to Zippia's defense-attorney demographics research summary, as of 2021, 75.1% of criminal-defense attorneys are white, 8% are Hispanic or Latine, 6.5% are Asian, and 5.7% are Black. *Defense Attorney Demographics and Statistics in the US*, ZIPPIA, https://www.zippia.com/defense-attorney-jobs/demographics [https://perma.cc/M5ZA-P3XN].

318. *See Race and Public Defense*, NAT'L ASS'N CRIM. DEF. LAWS. (Nov. 29, 2022), https://www.nacdl.org/Content/Racial-Disparity-and-Public-Defense [https://perma.cc/3LY4-NJAP].

education, attorneys should study critical race theory, critical legal studies, and other topics related to subordination and the law since doing so can help attorneys understand how race and racism operate, equip them to analyze clients' legal dilemmas through a racial-justice lens, and prepare them to argue the relevance and impact of racism in a given instance.[319] Our survey's findings on the implicit racial biases and attitudes of officers of the courts, including judges, attorneys, and jurors, highlight the importance of education about race and racism in the United States. This recommendation would face headwinds from the political movement against critical race theory, which, as discussed above, seeks to chill discussion of race and racism in educational settings like law schools.[320] But that should not dissuade educators from incorporating critical race studies into their curricula. The present moment demands more education about how race and racism affect the American legal system, not less.

2. Prosecutors

More than half (58.37%) of survey respondents reported that opposing counsels' attitudes toward racism-related evidence stymied its introduction.[321] Sixty-seven open-ended responses in the survey focused on prosecutors' attitudes, and several of these responses discussed prosecutorial racism, including through selective prosecution and enforcement. One respondent detailed the barriers to antiracist evidence: "District Attorneys['] attitudes, opposition, and job to convict defendants regardless of clear racial bias, structural or interpersonal racism, and the extreme inequity of prosecutors in the courtroom compared to defense attorneys and their clients."[322] The attitudes displayed by prosecutors also affect how they treat antiracist experts and arguments. Another respondent observed:

> When racial issues are raised by the defense, the prosecution takes it personal and fights harder and doesn't give any considerat[ion] or decent

319. *See* Cynthia Lee, *Race and the Criminal Law Curriculum*, *in* THE OXFORD HANDBOOK OF RACE AND LAW IN THE UNITED STATES (Devon Carbado, Emily Houh & Khiara M. Bridges eds.) (forthcoming) (manuscript at 1, 8-9); LeRoy Pernell, *Why I Will Not Stop Teaching Law Students to Think Critically About Race: The Attack on Teaching About the Role of Race in Law*, 25 RUTGERS RACE & L. REV. 1, 3-4 (2024); Benjamin M. Gerzik, *Reforging the Master's Tools: Critical Race Theory in the First-Year Curriculum*, 76 SMU L. REV. F. 34, 36-38 (2023).

320. *See* Leah M. Watson, *The Anti-"Critical Race Theory" Campaign – Classroom Censorship and Racial Backlash by Another Name*, 58 HARV. C.R.-C.L. L. REV. 487, 489 (2023) ("This movement has significantly reduced, or altogether silenced, discussions of racism and sexism in classrooms, essentially operating as an educational gag order on these topics.").

321. *See supra* Table 7.

322. R_2TLTCH8wcQd454B.

> offers to resolve the case. Bringing obvious racial issues to the for[e]front of a criminal defense is like putting a pois[o]n pill into the case. You lose credib[ility] with the court and have to fight the government even harder than if you don't raise it directly.[323]

These reflections by defense attorneys echo the literature documenting racial bias in prosecutorial discretion and punitiveness.[324] They also seem to capture the resistance prosecutors may display when confronted with antiracist evidence.

As Angela J. Davis writes, "Prosecutors are the most powerful officials in the system. They decide whether to charge an individual and what the charge or charges should be."[325] This is because their discretion as to whom and how to charge and plead out is virtually unfettered.[326] There is a broad literature documenting the perils of prosecutorial discretion and the related harm caused to people of color.[327] That said, in recent years, there have been discussions of how prosecutors can play a role in tempering racial bias in the criminal legal system.[328] There have been calls for prosecutors tangibly to change or end certain practices such as coercive plea bargaining, pursuing certain types of sentences,

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323. R_SAZw2bSMiEx4Bz3.

324. *See* Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. Rev. 1187, 1188 (2018) ("White defendants are twenty-five percent more likely than black defendants to have their principal initial charge dropped or reduced to a lesser crime."). *See generally* Besiki Kutateladze, Vanessa Lynn & Edward Liang, *Do Race and Ethnicity Matter in Prosecution?: A Review of Empirical Studies*, Vera Inst. of Just. (June 2012), https://vera-institute.files.svdcdn.com/production/downloads/publications/race-and-ethnicity-in-prosecution-first-edition.pdf [https://perma.cc/CK85-HHUQ] (reviewing empirical studies); Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 Cornell L. Rev. 383 (2013) (reviewing racial disparities in the juvenile justice process).

325. Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 Fordham L. Rev. Online 8, 9 (2018); *accord* Matt Ferner, *George Soros, Progressive Groups to Spend Millions to Elect Reformist Prosecutors*, Huffington Post (May 12, 2018), https://www.huffpost.com/entry/george-soros-prosecutors-reform_n_5af2100ae4b0a0d601e76f06 [https://perma.cc/82GC-FBCQ].

326. Davis, *supra* note 325, at 9.

327. *See, e.g.*, Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 Stan. L. Rev. 869, 876-84 (2009) (describing the dangers of prosecutorial discretion); Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 Yale L.J. 2, 10-16 (2013) (describing the challenge of prosecutorial discretion in conjunction with the Sentencing Guidelines); David Alan Sklansky, *The Problems with Prosecutors*, 1 Ann. Rev. Criminology 451, 456 (2018) (describing prosecutorial discretion as distinct from prosecutorial power); Rachel Elise Barkow, Prisoners of Politics: Breaking the Cycle of Mass Incarceration 143 (2019) (suggesting improvements for the operation of prosecutors' offices).

328. *See* Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA Crim. Just. L. Rev. 1, 2 (2019).

and using junk science to secure convictions.[329] Mary Nicol Bowman has argued that prosecutors should avoid framing cases in a racist manner, refuse to espouse theories or prosecutorial strategies that perpetuate racism, and grapple with the racially coded nature of the terms and rhetoric embedded in those theories and strategies.[330] Some of these recommendations can be adapted to the antiracist-expert-evidence realm.

In our adversarial system, it is natural that prosecutors will oppose much of the defense's evidence and vice versa in any given case. But prosecutors, who are duty-bound to seek justice, should be attuned to how their exercises of discretion hinder or advance justice at the societal level. When a defendant attempts to introduce qualified and relevant antiracist expert evidence, prosecutors should not move to exclude such evidence without legitimate cause. Because prosecutors have a duty to pursue truth and justice, they should not obstruct this evidence by being hyperfocused on securing a conviction at any cost. Survey respondents expressed concern that prosecutors may sometimes prosecute cases differently, or decline to offer reasonable plea deals, in light of the prospect of the introduction of antiracist expert evidence.[331] But antiracist expert evidence provides essential insight into the influence of individual and structural racism on a case and should be admitted to uphold justice. Prosecutors have a duty not to hinder the introduction of this evidence, as it directly affects the fairness of a conviction. As such, they should steer clear of trivializing the nature of such evidence, particularly by labeling it as an attempt to "play the race card" and evade responsibility. Instead, they should recognize the value of such evidence to the individual defendant and the criminal justice system broadly and not oppose the admission of such evidence so that jurors have all the relevant information they may need to reach a fair verdict.

3. Jurors

Since our survey's barriers questions focused on the availability and admissibility of antiracist experts, we did not include questions about juror receptivity to admitted antiracist expert evidence. However, several survey takers shared concerns about juror resentment, resistance, and implicit bias. Several

329. *See* Avanindar Singh & Sajid A. Khan, *A Public Defender Definition of Progressive Prosecution*, 16 STAN. J. C.R. & C.L. 475, 476, 486 (2021).

330. *See* Mary Nicol Bowman, *Seeking Justice: Prosecution Strategies for Avoiding Racially Biased Convictions*, 32 S. CAL. INTERDISC. L.J. 515, 531-36 (2023). *See generally* Mary A. Lynch, *Building an Anti-Racist Prosecutorial System: Observations from Teaching a Domestic Violence Prosecution Clinic*, 73 RUTGERS U. L. REV. 1515 (2021) (offering suggestions for building an antiracist prosecutorial system).

331. *See, e.g.*, R_SAZw2bSMiEx4Bz3.

respondents said they would hesitate to introduce antiracist expert evidence because of how jurors might receive it. The theme of "juror resentment or attitudes"—including references to "playing the race card"—appeared in thirty-eight open-ended responses.[332] Several attorneys expressed fear that, as one respondent shared, "the polarizing nature of the topic of race could turn jury members against the defense."[333] Relatedly, a respondent explained why antiracist experts might stir up jurors:

> Labeling "antiracist" triggers implicit bias. I use cultural experts in cases with native clients and it is widely accepted by our bench and bar. The word "antiracist" is a trigger for much of the bench and bar. In my experience it is often met with the resistance of "I am not a racist" and "I am loath to call you a racist."[334]

This defensiveness was also reported by other survey takers, particularly among attorneys practicing in rural areas. One respondent shared:

> In the rural counties in which I work, these types of evidence would likely be extremely unpersuasive to our jury pools (at least as currently formulated.) The way experts often talk about racism's effects are quite alienating and frankly underwhelming in their efficacy. Finding better language that white audiences can understand would be necessary before this type of evidence would be useful and actionable, at least for my semi-rural practice.[335]

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332. One respondent discussed this theme in three of their responses to different open-ended questions: R_2rjA4pixakinMRZ. Six respondents did so in two of their responses to different open-ended questions: R_2TTTEecdcE8SirO; R_e5tiECPopghkt9L; R_2vl9EH2a9wAEEHH; R_2D5r9roWyElJHSM; R_1CJDTjdOjBVxupq; R_1mVoZweJTftD7wx. Twenty-three respondents did so in one of their responses: R_2rqm309NebFWtbB; R_2AWtBI1YrKIIbLE; R_YQaIhdT3w3Tvx1D; R_3s5rdrXA4dbt5WR; R_3lErZ15fHMob1dh; R_3ITg4hxiWHaoa6C; R_29iSJto7X511qDo; R_s7sIAVZCbcZjEe5; R_xgenivZSXtFkntf; R_PzBgP6hNC6Rd35n; R_51nU1F7K9jL8uqJ; R_1BXEKs7tCX88fnG; R_1rH6fNF94F6w7h8; R_1pMySkopkDwsDHH; R_1hRcuU8hNzy5blo; R_wMqHYUFcDbrFSN3; R_b8yjA9NcYAZUm6B; R_1qUugoojuG1jM39; R_1Fgpt36lLU3prWE; R_1doTrgm9kdxIkVm; R_2P7Foz5cRoomowh; R_QlErLDQSlVRcJnH; R_2CkVX18YwsfBMwt.

333. R_1rH6fNF94F6w7h8.

334. R_3lErZ15fHMob1dh.

335. R_2vl9EH2a9wAEEHH. The same respondent wrote:

> Antiracism in northern, rural areas of the US are unpersuasive to the types of people we have in jury pools. [T]hese are some of the oldest, whitest, blue collar, conservative places in America. Antiracism research and expert evidence would be much

Attorneys practicing in rural counties in Northern California[336] and Iowa[337] shared similar sentiments. Notably, such perspectives are prevalent not only in rural areas but also in areas where there is a political culture of colorblindness. One attorney wrote:

> It would be incredibly helpful, as race impacts almost every step of the criminal process. However, in Florida, there is an overwhelming attitude of "don't say race" and this perversion of the equal protection clause in Florida federal and state law that is essentially silencing jurors from considering race as a factor and giving judges a pass to not consider race in making legal decisions.[338]

The concerns regarding juror receptivity to antiracist experts were not exclusively perceived by attorneys outside large urban areas or in so-called "red" states. One attorney from New York City shared: "In Manhattan, where I practice, most white people are offend[ed] by even mentioning any type of racism—in that they feel 'above it' so I do worry it could become antagonistic rather than illuminating/helpful."[339]

These responses are informative in at least three ways. First, the use of antiracist expert evidence, like any other evidentiary tool, requires counsel to make strategic decisions. They must assess whether the evidence will benefit the case and, if so, determine the most effective way to present it to persuade the jury. This requires an understanding of the jury pool's triggers and predispositions to present the testimony in a way that is palatable and persuasive, despite existing biases. Antiracist expert evidence is not a panacea but rather one evidentiary tool that should be available and employed when helpful to presenting a robust defense.

Second, these survey responses prompt us to consider who serves on juries and whether they reflect the community from which they come. To the extent that more diverse juries may be more receptive to antiracist evidence, building a

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> more efficacious if it developed a language that would better speak to these types of folks.
>
> *Id.*

336. *See, e.g.*, R_2P7Foz5cRoomowh. The respondent wrote: "Northern California small rural counties are like the lost counties of the freaking Confederacy. It is a nightmare out here how little insight and how active racist stereotypes are in the local imagination." *Id.*

337. *See, e.g.*, R_YQaIhdT3w3Tvx1D. The respondent wrote: "I don't know if I'm right or if this is bias on MY part, but I sometimes fear that bringing UP the issue of race will backfire with a jury in rural Iowa because they HATE to be 'accused' of racism or even reminded that racism exists." *Id.*

338. R_51nU1F7K9jL8uqJ.

339. R_29iSJto7X511qDo.

foundation for such evidence requires more inclusive juries. Concerns about jurors', particularly white jurors', discomfort with confronting racism highlight the need for more inclusive jury pools and jury-selection policies to ensure juries are "bodies truly representative of the community."[340] Extensive scholarship, beyond the scope of this Article, examines how systemic exclusion undermines demographic diversity on juries[341] and analyzes other issues,[342] including pool-building procedures that fail to reach people of color, the disenfranchisement of individuals convicted of felonies,[343] and the exclusion of linguistic minorities.[344] Studies show that racially diverse juries can deliberate more thoroughly, reduce expressions of racism, and render fairer verdicts.[345]

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340. Richard Lorren Jolly, *The New Impartial Jury Mandate*, 117 MICH. L. REV. 713, 733 & n.86 (2019) (quoting Smith v. Texas, 311 U.S. 128, 130 (1940)).

341. *See generally, e.g.*, Avern Cohn & David R. Sherwood, *The Rise and Fall of Affirmative Action in Jury Selection*, 32 U. MICH. J.L. REFORM 323 (1999) (describing one court's "balancing program" that successfully incorporated more citizens of color in jury pools); *Race and the Jury: Illegal Racial Discrimination in Jury Selection*, *supra* note 230 (describing the causes of racial discrimination in jury selection).

342. *See* Nina W. Chernoff, *Black to the Future: The State Action Doctrine and the White Jury*, 58 WASHBURN L.J. 103, 121 (2019) (highlighting how Black and Latine people "are more likely to be affected by undeliverable summons, because of correlations between race and income levels" and explaining that "[p]eople with lower income levels move more frequently, which means their addresses in the jury system files are more likely to be out of date – which in turn means a higher proportion of undeliverable summons"); Ann M. Eisenberg, *Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2012*, 9 NE. U. L. REV. 299, 339 (2016) (finding, through an empirical study in the death-penalty context, that the prosecution's strikes eliminated thirty-five percent of qualified Black jurors during voir dire but only twelve percent of eligible white jurors); Ann M. Eisenberg, Amelia Courtney Hritz, Caisa Elizabeth Royer & John H. Blume, *If It Walks Like Systematic Exclusion and Quacks Like Systematic Exclusion: Follow-Up on Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2014*, 68 S.C. L. REV. 373, 383-85 (2017) (finding similar results in an updated study).

343. *See* Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 593 (2013); Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 67 (2003). *See generally* Katy Naples-Mitchell & Haruka Margaret Braun, *Inequitable and Undemocratic: A Research Brief on Jury Exclusion in Massachusetts and a Multipronged Approach to Dismantle It*, HARV. KENNEDY SCH. app. A (June 2023), https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/Felony-Jury-Exclusion-in-Massachusetts-Appendix-A.pdf [https://perma.cc/ZH77-GTPM] (summarizing state-by-state jury exclusion rules for people with felony convictions).

344. *See* Jasmine B. Gonzales Rose, *Language Disenfranchisement in Juries: A Call for Constitutional Remediation*, 65 HASTINGS L.J. 811, 814 (2014).

345. *See* Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1024, 1029 (2003) (explaining how racial composition of juries can "influence a jury's deliberations and final verdict through both informational and motivational means" and discussing a study

Finally, and perhaps most importantly, the survey data indicate that some jurors might not fairly and impartially consider evidence of racism, which underscores the need for counsel to approach jury selection with heightened awareness and strategic focus on voir dire. Jurors inevitably carry their own biases and opinions. But a problem emerges "[i]f the jury brings too much of its own outside opinions, or the wrong kind of opinions, into the courtroom," such that "the parties are denied impartial consideration of their dispute."[346] Criminal-defense attorneys have a role to play in making juries more open to antiracist expert evidence. When selecting a jury, criminal-defense attorneys should endeavor to assess prospective jurors' biases and resistance toward evidence of racism. This assessment should entail more than whether the juror has negative bias against people of the defendant's race—it should include assessing jurors' views on the existence of racism.[347] For instance, do the prospective jurors deny the reality that racism still exists and impacts people of color in the United States? Do they think that racial awareness itself is "racist"? Do they believe that white people are more likely to experience racism than people of color?[348] Most importantly, could the jurors fairly consider evidence of racism in the case? If not, they should be struck, just as they would be if unable fairly and impartially to consider evidence on any other issue.

Close to 90% of survey respondents shared that antiracist experts would still be useful,[349] even in the face of potential juror skepticism. Introducing expert evidence on racism might actually shift the perspectives of skeptical jurors because actively addressing racism through evidence may help alleviate jurors' implicit biases.[350]

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whose "[d]ata indicated that White jurors on racially mixed juries were more amenable to discussion of such racial issues, perhaps because they started thinking about racial bias and their own racial attitudes as soon as they saw the racial composition of their jury[;] [o]n the other hand, when race or the possibility of racial bias came up during the deliberations of all-White juries, other jurors were likely to change the subject or attempt to dismiss these concerns as irrelevant").

346. Jolly, *supra* note 340, at 715.

347. For discussions on racial bias in voir dire, see generally Cynthia Lee, *A New Approach to Voir Dire on Racial Basis*, 5 U.C. IRVINE L. REV. 843 (2015); and Emily Coward, *Talking to Jurors About Race*, NAT'L ASS'N FOR PUB. DEF. (Nov. 30, 2016), https://publicdefenders.us/blogs/talking-to-jurors-about-race [https://perma.cc/E476-YQ84].

348. *See* Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 PERSPS. ON PSYCH. SCI. 215, 216 (2011).

349. *See supra* Table 6.

350. *See* Sommers & Ellsworth, *supra* note 345, at 1011-14.

4. Judges

Nearly three-quarters (73.51%) of respondents identified judges' attitudes toward evidence related to racism to be a barrier to introducing antiracist expert testimony.[351] Among the open-ended responses, many focused on how judges could be racist, have implicit biases, and be unable to identify racism. One respondent said: "Although many judges assume that they understand these things, many have at best a limited understanding and are strongly influenced by their own unconscious biases."[352]

This level of concern about judges' racial bias and attitudes toward evidence of racism is striking, and it finds support in the literature. Vida B. Johnson has documented examples of judges' explicit racial biases, such as referring to their court clerk by the n-word, stating that Black and Latine people were more violent than white people, and saying that Black people should return to Africa.[353] Judges also harbor implicit racial biases that can influence their judgments.[354] Judges may also rely on traditionalist contentions that race no longer matters and prioritize colorblind approaches to applying the law. Each of these manifestations of bias could affect how judges interpret admissibility rules and standards, a topic we delve into in the following Section.

To ensure impartiality, judges should examine their racial biases, continue to learn about racism and other forms of subordination, and consider how they can exercise their discretion to take steps that start to level the evidentiary playing field rather than perpetuate societal bias. In open-ended responses, several survey respondents stressed that judicial education is needed. Specifically, fifty-nine survey comments focused on how judicial education is needed or touched upon how expert witness testimony could be used to educate judges.[355] Some

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351. *See supra* Table 7.

352. R_xxToxvJPrfUj2lr.

353. Vida B. Johnson, *White Supremacy from the Bench*, 27 Lewis & Clark L. Rev. 39, 43-44 (2023).

354. *See, e.g.*, Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195, 1197 (2009).

355. Four respondents discussed this theme in three of their responses to different open-ended questions: R_2D5r9roWyElJHSM; R_21ai4FjWz9vTNAo; R_W864hw39uke6pwJ; R_2zvwy8Yt3Ec1l5N. Six respondents did so in two of their responses to different open-ended questions: R_1ot1sGKutSe3nk6; R_3L5XoRIlqSyEoCJ; R_2zqltSbMIzqrd5Q; R_2zYjVy8PY5ggZLT; R_1gdo5WtGLe5IPGC; R_1GB41XRa4MMxM87. Thirty-five respondents did so in one of their responses. R_20V78lJLUpOaA4R; R_3MfYATd4edQIFCr; R_2c6IpzoBGUz7gjH; R_RDiyCHpvg8Jt601; R_OwdpRABAnMfxBOF; R_11YN66pwPgACsH9; R_O9abkgFo1FkX3wJ; R_3PgFDfRE4GvoLDo; R_2fouKvPNSwhwhbF; R_1eqtZ3G2fH2Snir; R_s7sIAVZCbcZjEe5; R_25Rvd5KDdYGUs4i;

respondents also discussed that training for judges is needed to help them understand racism's prevalence in cases.[356] Judicial continuing education on racial bias, critical perspectives on evidence law, and the certifiability of expert witnesses on racism could enhance fairness in the administration of justice.

Implicit bias and its impact on judicial decision-making have been objects of consideration for some judges. One empirical study from 2009 found that, "[w]hen [judges] are motivated to avoid the appearance of bias, and face clear cues that risk a charge of bias, they can compensate for implicit bias."[357] However, the researchers conducting the study concluded that it was unclear whether judges were capable of continually and actively engaging in antibias practices once they returned to their day-to-day routines.[358] Therefore, the study recommended that judges should be exposed to stereotype-incongruent models and receive testing and training on implicit bias.[359]

The *California Benchguide*, a guide designed to assist judges and court personnel with legal standards, procedures, and best practices, highlights techniques judges report practicing to mitigate bias, including: (1) ensuring accountability by asking other people to review their decisions; (2) standardizing the amount of time they give parties to address the court; (3) affirmatively recognizing they hold biases and actively trying to ignore their biased perspectives; (4) engaging in thought exercises where they imagine litigants switching roles to assess whether their reasoning would remain the same; (5) educating themselves on unfamiliar cultural norms and, in their daily lives, immersing themselves in community with diverse groups; and (6) writing and displaying inconspicuous physical note reminders on their bench to remain vigilant about bias.[360]

Some judges have advocated for implicit-bias training and awareness, organized conferences with other judges on the topic of implicit bias, and created

R_3NVs5aQkowKfSHh; R_1mxEO8xyErlW6x5; R_3LgVceIcu3B3iP3; R_3r21u9dCHtGIJB4; R_eKVY4Dsrzl4Bg6l; R_PtWFdTicPMbehtT; R_2CkVX18YwsfBMwt; R_2QoLhToLdIyZXPm; R_xxToxvJPrfUj2lr; R_3fIbZ5JOX5QU1km; R_10P2RAcrDGq02gP; R_1gIV3jJ2IGRzoco; R_bPkwRlouUyCFKox; R_3lM3G5RfJEXetlp; R_1mw8rnGjwe6BZDb; R_3EcMjqYeYz4Kf2Q; R_1Nghfl9O7XrZ930; R_3Jazmxifwravyd J; R_2VwI124iV10UP2b; R_1doTrgm9kdxIkVm; R_3HIwq07xU6BpDho; R_2eVjTHAaDQFX6Xv; R_2tGdBJHWm1fpCN4.

356. *See, e.g.*, R_OwdpRABAnMfxBOF; R_1GB41XRa4MMxM87.

357. Rachlinski et al., *supra* note 354, at 1225.

358. *Id.*

359. *Id.* at 1225-28.

360. *See Handling Cases Involving Self-Represented Litigants: A Benchguide for Judicial Officers*, JUD. COUNCIL OF CAL. 11-1, 11-8 to 11-12 (Apr. 2019), https://courts.ca.gov/sites/default/files/courts/default/2024-08/ab1058-2019-ethics-srls-handout4.pdf [https://perma.cc/DA9F-9XBQ].

continuing legal education sessions on the topic of implicit bias.[361] Others have written articles with recommendations on how judges can reduce implicit biases' effects on their decision-making, with recommendations like avoiding hurried rulings; taking breaks, resting, and eating; using checklists and objective criteria; seeking feedback; obtaining training about implicit bias; and promoting diversity on the bench.[362] Methods to reduce judicial bias warrant deeper examination. While holistic strategies to address judicial implicit racial bias are ultimately beyond the scope of this Article,[363] our survey findings indicate that, even more than cost and reliability, judges' attitudes toward racism represent the most significant barrier to introducing antiracist expert evidence—and consequently to admissibility under Rule 702. This underscores the profound impact of judges' implicit racial biases and their potential to harm defendants of color by limiting their access to evidence of racism.

D. Interpretive Barriers

Since antiracist expert evidence is not well known and accordingly not widely utilized, there is limited precedent by which to anticipate how judges might handle its admissibility at scale. However, in addition to their concerns about judges' attitudes toward evidence related to racism, a majority of criminal-defense attorneys in our survey identified as barriers judges' determinations that antiracist expert evidence is not relevant (82.67%) or not reliable (55.18%).[364] Judges who illiberally and unfairly construe expert-certification rules and standards pose a potential challenge to admitting antiracist expert evidence. We refer to these as interpretive barriers: barriers imposed through judges' unduly restrictive interpretation of admissibility rules and doctrines. Interpretive barriers are not entirely separate and distinct from judicial attitudinal barriers due to the broad judicial discretion afforded to judges under the rules of evidence. Judges' implicit biases and attitudes toward evidence of racism can seep into their admissibility determinations. If judges do not check their implicit racial biases, understand racism, or believe that racism exists, they may not recognize antiracist expert

361. *See generally* ABA Crim. Just. Section, *Highlights: Judges Explore Implicit Bias*, YouTube (May 29, 2015), https://youtu.be/12TY110t8PY [https://perma.cc/PG8D-BN39] (discussing the impact of implicit bias in a continuing legal education session led by Judges Bernice Donald and Mark W. Bennett).

362. Bernice Donald, Jeffrey Rachlinski & Andrew Wistrich, *Getting Explicit About Implicit Bias*, 104 Judicature, no. 3, 2020-2021, at 75, 79-80.

363. For an exploration of how implicit bias could be addressed in a way that incorporates the structural criticisms of critical race theory, see Arlo Kempf, *A Critical Race Theory Intervention in Unconscious Race Bias*, 9 J. Critical Race Inquiry 47, 48 (2022).

364. *See supra* Table 7.

evidence as relevant, recognize experts as reliable and thus qualified, or accurately balance antiracist expert evidence's probative value with the risk of unfair prejudice.

Judges are the gatekeepers of evidence at trial.[365] They determine whether a witness is qualified to be certified as an expert and whether the content of their testimony is relevant, unfairly prejudicial, or otherwise admissible.[366] Not all witnesses will be qualified to be experts and not all witnesses' testimony will be sufficiently probative or reliable. Such evidence should be kept from the jury. But expert-witness certification decisions need to be made fairly and impartially. Racial bias, race denialism, white normativity, and partiality to law-enforcement witnesses need to be absent from the decision-making process. At a minimum, a criminal defendant's antiracist expert evidence must receive the same admissibility treatment as the prosecution's expert evidence.

Our survey has indicated that defense attorneys overwhelmingly anticipate that judges will fail both to find antiracist evidence relevant and to certify antiracist experts as reliable.[367] These are concerning findings. Overly restrictive interpretations and applications of relevance and expert-witness certification rules and standards can amount to misinterpretation of the law and maladministration of justice in criminal cases. In this Section, we explore expert-witness certification, relevance, and prejudice challenges to antiracist expert evidence. While evidence admissibility determinations are fact-specific, applicable doctrine need not hinder the admission of antiracist expert evidence. To the contrary: applicable doctrine supports its admission.

1. Expert-Witness Certification Rules and Standards

At the federal level, expert-witness certification is governed by Rule 702, and most states have adopted similar rules or have developed similar common-law traditions.[368] Rule 702 provides:

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365. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 595 (1993) ("Because of this risk [of expert evidence being misleading], the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." (quoting Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991))).

366. *See* FED. R. EVID. 104(a).

367. *See supra* Table 7.

368. *See generally State-by-State Compendium Standards of Evidence*, NAT'L CIV. JUST. INST. (July 11, 2023), https://ncji.org/wp-content/uploads/2024/01/Evidence-Standards-by-State-7.12.23.pdf [https://perma.cc/RL8E-DK8G] (listing the standards of evidence for expert-witness certification by state).

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:
>
> > (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> > (b) the testimony is based on sufficient facts or data;
> > (c) the testimony is the product of reliable principles and methods; and
> > (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.[369]

Accordingly, the central certification questions are: Is the expert qualified to testify? Will the expert assist the trier of fact? Will the expert utilize reliable methods based on sufficient facts or data? Will the expert's opinion be a reliable application of those methods in the case?

We explore each of these questions in relation to antiracist expert evidence and identify common pitfalls that judges should duly avoid to ensure that they do not unfairly exclude such evidence.

a. Expert Qualifications

Rule 702 states that in order to testify "in the form of an opinion or otherwise," an individual must be one "who is qualified as an expert by knowledge, skill, experience, training, or education,"[370] and that their knowledge must be scientific, technical, or specialized.[371] Per the 1972 Advisory Committee on Proposed Rules, expertise is not to be construed in a narrow sense and includes not only "physicians, physicists, and architects" but also "skilled" witnesses, "such as

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369. FED. R. EVID. 702. Note that Rule 702 was amended in December 2023 to provide that a proponent must prove prongs (a) through (d) by a preponderance of the evidence. *See* FED. R. EVID. 702 advisory committee's note to 2023 amendments. It also changed the language of Rule 702(d) from "the expert has reliably applied" to "the expert's opinion reflects a reasonable application." *See* Mark A. Behrens & Andrew J. Trask, *Federal Rule of Evidence 702: A History and Guide to the 2023 Amendments Governing Expert Evidence*, 12 TEX. A&M L. REV. 43, 47 (2024) (showing the revisions to the text from the 2023 amendments). It is yet to be seen whether these changes, in practice, have made the standard more stringent or have merely clarified the preponderance standard that was previously implied.

370. FED. R. EVID. 702.

371. FED. R. EVID. 702(a).

bankers or landowners testifying to land values."[372] Those with advanced study and top positions in their fields, as well as those with hands-on experience and practical knowledge, are well suited to serve as experts. Accordingly, in the anti-racist expert context, experts would most often be professors, researchers, scholars, medical and behavioral-health professionals, data scientists, and those engaged in on-the-ground work observing and understanding racism—such as community-service providers and organizers.

In assessing the qualifications of an expert, judges should apply a faithful reading of Rule 702 and consider whether the expert is qualified—not only by training or education but also by knowledge, skill, and experience. Judges should be aware that, particularly with regard to testimony about racism, experts on the subject may not have the same qualifications (or, as we discuss further below, the same methodologies) as experts in other fields. Academics in the social sciences and the humanities, including scholars of critical race studies, are certainly qualified to give testimony, but others who work in communities of color on racism-related issues may have amassed epistemic authority on the lived experiences and impacts of racism. They, too, are thereby qualified by knowledge, skill, and experience to offer testimony on these issues.

Judges should also be aware that structural barriers related to racism and class restrict the pool of available experts of color. Often, the qualification of an expert hinges on an individual's educational background,[373] which, in turn, shapes their professional and experiential background. According to data from the U.S. Department of Education, in 2021 white students received 57.8% of all professional and other doctoral degrees, while Black students received 7.2%, Hispanic students received 9.1%, and Asian students received 14%.[374] These statistics suggest limitations in retaining individuals of color traditionally deemed qualified to serve as experts. One of us has cautioned against expert evidence about racialized reality being heard disproportionately through white or "'insider' voices."[375] As Bennett Capers has pointed out, "[W]hen one thinks about who gets to be an expert; the history of unequal access to education; the unequal distribution of scientific, technical, or other specialized knowledge; or the unequal distribution of advanced degrees, the racial impact of Rule 702 suddenly

372. FED. R. EVID. 702 advisory committee's note to 1972 proposed rules.

373. *See* Zach Barreto, *How to Become an Expert Witness*, EXPERT INST. (Mar. 15, 2022), https://www.expertinstitute.com/resources/insights/how-to-become-an-expert-witness [https://perma.cc/DS24-Q36X].

374. Ji Hye "Jane" Kim, Maria Claudia Soler, Zhe Zhao & Erica Swirsky, *Race and Ethnicity in Higher Education: 2024 Status Report*, AM. COUNCIL ON EDUC. 130 (2024), https://www.equityinhighered.org/wp-content/uploads/2024/05/REHE2024_Chapter5.pdf [https://perma.cc/SJC7-E6L7].

375. Gonzales Rose, *supra* note 1, at 2244.

comes into sharp relief."[376] The fact that the pool of educationally qualified experts may be limited means courts should more liberally consider the equally qualified pool of skilled experts who can testify from their work experience in impacted communities.

At times, trial judges interpret Rule 702 qualifications so narrowly that few experts could be deemed qualified to testify on behalf of the defense. For example, in *United States v. Hoa Quoc Ta*, the defendant sought an expert to respond to the prosecution's argument that his failure to go to the police evinced his intent to commit the crime.[377] The defendant tried to introduce an expert on Vietnamese culture and society to explain that his decision not to contact the police was informed by his distrust and fear of police.[378] The proffered expert, Nguyen Ba Chung, had researched "post-war issues of culture, society, and politics of Vietnam."[379] He was also a lecturer at a Vietnamese university, had worked as a literary translator, and had been studying, analyzing, and gathering information on Vietnamese culture and society for more than thirty years.[380] Nevertheless, the court found that Nguyen was not qualified to serve as an expert due to his supposed lack of expertise in relevant disciplines.[381] The court's reasoning suggested that expert testimony would only be admissible if the expert was an "expert on social sciences and psychology or Vietnamese social, cultural, or psychological issues, particularly as they relate to criminal activity."[382] While this case deals with expert evidence of culture rather than that of racism, we provide this example to point to the court's disregard of Nguyen's substantial research experience, which, in turn, illustrates how narrowly reading the qualification standard may significantly decrease the pool of experts available to defense attorneys.

This glaringly contrasts with how courts generally evaluate the prosecution's law-enforcement or security experts. Examples include counterterrorism professionals testifying against Arab and Muslim men facing terrorism charges and

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376. Bennett Capers, *Race, Gatekeeping, Magical Words, and the Rules of Evidence*, 76 VAND. L. REV. 1855, 1867 (2023) (footnote omitted).

377. Defendant's Response to Government's Motion to Exclude Expert Testimony and Joint Request for a Daubert Hearing at 2, United States v. Hoa Quoc Ta, No. 05-cr-094-01 (N.D. Ga. Aug. 9, 2007).

378. United States v. Hoa Quoc Ta, No. 05-cr-094-01, 2007 WL 2324616, at *1 (N.D. Ga. Aug. 9, 2007).

379. *Id.* at *3.

380. Defendant's Response to Government's Motion to Exclude Expert Testimony and Joint Request for a Daubert Hearing, *supra* note 377, at 8.

381. *Hoa Quoc Ta*, 2007 WL 2324616, at *3 ("There is no evidence that [Nguyen] has conducted scholarly studies on Vietnamese cultural attitudes, American cultural attitudes, or the difference between the two – especially related to the particular facts of this case.").

382. *Id.*

police officers serving as rap-lyric experts in prosecutions of Black men.[383] For instance, Maxine D. Goodman and Wadie E. Said have raised concerns about the qualifications of Evan Kohlmann, a controversial counterterrorism consultant who frequently testifies as an expert for the government on al-Qaeda and affiliated groups.[384] Said has noted that Kohlmann does not speak Arabic or any other language that is regularly used by al-Qaeda (and thus, must rely on translators)[385] and has no "advanced degrees in any discipline related to the Middle East, Central Asia, or Islamic studies of any kind . . . [or] experience as a law enforcement officer, in the military, or as an intelligence operative."[386] While Kohlmann has authored a book on al-Qaeda's presence in Europe, this book is about al-Qaeda's European cells in the Bosnian War of the 1990s as opposed to about the group's functioning in the United States.[387] Other supposed evidence of his expertise pertains to his undergraduate thesis on the Arab mujahideen in Afghanistan.[388] Each of these facts call into question why courts continue to consider him qualified.

This outsize deference to prosecutorial experts is also exemplified in the routine and systematic practice of qualifying police officers as expert witnesses without subjecting their experience and knowledge to adequate scrutiny.[389] Police

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383. Islamophobia may be a form of racism. *See* Nasar Meer & Tariq Modood, *Refutations of Racism in the 'Muslim Question,'* 43 PATTERNS PREJUDICE 335, 344 (2009); Nasar Meer & Tariq Modood, *The Racialisation of Muslims*, *in* THINKING THROUGH ISLAMOPHOBIA: GLOBAL PERSPECTIVES 69, 71-79 (Salman Sayyid & Abdool Karim Vakil eds., 2010).

384. Maxine D. Goodman, *A Hedgehog on the Witness Stand—What's the Big Idea?: The Challenges of Using* Daubert *to Assess Social Science and Nonscientific Testimony*, 59 AM. U. L. REV. 635, 659-70 (2010); Wadie E. Said, *Constructing the Threat and the Role of the Expert Witness: A Response to Aziz Rana's* Who Decides on Security?, 44 CONN. L. REV. 1545, 1552-56 (2012).

385. Said, *supra* note 384, at 1553; *see also* Wesley Yang, *The Terrorist Search Engine*, N.Y. MAG. (Dec. 3, 2010), https://nymag.com/news/features/69920 [https://perma.cc/H3EG-28R8] (noting an FBI agent's reference to Kohlmann as "the Doogie Howser of Terrorism" and discussing Kohlmann's credentials that led to his certification as an expert witness in over twenty high-profile terrorism prosecutions).

386. Said, *supra* note 384, at 1553.

387. *See generally* EVAN F. KOHLMANN, AL-QAIDA'S JIHAD IN EUROPE: THE AFGHAN-BOSNIAN NETWORK (2004) (arguing that the Bosnian War of the 1990s is necessary to understand al-Qaeda's European cells).

388. Yang, *supra* note 385.

389. *See* Mark Hansen, *Dr. Cop on the Stand: Judges Accept Police Officers as Experts Too Quickly, Critics Say*, 88 A.B.A. J. 31, 32 (2002) (describing critics' view that trial courts hold police officers to a different admissibility standard than they do other types of expert witnesses); *see also* Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 1998-99 (2017) ("Starting in the 1950s, judges came to rely on the promise of police expertise . . . to expand police authority in multiple areas of the law."); Christopher McGinnis & Sarah

officers with no education or training in or specialized knowledge of the musical genres of rap or hip hop are often deemed qualified to testify about the meaning of rap lyrics. For instance, in the prosecution of Gary Bryant Jr., a police officer testified that the defendant's rap lyrics were a pathway to understanding his criminal mindset.[390] He testified that the use of the term "geeked up" meant "being armed with firearms," while the words "lay a demo" meant "shooting somebody."[391] The defendant's expert witness pointed out both inaccuracies, clarifying that "'geeked up' . . . can most commonly mean being under the influence of drugs or alcohol" and "often means very drunk or high," and "'lay a demo' . . . means to make a record, make a track."[392] In addition to being routinely qualified as expert witnesses without adequate scrutiny, police officers are also often presented by prosecutors — and permitted by courts — to provide opinion testimony as lay witnesses, without having to pass muster under Rule 702 and despite their knowledge being based on work experience.[393] Such opinions run the risk of being overvalued by jurors, who may be unable to discern the difference between a lay witness and expert witness, particularly if the witness is a police officer.[394]

These examples involved a lax standard of certification for the prosecution's experts — which is not only unfair but also exacerbates racial inequity. Such experts, as seen in the counterterrorism and rap-lyrics contexts, introduce evidence that is informed by negative racial stereotypes or biases and contribute to the

Eisenhart, *Interrogation Is Not Ethnography: The Irrational Admission of Gang Cops as Experts in the Field of Sociology*, 7 HASTINGS RACE & POVERTY L.J. 111, 111 (2010) (criticizing "the evidentiary foundations of police officer gang expert testimony" used in California "to prove that a given crime is gang-related").

390. People v. Bryant, No. 05-152003-0, slip op. at 9-10 (Cal. Super. Ct. Oct. 3, 2022), https://bpb-us-e2.wpmucdn.com/sites.uci.edu/dist/d/2220/files/2022/10/rja-order.pdf [https://perma.cc/Q7TS-7KLG]; Nigel Duara, *Rap Lyrics on Trial: Bill Would Limit Prosecutors' Use of Words and Music as Evidence*, CALMATTERS (Sept. 14, 2022), https://calmatters.org/justice/2022/09/bill-rap-lyrics-evidence [https://perma.cc/ZYX6-72E7].

391. *Bryant*, slip op. at 9-10.

392. *Id.* at 31.

393. *See generally* Lvovsky, *supra* note 389 (discussing and characterizing this phenomenon as part of a broader regime of judicial deference to police officers); Kim Channick, Note, *You Must Be This Qualified to Offer an Opinion: Permitting Law Enforcement Officers to Testify as Laypersons Under Federal Rule of Evidence 701*, 81 FORDHAM L. REV. 3439 (2013) (discussing this phenomenon).

394. *See generally* Jonathan M. Warren, *Hidden in Plain View: Juries and the Implicit Credibility Given to Police Testimony*, 11 DEPAUL J. FOR SOC. JUST., no. 2, 2018, art. no. 4 (recommending, among other things, cautionary jury instructions to mitigate such risks); Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245 (2017) (same).

criminalization of individuals from marginalized backgrounds, including Black, Latine, Middle Eastern, Arab, and Muslim people.

b. Assisting the Trier of Fact

Rule 702(a) sets out that an expert's knowledge must "help the trier of fact to understand the evidence or to determine a fact in issue."[395] In explaining this prong, the Advisory Committee on Proposed Rules quotes Mason Ladd:

> There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.[396]

When an attorney is considering whether to introduce testimony from an antiracist expert, much hinges on whether the testimony would help jurors arrive at the conclusions they need to draw to perform their factfinding role. Courts have held that the information does not have to be entirely new or on a subject that the jury is completely ignorant about; it simply needs to have an assistive function.[397] What information may be considered sufficiently useful is left to the discretion of the trial-court judge, in ways that sometimes replicate existing hierarchies. For instance, certain types of evidence usually presented by defendants, particularly experimental-psychology evidence like evidence related to eyewitness biases and confessions, is excluded at high rates.[398] Judges tend to exclude such evidence because they conclude that it fails to meet the "assisting the trier of fact" criterion, ruling that the evidence merely restates common knowledge.[399]

As Parts I and II demonstrated, there are many situations where an expert could help a jury understand evidence of racism. Despite that, judges often assume—incorrectly—that proffered evidence about racism is so obvious that an antiracist expert would not assist the trier of fact. For instance, in *State v.*

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395. FED. R. EVID. 702(a).

396. FED. R. EVID. 702 advisory committee's notes on proposed rules (quoting Mason Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952)).

397. *See* People v. Prince, 156 P.3d 1015, 1047 (Cal. 2007); People v. Lindberg, 190 P.3d 664, 698 (Cal. 2008).

398. *See* Groscup & Penrod, *supra* note 39, at 1151 (describing how experimental psychologists' testimony "is the type of testimony in a criminal case that is least likely to be admitted").

399. *Id.* at 1153 ("Courts were significantly more likely to say experimental psychology was already in the jurors' common knowledge (37.8%) than police officers (8.1%).").

Tankovich, the defendant and his brothers allegedly targeted a couple, the Requenas, because the husband was Latino.[400] The prosecution sought to introduce expert evidence about two of the Tankovich brothers' tattoos to show racist affiliations or beliefs.[401] The Idaho trial court, however, concluded that the expert would not be permitted to testify regarding the meaning of the swastika near the defendants' truck, or on the meaning of tattoos of an eagle and the words "Aryan Pride," because jurors could readily understand the meaning of those symbols and words without the assistance of an expert to guide them.[402] The trial court did permit testimony regarding "common meanings of the 'SS' lightning bolts and the three-leaf clovers displayed in [one of the Tankovich brother's] tattoos because the association between those symbols and white supremacist groups was less well known to the public."[403] The appellate court found no error with this ruling.[404]

Assumptions that jurors will fully understand expressions, manifestations, and impacts of racism may be unfounded. In *Tankovich*, the court assumed that all jurors would know the meaning of the swastika symbol, the term "Aryan Pride," and the racist meaning behind a tattoo of an eagle.[405] Given a landscape where defendants are disproportionately people of color, jurors and judges are predominantly white, and white supremacy, antisemitism, and Islamophobia are resurgent,[406] the utility of expert explanation should not be undervalued.

c. Reliable Methods

Rule 702(c) requires that an expert's testimony be the product of reliable principles and methods. More than half (55.18%) of survey respondents stated that judges' determinations that antiracist expert evidence is unreliable pose a barrier to its introduction.[407] This Section discusses federal and state standards governing reliability and assesses how interpretations of Rule 702(c) and the

400. 307 P.3d 1247, 1249-50 (Idaho Ct. App. 2013).

401. *Id.* at 1250-51.

402. *Id.* at 1253.

403. *Id.*

404. *Id.*

405. *See id.*

406. Maya Yang, *Islamophobia and Antisemitism on Rise in US Amid Israel-Hamas War*, GUARDIAN (Nov. 10, 2023), https://www.theguardian.com/us-news/2023/nov/10/us-islamophobia-antisemitism-hate-speech-israel-hamas-war-gaza [https://perma.cc/4TPW-EJKC]; Meredith Deliso, *Bias Incidents Against Muslims, Jews on the Rise in US Amid Middle East War, New Data Shows*, ABC NEWS (Nov. 9, 2023), https://abcnews.go.com/US/anti-muslim-anti-jewish-incidents-rise/story?id=104760450 [https://perma.cc/7DJU-NZTE].

407. *See supra* Table 7.

Daubert and *Frye* standards serve as barriers to the introduction of antiracist testimony.

From 1923 to 1993, *Frye v. United States* prescribed the test governing the admissibility of expert testimony.[408] Under the *Frye* (or "general acceptance") test, the key question was "whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally."[409] Rule 702 was enacted in 1975, and it set out the standard for admissibility of expert evidence, including reliability as one prong among others.[410] In response to concerns about "junk science" flooding courtrooms through expert witnesses,[411] the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals* held that "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."[412]

The *Daubert* Court provided five factors for trial courts to consider in making determinations as to whether an expert's testimony is reliable: (1) whether the theory has been "subjected to peer review and publication"; (2) whether it has attracted widespread acceptance within a relevant scientific community; (3) whether the theory or technique "can be (and has been) tested"; (4) its "known or potential rate of error"; and (5) the "existence and maintenance of standards controlling the technique's operation."[413] In *Kumho Tire Co. v. Carmichael*, the Court extended the *Daubert* reasoning to nonscientific experts,[414] stressing that the *Daubert* inquiry was meant to be flexible and the factors suggested by the Court might not apply in every case.[415] Although *Daubert* set only the federal standard to assess reliability, it has been adopted by or influenced a majority of states' regimes.[416] There are still a handful of states that follow different

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408. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). The Court held in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* that "the *Frye* test was superseded by the adoption of the Federal Rules of Evidence." 509 U.S. 579, 587 (1993).

409. People v. Wesley, 633 N.E.2d 451, 454 (N.Y. 1994).

410. Act of Jan. 2, 1975, Pub. L. No. 93-595, § 702, 88 Stat. 1926, 1937.

411. *See* Edward J. Imwinkelried, *The Next Step After* Daubert*: Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony*, 15 CARDOZO L. REV. 2271, 2273 (1993).

412. *Daubert*, 509 U.S. at 589.

413. *See id.* at 592-96.

414. 526 U.S. 137, 151 (1998).

415. *Id.* at 158.

416. As of July 2023, *Daubert* had been fully adopted by thirty states and has influenced the expert-admissibility rules of another five in at least certain types of cases. *See generally State-by-State Compendium Standards of Evidence*, *supra* note 368 (listing the expert-admissibility standards for each state as of July 11, 2023); *States Following the* Daubert/Kumho *Doctrine*, WHITE &

standards or a modification of *Daubert*.[417] Some states, such as California, New York, and Pennsylvania, continue to follow the *Frye* standard.[418]

Evidence-law scholars debate whether empirical data show the relative stringency of *Frye* versus *Daubert*.[419] But when it comes to social-scientific evidence, *Daubert* is probably applied more stringently since it entails a more detailed assessment of the methodology and reliability of the expert's testimony. Either standard's strictness can vary depending on how inflexibly courts apply it in each case. For proponents of antiracist expert evidence, it would be advantageous to use the relevant field's acceptance of the expert's methodology—whether that be social sciences, history, or ethnic studies—as the relevant benchmark for the reliability of the testimony.

Courts may be ill-equipped to deal with expert evidence in the social sciences and humanities—the primary disciplines from which antiracist expert witnesses come. Edward J. Imwinkelried has recognized the difficulty of applying *Daubert* to nonscientific evidence because such evidence does not necessarily rest on replicable experiments and therefore cannot be validated by the methods of

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Williams LLP, https://www.whiteandwilliams.com/assets/htmldocuments/Subro%20Charts%20Updated%205_10_16/Daubert.pdf [https://perma.cc/5QVT-45J7] (reviewing *Daubert*'s reception, and widespread adoption, in state-level jurisprudence). There is no reliable and easily accessible resource speaking to how many states have adopted *Kumho* and formally extended the *Daubert* test to the "soft" sciences, but scholars have argued that the *Daubert* test influences judicial decisions even where it is not the controlling standard. *See* Edward K. Cheng & Albert H. Yoon, *Does* Frye *or* Daubert *Matter? A Study of Scientific Admissibility Standards*, 91 Va. L. Rev. 471, 474 (2005) (citing 4 David L. Faigman, David H. Kaye, Michael J. Saks & Joseph Sanders, Modern Scientific Evidence: The Law and Science of Expert Testimony § 35-1.3, at 150-51 (2d ed. 2002)) ("*Daubert*'s shadow now casts itself over state court opinions even in jurisdictions that have not formally adopted the *Daubert* test.").

417. *See generally States Following the* Daubert/Kumho *Doctrine*, *supra* note 416 (analyzing whether *Daubert* has been adopted by each state for cases governed by their own state evidence law).

418. *See* Christine Funk, Daubert *Versus* Frye*: A National Look at Expert Evidentiary Standards*, Expert Inst. (July 10, 2024), https://www.expertinstitute.com/resources/insights/daubert-versus-frye-a-national-look-at-expert-evidentiary-standards [https://perma.cc/F4U9-4NFU].

419. *Compare* Jennifer L. Groscup, Steven D. Penrod, Christina A. Studebaker, Matthew T. Huss & Kevin M. O'Neil, *The Effects of* Daubert *on the Admissibility of Expert Testimony in State and Federal Criminal Cases*, 8 Psych. Pub. Pol'y & L. 339, 345 (2002) ("[T]he basic rates of admission at the trial and the appellate court levels did not change significantly after *Daubert* in criminal cases on appeal."), *with* Cheng & Yoon, *supra* note 416, at 475, 503 (finding "strong support for the theory that the choice between a *Frye* and *Daubert* standard does not make any practical difference" and that "the debates about the . . . merits and drawbacks of adopting a *Frye* standard versus a *Daubert* standard are largely superfluous"), *and* Andrew W. Jurs & Scott DeVito, *A Tale of Two* Dauberts*: Discriminatory Effects of Scientific Reliability Screening*, 79 Ohio St. L.J. 1107, 1124 (2018) ("[C]ivil plaintiffs and defendants act in ways that demonstrate that *Daubert* is perceived as a stricter standard than the *Frye* standard.").

Newtonian science, as is common for the kind of scientific testimony contemplated by *Daubert*.[420] Similarly, "the factor of an ascertainable error margin has little relevance to the context of nonscientific expert opinions."[421] These criticisms are evident in the challenges courts may face when strictly applying *Daubert* to expert testimony outside the realm of the hard sciences.

Not only is *Daubert* potentially more demanding, but there is also wide variance in how it is applied.[422] Maxine D. Goodman has shown how certain courts and judges have admitted testimony in cases where multiple *Daubert* factors were not met, and in some cases, they have considered additional factors in their analyses.[423] She has also shown how there is wide variation in how vigorously the standards are applied: some judges perform their gatekeeping function exactingly while others gloss over *Daubert* factors in performing cursory reviews.[424] When attorneys consider whether to introduce an antiracist expert, they may have difficulty predicting if a nonscientific expert's methodology will be deemed reliable and if it will be found to meet the *Daubert* requirements. Due to defenders' financial limitations,[425] and especially because attorneys may have to pay for experts to draft a report prior to a *Daubert* hearing, defense attorneys may be hesitant to retain experts.

Different judges often interpret reliability requirements differently. Recall *Commonwealth v. Hinds*, where the trial court excluded Sophie Bjork-James's expert testimony, to the effect that the number 211 tattoo on a man's arm referenced white-supremacist gangs, on the grounds that it was not reliable.[426] The Massachusetts Supreme Judicial Court reversed, finding that she had adequately testified as to her ethnographic research and her approach to studying online white-supremacist website postings.[427] She had also testified that, as a matter of cultural anthropology, she did not know of any other use of the number 211, aside from the group reference.[428] The Supreme Judicial Court found that the lower-

420. Imwinkelried, *supra* note 411, at 2279-80, 2283.

421. *Id.* at 2285.

422. *See generally* Risinger, *supra* note 39 (exploring the different success rates of civil and criminal defendants making *Daubert* challenges).

423. Goodman, *supra* note 384, at 652-70.

424. *Id.* at 649.

425. *See supra* notes 265-279.

426. Commonwealth v. Hinds, 166 N.E.3d 441, 446-47, 450, 455-57 (Mass. 2021); *see supra* notes 47-49 and accompanying text.

427. *Hinds*, 166 N.E.3d at 457.

428. *Id.* at 455.

court judge had "incorrectly focused on the persuasiveness of Bjork-James's conclusions, not the reliability of her methodology."[429]

The lower court's decision in the *Hinds* case is a compelling example of how courts might employ the reliability factor of *Daubert* incorrectly and strictly, thereby impacting expert-evidence admissibility. The lower court conflated the reliability inquiry with the question whether the expert's findings were persuasive, which "intruded" into the jury's exclusive province.[430] Rule 702(c) is meant to be an inquiry into the reliability of the methodology or process adopted to arrive at conclusions. Additionally, courts have differing standards on which methodologies they consider acceptable, and that may increase the burden on parties seeking to introduce experts. Judges frequently apply *Daubert* incorrectly, as evidenced by the lower court's opinion in *Hinds*, resulting in valuable, potentially antiracist evidence being excluded.

Courts must apply Rule 702 and the *Daubert* and *Frye* standards fairly and ensure that they clearly articulate the principles they used to arrive at their decision. Furthermore, as the Supreme Judicial Court opined in *Hinds*, "to respect the methodological distinctions that divide soft from hard sciences, application of the *Daubert-Lanigan* standard to soft sciences requires flexibility with special attention being paid to the criteria of reliability that different disciplines develop."[431] Not only should courts employ similarly flexible, broad-minded approaches to the admissibility of social-scientific evidence, but they also must educate themselves on how criteria for reliability may vary across disciplines.

d. Reliable Application to the Case at Hand

Rule 702(d) states that the expert's opinion must "reflect[] a reliable application of the principles and methods to the facts of the case."[432] This requires a link between an expert's research and the case at hand, which can be construed too narrowly—thereby keeping out relevant, reliable, and applicable antiracist testimony.

Requiring experts to link their research perfectly to the facts at hand can be an interpretive barrier to admissibility. It is not feasible to expect an expert's research and scholarship to be on point for every variable in the case. Thus, in *United States v. Mamah*, the defendant, an immigrant from Ghana, sought to introduce expert testimony by two witnesses, a sociologist and an anthropologist,

429. *Id.* at 456.

430. *Id.*

431. *Id.* at 454.

432. FED. R. EVID. 702(d).

regarding what he claimed was a false confession to law enforcement.[433] One of the experts, Deborah Pellow, sought to testify about how people from Ghana may give false confessions when confronted by law enforcement, in response to having lived under a military regime.[434] Here, the district court held that this testimony was inadmissible on reliability grounds.[435] The court also found that the defendant had been in the United States long enough "to have learned the difference between Ghanaian and American law-enforcement practices."[436] The Seventh Circuit affirmed, finding that the issue with the two respective testimonies was not in the quality of the experts' research but rather in their inability to link their research to the fact that a false confession was provided.[437]

Regarding Pellow's testimony, the court found that while she was well versed in the cultural practices of Ghanaian nationals living in Ghana, there was no way to have applied this conclusion to the defendant, who had not lived in Ghana for several years.[438] The court stated:

> Had she offered an empirical study demonstrating that Ghanaian ex-patriots [sic] who have lived in the United States for more than ten years are unusually likely to give false confessions, then perhaps she could have established this link. But Dr. Pellow did not have at her disposal sufficient facts and data to support the proposition that Mamah's cultural background might have induced him to give a false confession.[439]

The context here is cultural expert evidence, not antiracist expert evidence. Still, *Mamah* represents an overly stringent—even procrustean—interpretation of Rule 702(d)'s standard, one under which courts would sometimes exclude relevant and reliable testimony when experts' research does not perfectly apply to the facts at hand. The court here wanted the defendant to offer an expert who had studied false confessions by Ghanaian expatriates who had lived in the United States for more than ten years. Finding an expert whose research focuses on those particular themes, and then persuading them to testify, is too specific and restrictive to be feasible, particularly in light of the availability barriers discussed above.[440]

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433. 332 F.3d 475, 476 (7th Cir. 2003).

434. *Id.*

435. *Id.*

436. *Id.* at 476-77.

437. *Id.* at 478.

438. *Id.*

439. *Id.*

440. *See supra* Section III.B.

2. *Relevance*

Under Federal Rule of Evidence 401, evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" (probativeness) and "the fact is of consequence in determining the action" (materiality).[441] The evidence need not prove an ultimate issue, or alone prove or disprove a fact—it must merely make a fact of consequence more or less likely than it would be without the evidence.[442]

A very high proportion (82.67%) of criminal-defense attorneys surveyed identified "judges[']determin[ations] that such evidence is not relevant" as a barrier to introducing antiracist expert evidence, making it the survey's most widely identified barrier.[443] As demonstrated in Parts I and II, expert evidence establishing or explaining the existence or impact of racism can be both material and probative, and thereby relevant, in many circumstances. Antiracist expert evidence can elucidate how an individual's racist affiliations or views—whether those of a law-enforcement officer or of a complainant—may have influenced their intentions or actions concerning the defendant. Experts can establish and explain the significance of symbols or affiliations associated with racism, shedding light on the motivations behind certain conduct. Additionally, expert testimony can clarify how racist language, imagery, and stereotypes shape perceptions and actions that affect case dynamics. This includes explaining coded language, racial stereotypes, and implicit biases in decision-making processes, such as those involved in eyewitness identifications and policing practices. Experts can reveal the effects of systemic racism on a defendant's health and behavior, demonstrating how experiences of racism impact actions and reactions. They can also counteract prosecutors' use of "racial stereotype emphasis evidence," such as biased racial characterizations about dress, activities, and art; these inflame racist sentiments rather than provide jurors with legitimate evidence.[444]

These examples highlight just some of the potential uses of antiracist expert testimony. While judges rightfully should exclude all evidence that is not relevant, they should also be careful to apply the correct standard in evaluating evidence of racism. Judges should be aware of implicit white-normative

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441. FED. R. EVID. 401.

442. *See* FED. R. EVID. 401 advisory committee's note (quoting CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE § 152, at 317 (Edward W. Cleary ed., 2d ed. 1972) to highlight how "[a] brick is not a wall," referring to the role an individual piece of evidence must play in building a claim or defense).

443. *E.g.*, R_2zqltSbMIzqrd5Q.

444. *See supra* note 54.

assumptions about what constitutes relevant evidence.[445] The relevance standard — any tendency to make a fact of consequence more or less probable — is a low bar, and the standard should not be heightened when it comes to evaluating evidence of racism.

3. Unfair Prejudice

Rule 403 provides that a "court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[446] Most states have a similar rule,[447] although the balancing test can vary: Pennsylvania, for instance, only requires that prejudice outweigh, instead of substantially outweigh, the probative value.[448]

When the opposing party worries that evidence of their client's racist views, affiliations, or expressions will make the jury view them unfavorably, they might object, invoking unfair prejudice.[449] In *People v. Lindberg*, for example, the defendant argued that expert testimony opining that he was a white supremacist was unfairly prejudicial "because it depicted him as an anti-Semite who wanted to exterminate Jews, minorities, homosexuals, and gypsies," and "equated him with Adol[f] Hitler and 'the worst excesses of the Nazi regime.'"[450] He further argued "that the expert's description of a photograph of 'a white man with a double-barrel shotgun blasting a minority with a couple of rounds' in a White Aryan Resistance publication was prejudicial."[451] The court refused to exclude this testimony due to its high probative value.[452] However, cases with similar fact patterns and evidence have been decided differently, with courts finding that the risk of unfair prejudice substantially outweighed the probative value.[453]

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445. *See supra* notes 3-5.

446. FED. R. EVID. 403.

447. Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 497 n.3 (1983).

448. 225 PA. CODE § 403 (2025).

449. *See, e.g.*, Motion in Limine to Limit the Testimony of Plaintiffs' Experts Peter Simi and Kathleen Blee and to Bar Argument and Testimony Regarding Defendants' Alleged Animus Towards "Immigrants, Social Minorities and Feminism" as Irrelevant and Intended to Confuse and Mislead the Jury Pursuant to Fed. R. Evid 401-403 at 5, Sines v. Kessler, No. 17-cv-072 (W.D. Va. Oct. 4, 2021).

450. 190 P.3d 664, 700-01 (Cal. 2008).

451. *Id.* at 701.

452. *Id.*

453. *See, e.g.*, Downing v. Abbott Lab'ys, 48 F.4th 793, 807 (7th Cir. 2022).

Traditionally, the Rule 403 balancing of unfair prejudice with probative value is geared toward eliminating the dangers of jurors making determinations on the basis of heightened emotions[454] or another improper basis. Racial prejudice must be more readily recognized as an improper basis under Rule 403,[455] and this applies to the expert-evidence context. A judge should consider how the absence of evidence of racism may lead to jurors determining the issues upon an unfair basis of racial prejudice. If a Rule 403 analysis does not contemplate the effects of all forms of racism, it might overestimate the prejudicial effects of antiracist testimony or underestimate the risk of judicial determinations in the absence of the antiracist testimony.

* * *

The Federal Rules of Evidence enshrine an obligation "to administer every proceeding fairly" and "promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[456] The judicial duty to facilitate truth-seeking and secure just determinations is better fulfilled when criminal defendants are allowed to introduce evidence of how racism shaped their case. Criminal proceedings are not administered fairly when the prosecution has the upper hand in the funding, procuring, and admission of experts. Judges should ensure that defendants do not have a heavier evidentiary burden than the prosecution—particularly when the parties are litigating the issue of racism. As the gatekeepers of evidence, judges should uphold evidence equity.

CONCLUSION

From the Fugitive Slave Act and race-based witness restrictions to the present-day barriers to antiracist expert evidence uncovered in this Article, the legal system has long excluded evidence of racism from the courtroom. As our national survey reveals, many criminal-defense attorneys are eager to break this pattern. Despite their concerns about bias and the reception of antiracist expert evidence by judges and juries, nearly 90% of surveyed criminal-defense attorneys believe it would be useful in practice.[457] Open-ended responses indicated that antiracist experts are an "ingenious" idea[458] and "desperately needed,"[459] and

454. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 4:13 (4th ed. 2009).

455. *See* Gonzales Rose, *supra* note 1, at 2306 ("Racism, in all its forms, is a manifestly improper basis that poses a substantial danger of prejudice within the meaning of Rule 403.").

456. FED. R. EVID. 102.

457. *See supra* Table 6.

458. R_2tFN1sx9U9lEQdb.

459. R_2c6IpzoBGUz7gjH.

that respondents "would love to see this [evidence] begin to dominate court systems"[460] and would "love to expand [its] use."[461]

This Article is the first to provide an empirical, theoretical, and doctrinal examination of the use of expert witnesses to prove the existence, manifestations, and impacts of racism for the purpose of mitigating it. But we hope our intervention will not be the last. Challenges faced by defendants in proving racism at trial reflect a criminal legal system that falls short of upholding the principles, if not the explicit rights, guaranteed by the Constitution. The accused must be able to present their defense fully, including by introducing witnesses and other evidence on racism to an impartial jury selected from a fair cross section of the community. In this way, antiracist experts are a barometer for the racial fairness of our criminal legal system. In studying and addressing the obstacles to antiracist expert evidence, we can better understand and address larger deficiencies in our criminal legal system.

460. R_3nOyocnPJowHV7c.

461. R_3PgFDfRE4GvoLDo.

APPENDIX

A. Evidence Equity Survey[462]

1. Screener Questions

    A. Are you at least 18 years old?
        a. Yes
        b. No

    B. Are you a criminal defense attorney?
        a. Yes
        b. No

2. General Views on Racism

    Please answer the following questions using strongly disagree, disagree, neutral, agree, strongly agree.

    A. Racism negatively impacts the lives of people of color in the United States.
        a. Strongly Disagree
        b. Disagree
        c. Neutral
        d. Agree
        e. Strongly Agree

    B. In at least some criminal cases, racism impacts determinations of guilt for defendants of color
        a. Strongly Disagree
        b. Disagree
        c. Neutral
        d. Agree
        e. Strongly Agree

462. The survey is reproduced as it appeared for respondents on Qualtrics and has not been altered to adhere to the *Journal*'s own Style Guide.

3. Legal Practice Background Information

    A. Is your current practice focused on
        a. Public criminal defense
        b. Private criminal defense
        c. Both (a) and (b)
        d. Other

    B. Which type of courts do you practice criminal defense in?
        a. State
        b. Federal
        c. Tribal
        d. Municipal
        e. Juvenile
        f. Family
        g. Other

    C. In what jurisdiction(s) have you practiced criminal defense in? (Check all that apply)

        [Drop-down list of all U.S. States and Territories]

    D. How long have you worked in criminal defense?
        a. 0-5 years
        b. 5-10 years
        c. 10-25 years
        d. 25-40 years
        e. Over 40 years

    E. At what stage(s) do you represent criminal defendants: (Check all that apply)
        a. Pretrial
        b. Trial
        c. Sentencing
        d. Appeals
        e. Post-Conviction
        f. Other

4. Racism and Expert Evidence

We are seeking to learn more about whether criminal defense attorneys have a need for expert evidence about racism. Please review the examples listed below, and answer the questions about them, as it pertains to criminal law practice.

A. Racist Affiliations or Views: expert evidence about associations, sympathies, group memberships, or alliances that may indicate racist allegiances. (One example is expert evidence regarding an individual's membership in a white supremacist, nationalist, or separatist group. We invite you to think beyond this example).
    a. Have you ever heard of expert evidence regarding racist affiliations or views?
        i. Yes (if yes, please describe - [optional]): _____
        ii. No
    b. Would expert evidence of racist affiliations or views be useful in the practice of criminal defense?
        i. Yes (if yes, how? - [optional]): _____
        ii. No

B. Racist Language, Sounds, or Imagery: expert evidence about terms, slurs, images, symbols, or sounds that indicate racist ideas, prejudice, or bias. (One example is expert evidence identifying that a tattoo is a white supremacist symbol. We invite you to think beyond this example).
    a. Have you ever heard of expert evidence regarding racist language, sounds, or imagery?
        i. Yes (if yes, please describe - [optional]): _____
        ii. No
    b. Would expert evidence of racist language, sounds, or imagery be useful in the practice of criminal defense?
        i. Yes (if yes, how? - [optional]): _____
        ii. No

C. Racial Stereotypes: expert evidence about social, historical, and linguistic context illustrating why an idea, argument, or narrative draws on or promotes racist stereotypes. (One example is

expert evidence explaining how a prosecutor's evidence was employed to inflame racial stereotypes. We invite you to think beyond this example).

a. Have you ever heard of expert evidence regarding racist stereotypes?
    i. Yes (if yes, please describe - [optional]): _____
    ii. No
b. Would expert evidence of racist stereotypes be useful in the practice of criminal defense?
    i. Yes (if yes, how? - [optional]): _____
    ii. No

D. Structural Racism: expert evidence about: racism within a particular system; racial disparities in access to resources; racially discriminatory policies or practices within an institution; or individual and community responses to any of the above. (One example is expert evidence regarding how law enforcement agents racially profile people from certain communities or backgrounds. We invite you to think beyond this example).

a. Have you ever heard of expert evidence regarding structural racism?
    i. Yes (if yes, please describe - [optional]): _____
    ii. No
b. Would expert evidence of structural racism be useful in the practice of criminal defense?
    i. Yes (if yes, how? - [optional]): _____
    ii. No

E. Implicit Racial Bias: expert evidence about unconscious biases. (One example is expert evidence regarding the unreliability of cross-racial witness identification. We invite you to think beyond this example).

a. Have you ever heard of expert evidence regarding implicit racial bias?
    i. Yes (if yes, please describe - [optional]): _____
    ii. No

b. Would expert evidence of implicit racial bias be useful in the practice of criminal defense?
    i. Yes (if yes, how? - [optional]): _____
    ii. No

F. Racialized History or Application of Law, Policy, or Practice: expert evidence about the racialized history, context, application, or implications of a particular law, policy, or practice.
    a. Have you ever heard of expert evidence regarding racialized history, or application of law, policy or practice?
        i. Yes (if yes, please describe - [optional]): _____
        ii. No
    b. Would expert evidence of racialized history, or application of law, policy or practice be useful in the practice of criminal defense?
        i. Yes (if yes, how? - [optional]): _____
        ii. No

G. Racial Trauma: expert evidence about the impact or existence of racial trauma or traumatic stress resulting from racism, as experienced by individuals and/or communities. (One example is expert evidence regarding racial trauma experienced by a particular individual who was subjected to or witnessed police brutality. We invite you to think beyond this example).
    a. Have you ever heard of expert evidence regarding racial trauma?
        i. Yes (if yes, please describe - [optional]): _____
        ii. No
    b. Would expert evidence of racial trauma be useful in the practice of criminal defense?
        i. Yes (if yes, how? - [optional]): _____
        ii. No

H. Impact of Racism on Conduct, Behavior, or Attitude: expert evidence about how racism affects people of color (including a criminal defendant), and influences their conduct, behavior, or attitude. (One example is expert evidence regarding an accused's flight from law enforcement as an effort to avoid police

brutality and not as an indication of consciousness of guilt. We invite you to think beyond this example).

a. Have you ever heard of expert evidence regarding the impact of racism on conduct, behavior, or attitude?
    i. Yes (if yes, please describe - [optional]): _____
    ii. No
b. Would expert evidence of impact of racism on conduct, behavior, or attitude be useful in the practice of criminal defense?
    i. Yes (if yes, how? - [optional]): _____
    ii. No

I. Among the aforementioned types of evidence of racism, which types are the most applicable and useful to your practice of criminal defense? [Check three boxes only]
    a. Evidence of racist affiliation or views
    b. Evidence of racist language, sounds, or imagery
    c. Evidence of racist stereotypes
    d. Evidence of structural racism
    e. Evidence of implicit racial bias
    f. Evidence of racialized history or application of law, policy, or practice
    g. Evidence of racial trauma
    h. Evidence of the impact of racism on conduct, behavior, or attitude

J. Are there other kinds of evidence regarding racism that would be useful to criminal defense? We invite you to share examples of fact patterns or cases in which antiracist evidence would be particularly helpful.
    a. Yes (if yes, please describe - [optional])
    b. No

K. Are there barriers to accessing and introducing expert evidence about racism?
    a. Yes
    b. No

L. If yes, what are these barriers? (Select all that apply)

a. Cost to party.
b. Cost to counsel/firm/organization.
c. Difficulty finding experts.
d. Lack of experts.
e. Lack of training for experts on issues of racism.
f. Judges determine that such evidence is not relevant.
g. Judges determine that such evidence is not reliable.
h. Attitudes of judges towards evidence related to racism.
i. Attitudes of opposing counsel towards evidence related to racism.
j. Other, please describe: _____

5. Demographic Information

A. Age

B. Gender
   a. Male
   b. Female
   c. Non-Binary
   d. Prefer to self-describe: _____

C. Race / ethnicity Racial and/or ethnic identity: (select all that apply)
   a. Alaska Native
   b. American Indian
   c. Asian, Asian America
   d. Black and African American
   e. Indigenous peoples, First peoples, First Nations, Aboriginal peoples, and Native peoples
   f. Latino/a/x/e or Hispanic
   g. Middle Eastern, North African, or Arab American
   h. Native Hawaiian
   i. Pacific Islander
   j. White
   k. Other: _____

B. Associations Between Demographics and Attitudes Toward Antiracist Expert Evidence (Familiarity and Perceived Usefulness)

	Familiarity	**Usefulness**
Age	0.131	-0.119**
	(0.078)	(0.042)
Man	-0.043	-0.051
	(0.034)	(0.018)
White (Non-Hispanic)	0.042	0.072**
	(0.041)	(0.022)
Northeast	0.048	0.007
	(0.038)	(0.020)
Midwest	0.063	-0.024
	(0.039)	(0.021)
West	0.160***	0.054**
	(.037)	(0.020)
Constant	0.381***	0.924***
	(.052)	(0.028)
N	457	457
R-squared	0.057	0.087

*p < 0.05; **p < 0.01; ***p < 0.001 (one-tailed)

Note: Cell entries are ordinary-least-squares coefficients. Standard errors are in parentheses. All variables have been coded to range from zero to one. Omitted (baseline) categories for nominal variables are as follows: woman (twelve non-binary respondents excluded), all racial/ethnic categories besides non-Hispanic white (combined, due to the low sample size), and South, respectively. Listwise deletion is used to deal with missing observations.