INTEGRATING INTERSECTIONALITY IN THE FEDERAL RULE OF EVIDENCE 403

by Sharon Perez

Sharon Perez is from Southern California and attended the University of California Santa Barbara. She majored in Sociology and Black Studies. She was on the Dean's list, earned distinct honors in Black Studies, and wrote an Honors Thesis titled "The Class First Approach: An Intersection of Race, Class, and Capitalism." While in undergrad, Sharon volunteered for Freedom 4 Youth, where she mentored minors in and out of the juvenile justice system. Sharon attends the Chapman University Fowler School of Law, where she is on the Moot Court Board, Diversity Editor of *Chapman Law Review*, Vice President of the Public Interest Law Foundation, Representative of the Chapman's Women's Lawyers Association, and Volunteer Chair of the Animal Legal Defense Fund Board. In her spare time, Sharon enjoys club volleyball, gardening, and playing the steel drums.

Introduction

The murders of Ahmaud Arbery, Breonna Taylor, George Floyd, and countless other African Americans, who lost lives at the hands of police, sparked mass protests all over America. The national consciousness is being re-awakened to the idea that the United States still needs radical changes, particularly in the ways interpersonal and systemic discrimination is conceptualized and functions. Professor Cornel West argues progressive legal practitioners "confront the difficult task of linking their defensive work within the legal system to possible social motion and movements that attempt to fundamentally… transform American society".[1] However, if the transformation West suggests is only addressed on the basis of race, and race is not inherently intersectional, the particularities of how people of color, men, women, men of color, women of color, LBGTQUIA+[2] people, disabled individuals, immigrants and especially the intersections of these identities, tend to be negated.

Professor Kimberlé Crenshaw coined the term "intersectionality," which describes how systems of oppression overlap to create distinct experiences for people with multiple identity categories.[3] Intersectionality encompasses how overlapping or intersecting social identities, particularly minority identities, function and relate to systems and structures of discrimination.[4] Intersectionality allows the legal practice to go beyond race and address the specificity and intersections within suspect groups of race, sex, class, gender, sexuality, religion, immigration status, class status, and those within the LBGTQIA+ community. Thus, an intersectional lens is vital to legal practitioners and our legal system because it acknowledges and incorporates complexity in how the law is practiced and upheld. If explicitly implemented in evidentiary law, intersectionality would address the implicit biases that are not uniform across the categories of race, gender, class, and more. This Note asserts that a more equitable and complex framework for implementing intersectionality's role in perception and overall judgment in the legal system and evidentiary discourse, specifically surrounding the Federal Rule of Evidence 403 "FRE 403", will allow legally significant differences between divergent types of evidence to be better analyzed and articulated.

The Federal Rules of Evidence 403 states, "the court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[5] Currently, FRE 403 does not call for an intersectional lens when considering the unfair prejudice of particular evidence. FRE 403 negates the intersections of suspect classes, and it does not adequately prepare judges and attorneys to address the possessive investment in whiteness[6] ingrained within themselves, jurors, and the entire legal system. Additionally, FRE 403 does not adequately account for jurors' implicit biases elicited by a party's intersectional identity and the emotional responses the jurors may face from these biases in their decision-making. This Note will offer mitigation to the effects of implicit bias and the possessive investment in whiteness within the legal system by proposing an intersectional lens within the evidentiary discourse of FRE 403. If an intersectional framework is explicitly considered when looking at a piece of evidence and its potential prejudicial effect, the party's identity and the implicit biases that come with that identity can be explicitly considered when raising the FRE 403 objection.

This Note proceeds in five parts. Part I will discuss the framework of intersectionality created by Professor Crenshaw. It details the lack of said framework within legal practitioners and the legal practice. Further, it will discuss the current evidentiary discourse surrounding FRE 403 and how objections to unfair prejudice have been noted historically and contemporarily. Part II addresses the narratives typically invoked in our legal system when analyzing suspect classes and how implicit bias can

infiltrate legal practitioners and jurors, ultimately affecting their decision-making process. Furthermore, it will discuss and evaluate Dr. George Lipsitz's book, *The Possessive Investment in Whiteness*[7], and how this notion may be upheld within white jurors and white legal practitioners. Part III will discuss the current legal mechanisms available to address racial bias and the existing scholarly literature addressing the need for more effective interventions to limit those biases. Part IV will provide a specific proposal as to how intersectionality can become a part of FRE 403 and how an intersectional lens may allow objections based on unfair prejudice to be raised more efficiently.

Intersectionality must be defined and analyzed to fully recognize why it is a necessary framework for the legal field and legal decision-making process that should be explicitly stated and considered in the balancing test of FRE 403. Additionally, FRE 403 must be explained so that the current language of the rule may be understood and subsequently addressed. Then, with an understanding of how FRE 403 functions and an acknowledgment of the persistent racism in our legal system and society, "signs of racial subordination in the evidence context will come more clearly into view."[8]

I. Kimberlé Crenshaw's Intersectionality and Federal Rules of Evidence 403: Unfair Prejudice

A. Kimberlé Crenshaw's Intersectionality

Professor Crenshaw created the framework of "intersectionality" in 1989. The civil rights activist and legal scholar[9] has been actively involved in race and civil rights work for over thirty years.[10] She was recently elected to the American Academy of Arts and Sciences.[11] Professor Crenshaw wrote in the University of Chicago Legal Forum that antiracist policies and traditional feminist pathologies exclude Black women due to the overlapping discrimination they face.[12] However, intersectionality is not limited to Black females, accurately describing their position in our country.[13] Intersectionality has now been defined as a sociological term by the *Oxford English Dictionary* meaning, "the interconnected nature of social categorizations such as race, class, and gender, regarded as creating overlapping and interdependent systems of discrimination or disadvantage; a theoretical approach based on such a premise."[14] Intersectionality has also been defined as "the complex, cumulative way in which the effects of multiple forms of discrimination (such as racism, sexism, and classism) combine, overlap, or intersect especially in the experiences of marginalized individuals or groups."[15] These marginalized groups include people of color, men, women, men of color, women of color, LBGTQUIA+ people, disabled individuals, immigrants, and working-class people.

Professor Crenshaw starts her analysis of intersectionality by discussing how focusing on otherwise-privileged groups, such as white females experiencing sexism and Black males experiencing racism, "creates a distorted analysis of racism and sexism because the operative conceptions of race and sex become grounded in experiences that actually represent only a subset of a much more complex phenomenon."[16] Thus, Crenshaw uses the experiences of Black women and how the court frames and interprets their stories to display how intersectionality functions in the legal apparatus.[17] Crenshaw considered cases such as *Moore v. Hughes Helicopter, Inc.* in order to illustrate the difficulties inherent in judicial treatment of intersectionality.[18] This case failed to recognize Black females as class representatives in race and sex discrimination cases, resulting in a Black woman's complaints of discrimination being left groundless because the court reasoned that she "never claimed before the EEOC that she was discriminated against as a female but only as a Black female," and that there were serious doubts about the ability for the Black female employee "to adequately represent white female employees."[19] The Ninth Circuit's decision displays how the antidiscrimination doctrine fails to embrace the framework of intersectionality while also making the white female experience central in the concept of gender discrimination.[20] Thus, *Moore* is a prime example of the limitations that legislation and law, such as the antidiscrimination doctrine, face when intersectionality is ignored. The distinct experiences of particular groups of individuals are left unprotected. Intersectionality allows for the fullness of an individual's identity to be considered within the legal field. Specifically, an intersectional framework explicitly added to the FRE 403 would allow the fullness of a party's identity to be considered. Intersectionality will allow 1) counsel to advocate for them entirely, 2) a judge to contemplate how evidence will invoke biases when it comes to a party's intersecting identities, and 3) the jury will either be shielded or shown evidence that allows them to consider the wholeness of the party's identity when contemplating a decision.

B. Meaning of FRE 403

The historical background of FRE 403 and its origins show how pivotal FRE 403 became to evidentiary discourse and the legal field. One comprehensive article discussed how Congress quickly enacted the rule on its face value and adopted the rule[21]. The article analyzed how much power FRE 403 gives to a trial judge when making decisions starting with whether the rule should be applied to a piece of evidence and then:

"The judge…must estimate both the probative value and the prejudicial effect of the particular

evidence and decide which factor outweighs the other. Additionally, the judge must determine what to do about evidence that in some way runs afoul of the rule. This last decision is often the most troublesome. A judge's perceptions of the goals and values of the prejudice rule, of course, will influence greatly a decision in any phase of a prejudice rule determination during trial."[22]

FRE 403 provides "tremendous latitude and unfettered discretion"[23]to judges. With this discretion comes the high likelihood that the judge may overlook a person's intersecting identity and how those identities can significantly affect a party's case. Thus, if mandated to do so, judges are more likely to consider how a party's lived experience is vastly different from their own, and how their lived experience and intersectional identity should be considered when using their discretion and analyzing a piece of evidence under FRE 403.

The Federal Rules of Evidence 403 states, "the court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[24] The advisory notes provide that "unfair prejudice . . . means an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one."[25] This note simply means that evidence can be excluded if it "appeals to"[26] emotions of the jury instead of rational thought. Thus, emotion can be considered a "hallmark of unfair prejudice."[27] However, emotion is pivotal to people's everyday life. Emotions can convey information, such as repugnance or anger when analyzing a situation.[28] This natural emotional response in jury members is accounted for currently in our legal system, but not with the perspective of how a party's intersectional identity sparks those emotions and implicit biases.

Furthermore, emotions do not always ignite prejudice, but "they can lead to prejudice in more complex and subtle ways than previously recognized, impacting not only the decision maker's reactions to evidence but also the decision-making process itself."[29] In legal decision-making, emotion should not be categorized as prejudicial from the start. Instead, it should shift to specific questions that are designed to "determine which emotions, under which circumstances enhance [or limit] legal decision making."[30] Thus, when a particular piece of evidence ignites the emotional reactions of the jurors, it must be considered whether that emotional reaction is working simultaneously with the implicit biases that come with a party's intersecting identity. The emotional response from prejudice is essential to discuss because they are frequently considered from a position of race only. This would mean the prejudice that comes with people's intersecting identities would be negated and the judge and attorney may allow the jury to consider evidence that sparks their implicit biases, from said identities, because an intersectional consideration was negated.

C. Current Legal Notion of Unfair Prejudice and FRE 403 in Practice

Lawyers in determining how to present evidence are experts on the issues mentioned above and must explain why a piece of evidence is prejudicial or has probative value.[31] Lawyers are in charge of describing the appropriate way a particular piece of evidence should be used by a jury, or a lawyer must explain the reasoning behind why a piece of evidence shall not be admitted.[32] When a piece of evidence is not admitted by a lawyer, it is usually with the fear that a piece of evidence is prejudicial because it will invoke an emotional response and thus will not be appropriately used by the jury).[33] Lawyers usually do not invoke a dry narration of the case's facts in advocating for their clients. More often than not, arguments draw on vivid stories that elicit emotions because this approach makes it more likely for details to stay in the jury's memory due to the attention they capture.[34]

FRE 403 functions as a balancing test in order to ensure due process[35] in the wake of these epic narratives told. A lawyer articulates whether a piece of evidence is probative or has a substantial prejudicial effect. The judge has discretion to admit or reject the proffered evidence. However, a lawyer must be able to advocate entirely for a client, including understanding how to make a prejudicial argument to a piece of evidence if necessary. A lawyer must know how to advocate for their client passionately when objecting to a piece of evidence based on its prejudicial effect, including the consideration of all aspects of a client's identity. For instance, "the fact that a piece of evidence hurts a party's chances does not mean it should automatically be excluded…"[36]. The question is of unfair prejudice- not of prejudice alone. Thus, if lawyers are mandated to consider their client's intersecting identities, they will likely be more equipped to identify a juror's implicit biases that are elicited by their client. They would then be able to use that reasoning as a part of their argument as to why a piece of evidence is prejudicial. Lastly, if judges are mandated to apply an intersectional lens, then they will have a better understanding as to how a juror may negatively see a party's intersecting identities.

With the judge and attorney considering how pieces of evidence impact a juror's perception, weaving intersectionality within the FRE 403 balancing test and in the decision-making process would allow the identities of the parties of litigation to be considered, analyzed, and can lend to either side of the balancing scale. Thus, the lawyer must formally and affirmatively allow the parties' identities to be considered and then profess the importance of those intersecting identities to the judge. Furthermore, this process would offer parties in an adversarial process an opportunity to lobby the jury by educating them about the complex identity of a witness, defendant, plaintiff, and so forth. Considering all aspects of a party's identity will also allow the judge and attorney to be explicitly aware of how that party's identity could elicit implicit biases in the jury. Thus, they can consider those implicit biases when advocating and considering the admissibility of pieces of evidence.

II. Constructions of Race, Implicit Bias, and the Possessive Investment of Whiteness

The ways in which people of color, LBGTQUIA+ people, disabled individuals, women, men of color, women of color, and immigrants are constructed and

discriminated against based on implicit and explicit biases needs to be discussed in order to evaluate the issue that an intersectional lens within evidentiary discourse will address,

A. Constructions of Race and Implicit Bias

One issue with current evidentiary discourse is that unfair prejudice based on race is not inherently intersectional because race is only a singular identity. Nevertheless, a discussion on the constructions of race, gender, class, citizenship status, et al. and the implicit biases related to the coexistence of an individual's particular identities is necessary to understand intersectionality's importance within evidentiary discourse. Persistent racial stereotypes connect notions of blackness with criminality.[37] Social science research demonstrates that most Americans harbor implicit racial biases that connect blackness with negative characteristics such as aggression, hostility, violence, criminality, and weapons.[38] These binary assumptions of race within pervasive stereotypes, which are ultimately assumptions of personality and character traits based on race, often function as implicit biases within many individuals. These implicit biases then maneuver on a subconscious level, causing individuals to have a particularly negative outlook and reaction to specific target groups.[39] For instance, "seventy-five percent of people who have taken the Implicit Association Test for race have demonstrated a subconscious preference for whites and an implicit racial bias against Black people."[40]

Within our nation, African Americans are 2.5 times more likely than whites to be stopped pulled over, and arrested.[41] Bryant Stevenson states, "in poor urban neighborhoods across the United States, Black and Brown boys routinely have multiple encounters with the police. Even though many of these children have done nothing wrong, they are targeted by the police, presumed guilty, and suspected by law enforcement of being dangerous or engaged in criminal activity."[42] He supports the notion that even at a young age, the police system targets people of color. In fact, according to the 2014 report on racial discrimination in America, juveniles of color represented roughly 67 percent of juveniles committed to public facilities nationwide.[43] Same question about the original source.

Another instance of racial profiling and implicit bias in the United States was in New York City. Stop and frisk is a "New York City Police Department practice of temporarily detaining, questioning, and at times searching civilians on the street for weapons and other contraband."[44] In 2010, white people accounted for 44 percent of New York's population, while African Americans accounted for 22.5 percent.[45] Despite the population being predominately white, in 2010-New Yorkers were stopped 601,285 times-315,083 were Black (54 percent), 189,326 were Latinx (33 percent), 54,810 were white (9 percent). This pattern persisted in the first three quarters of 2016: citizens were stopped 10,171 times, 5,401 were Black (54 percent), 2,944 were Latinx (29 percent), 1,042 were white (10 percent).[46] The New York Police Department in 2019 recorded 13,459 stop; 7,981 were Black (66 percent), 3,869 were Latinx (29 percent), and 1,215 were white (9 percent).[47]

Implicit biases go beyond race. They can encompass negative emotions towards women, immigrants, LBGTQUI+ people, disabled people, and be specific. For example, the Department of Justice in *Windsor v. United States* summarized the history of discrimination against LBGTQUIA+ people in its brief to the United States Supreme Court.[48] This history of discrimination is common by law enforcement officials and includes "profiling, entrapment, discrimination and harassment by officers; victimization that often was ignored by law enforcement; and discrimination and even blanket exclusions from being hired by law enforcement agencies."[49] These statistics and information illustrate the high likelihood that the implicit biases associated with intersecting identities can be ignited within some judges, attorneys, and jurors. These biases may be activated by specific racial imagery or perpetuating stereotypes and can limit how a piece of evidence is analyzed, considered, and weighed under FRE 403. Additionally, within these implicit biases, there is a Black/White binary paradigm of race[50] within these implicit biases excludes the intersections of individuals' identities. Thus, issues that are about race, particularly implicit and explicit racial biases, are not inherently intersectional. Additionally, the lived experiences and biases around those who have intersecting identities[51] are often ignored in evidentiary discourse, leaving them susceptible to limited representation and treatment within our justice system.

Furthermore, intersectionality within FRE 403 is pivotal because white individuals, who are commonly heterosexual, make up a majority of jury pools, lawyers, judges, and magistrates.[52] Thus, if some of those white jurors, lawyers, judges, and magistrates are invested in maintaining the systemic and interpersonal privileges that come with their whiteness and have implicit biases about people of color or individuals with multiple intersecting identities, an intersectional lens within evidence law may allow them to see beyond their own racialized, gendered, and classed experiences. Furthermore, a mandated

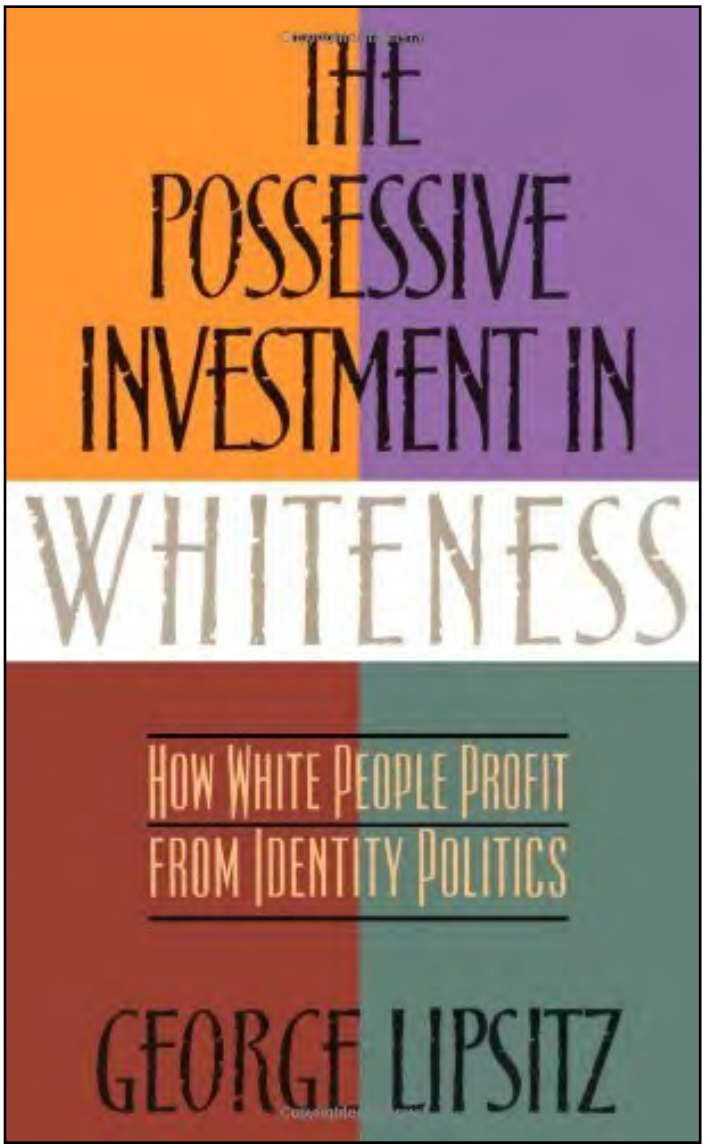
intersectional lens may illuminate the subordination of people with identities that are traditionally marginalized within evidentiary law and offer a solution to that systemic subordination by ensuring individuals suspect class intersections are considered and prioritized.

B. "The Possessive Investment in Whiteness" Within White Jurors and White Legal Practitioners

Dr. George Lipsitz, in his book "The Possessive Investment in Whiteness: How White People Benefit from Identity Politics,"unfolds how the artificial construction of whiteness almost always comes to possess white people themselves, unless they develop antiracist identities and unless they divest themselves of their investment in white supremacy.[53] Dr. Lipsitz gives a detailed account of the history of the United States and how systems that reinforce white advantage and supremacy function most effectively when there is no acknowledgment of the offered privileges, allowing for white privilege to stay unaddressed. He articulates how many white individuals historically and contemporarily "attach to mechanisms that give whiteness force and power" and how the history of the United States "has consistently been built on racial exclusions."[54] White individuals have benefitted within the legal field from these same racial exclusions. For example, the California Crimes and Punishment Act of 1850 state that "no black or mulatto person, or Indian, shall be permitted to give evidence in favor of or against any white person."[55] This Act illustrates how white privilege and racial discrimination in the law were more explicit in relatively recent history. However, although no evidentiary rules distinctly exclude racial groups contemporarily, implicit ways exist of discrimination functions, including the misconception of racial equality and the subsequent perpetuation of colorblindness.[56] Colorblindness assists in upholding white privilege by not explicitly incorporating anti-racist language in the law, and those within that privileged group tend to generate new mechanisms to increase the value of past and present discrimination.

The contemporary mechanisms for upholding white privilege can function implicitly and explicitly. Racial categorization is a way that discrimination and exclusion function implicitly within the United States as "racial categorization creates social structures and assigns moral qualities to members of racial groups in ways that benefit people designated as white."[57] Thus, racism can exist without explicit discriminatory legislation because racism functions through the centrality of the white experience and white, middle-to-upper class, cisgendered, heterosexual men "collectively receiving privileges and benefits from the systemic subordination of non-whites" is foundational to past and present systemic issues.[58]

The investment many white people have in the privileges that come with their race and other hegemonic identities may cause whiteness to represent as the norm, and anything outside that norm can spark implicit biases. The investment in whiteness and white norms that have historically been and continue to be embedded in our legal system raise an issue for parties, especially those with multiple identities that are systemically and interpersonally discriminated against, to be seen as outside that norm. Furthermore, strictly white experiences can allow evidence of white experiences and customs to be submitted to the jury without objection because these experiences are considered the norm.[59] For instance, an example of how white lived experiences can function as the norm can be found when analyzing a defendant's flight from the police.



When looking at flight through the experiences of people of color, the fear of being targeted due to their race and becoming a potential victim of police brutality is often present.[60] However, when looking at flight through the white experience, it is often looked at as a consciousness of guilt for some crime committed.[61] Furthermore, this power dynamic can be further exacerbated when you consider an individual's intersecting identities. A Black trans-woman may run away from the police due to the increased fear incited by the combination of racism, transphobia, and sexism within our country. These examples highlight how the lived experiences of people of color and their other intersecting identities are not always considered within the legal field.

Understanding the possessive investment in whiteness and the urge for many white people to uphold their lived experiences as the norm is important because white individuals make up many jury pools. For example, between 2005 and 2009, half of Houston County juries were all-white while the other half included only one Black member.[62] The analysis, conducted by the non-profit Equal Justice Initiative, further discusses how the process for striking jurors of color is a standing operating procedure in many District Attorney's Offices and Public Defender's Offices because the policy for systematically excluding people of color from a jury is not convoluted.[63] Striking jurors of color is due to the notion that "any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons."[64] This practice of racial discrimination in jury selection is also found in California. Students and faculty from Berkeley Law's Death Penalty Clinic evaluated 683 California Courts of Appeal cases from 2006 to 2018 that involved objections to prosecutors' peremptory challenges. They were used by attorneys to excuse potential jurors without providing a reason why.[65] Prosecutors used their strikes to remove African American jurors in nearly 75 percent of these cases, Latinx jurors in about 28 percent, and white jurors in only three cases (0.4 percent).[66] These statistics shed light on the idea that juries are more likely to be predominately white, thus invoking the white experience as a norm. Therefore, intersectionality should be explicitly implemented in evidentiary discourse so that the lived experiences of people with marginalized identities who are parties in litigation are considered during the legal process. This will combat the white norm and hegemonic ideals that are likely to be perpetuated in a courtroom that is predominantly filled with white individuals.

Many white judges and attorneys are likely to invest in their whiteness and hegemonic ideals as well.[67] However, introducing intersectionality as a standard lens within FRE 403 will mandate attorneys and judges to consider the lived experiences of minority parties and make their identities a pivotal component in their legal advocacy. By explicitly adding an intersectional framework to FRE 403, attorneys and judges will be mandated to consider how it functions within a given case by expressly adding an intersectional framework to FRE 403. This revision could not only increase the probability of sparking judges' and attorneys' cognition to their own implicit biases towards the intersections of an individual's identity, but also mandate them to consider how an individual's intersecting identity may spark a juror's implicit biases. Although an intersectional lens within evidentiary discourse may not stop white judges, attorneys, and jurors from investing in their whiteness, hegemonic ideals, and upholding whiteness as the status quo, it forces white judges and white attorneys to think outside their lived experiences because they will be mandated to do so instead of having the mere choice to do so.

III. Current and Proposed Mechanisms to Combat Implicit Bias within Evidentiary Procedure

This section will examine current mechanisms in the law and in academic proposals to address implicit biases within evidentiary discourse. It will analyze that although race-based solutions are important, we must go beyond those initial suggestions for reform and consider an intersectional framework within the legal field.

A. Legal Mechanisms that Currently Address Racial Biases and Racial Bias as a Trial Strategy

The current legal mechanisms in place to address implicit and explicit racial biases within the courtroom do not address the biases that may arise from a person's intersectionality. For example, the Supreme Court in *Pena-Rodriguez v. Colorado* created an exception to FRE 606(b)[68] that prohibits a juror from testifying about "any statement made . . . during the jury's deliberations . . . or any juror's mental processes concerning the verdict or indictment." The Supreme Court held that the Sixth Amendment requires that the "no impeachment rule give way" if a criminal defendant was convicted by a juror based on a clear statement that the conviction was based on racial stereotypes or racial hostility.[69] Explicitly not addressing the mental processes of jurors causes insufficiency in addressing all biases and focuses on race alone.

Additionally, there have been cases in which race was explicitly targeted in order to elicit racial biases within the jury. The North Carolina State Supreme Court has reviewed cases based on instances where lawyers for six death row inmates argued that racial bias played a dominant role in the outcome of their cases.[70] In the case against one of the defendants, the prosecution deployed violent racialized stereotypes, calling the Black defendant a "big black bull."[71] This shows that race has been used to incite the jury to push toward conviction, and in other instances race-neutral approaches have been used that omit race as a primary factor and argue it as non-relevant.[72] North Carolina enacted in 2009 "The Racial Justice Act" which allowed death row inmates to contest their conviction if they could display that race was a "significant factor in being sentenced to death."[73] This law was repealed soon after its inception in 2013, but the issues that it was intended to address are still potent and consistently active. As previously discussed, racial biases within most individuals are inevitable[74], but even laws that only focus on race, such as the Racial Justice Act, are missing pivotal components of a person's identity. Although the law was enacted to combat racial inequality through biased convictions, it still only addressed race. This racially violent classification of "big black bull" also addressed specifically Black men. Thus, even if the legislation was not overturned (or others similar to it that

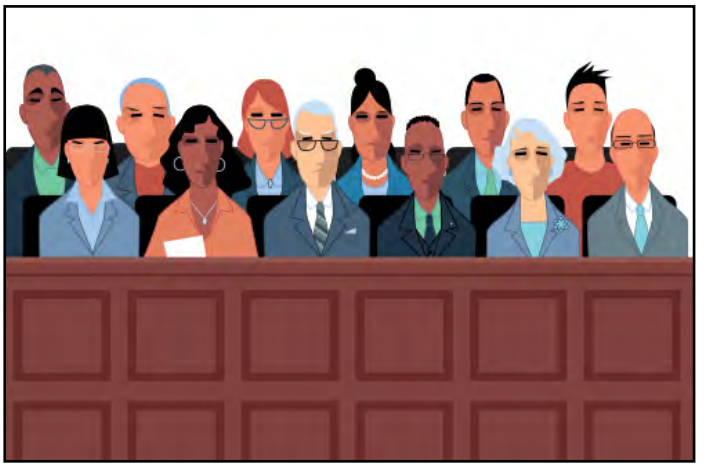
still stand), it does not address the particular biases that come with the intersections of being Black and a man in the United States. Racial biases should be explicitly addressed as they are in these solutions, and an intersectional framework can encompass race and other aspects of an individual's identity, creating more inclusive and equitable approaches to the legal system.

B. Scholarly Legal Articles that Address Implicit Bias and Offer Race Based Solutions that are not Inherently Intersectional

Current legal articles address the need for race and implicit biases to be explicitly considered within evidentiary discourse. Jasmine B. Gonzalez proposes a change to FRE 403 as a solution to these issues. She explains in "Toward a Critical Race Theory of Evidence""how a "[c]ritical race evidentiary theory is valuable because it exposes how the law of evidence can insidiously operate to perpetuate racial subordination."[75] One of her suggestions is a reinterpretation of the FRE 403 that calls for consideration of a party's ability to introduce evidence to oppose racial prejudice and furthermore to demand that races be treated equally under the law of evidence so that "[j]udges and attorneys may take proactive steps to make it more feasible for people of color to share their racialized experiences and to expose systemic racism in litigation."[76] Although this proposed interpretation of FRE 403 addresses some of the issues presented thus far, it focuses predominately on race. Judges and attorneys need to consider the lived experiences of people of color and how those experiences are uniquely different from those of white people. Just as important is that these experiences be understood beyond race. Thus, adding an intersectional approach to Gonzales' proposed interpretation of FRE 403 may allow all aspects of an individual's identity to be considered when advocating on their behalf. For instance, a working-class Black female has a different lived experience than that of a wealthy class Black male. The interpretation of FRE 403 above that focuses on race only suggests the ways in which a working-class Black female is legally advocated for and the ways in which a wealthy class Black male is legally advocated for would be similar because they share the same race. However, if a judge or attorney is mandated also to consider the sex, socio-economic status, race, and more of these two individuals, then a more precise consideration of how their intersecting identities may elicit an emotional response in a jury.

"Black Lives Discounted: Altering the Standard for Voir Dire and the Rules of Evidence to Better Account for Implicit Racial Biases Against Black Victims in Self Defense Cases" explains how the criminal records, physical appearances, and lifestyles are used against victims of police brutality to justify the violence inflicted on them.[77] The article discusses how traditional self-defense law incites racial biases and offers solutions to these biases by proposing an explicit new rule to the Federal Rules of Evidence. The proposed rule explicitly addresses implicit biases within individuals by not allowing cops to use race as a tool for why they saw the victim as a threat and thus acted in "self-defense."[78] This rule is limited to people of color who are victims of police brutality but could be a guide for a broader application to address implicit and explicit biases. This rule is meant to limit jurors' inevitable racial biases and "limit the admissibility of potentially irrelevant and prejudicial racial insinuations during trial."[79]

However, this proposed solution is solely based on race, which is not inherently intersectional.[80] The particular needs of victims in self-defense cases who have intersecting suspect class identifications will not be accounted for when using this rule. Furthermore, this rule needs to be changed as the legal system evolves from the "white norm" as the default. This rule is structured around white experiences as the norm, although this rule addresses implicit biases by not allowing those who are pleading self-defense to use race as a basis for their determination of whether severe bodily harm was imminent,[81] this rule is structured around white experiences being the norm. Whites rarely use their whiteness as a reason they pose as a threat, however as previously discussed; it is common for individuals to connect blackness with criminality and violence.[82] The goal as legal scholarship evolves would be to stray away from this white narrative as the norm within legal analysis and advocacy. This rule is brilliantly proposed and a necessary addition to the Federal Rules of Evidence; it illuminates the greater need for intersectionality in proposed solutions.



Individuals within the justice system may not obtain the legal advocacy they deserve without intersectionality used as a lens in which evidentiary work is approached, The lack of consideration of all of the aspects of an individual's intersecting identities, especially if their experience, and the associated implicit and explicit biases accompanied by their experience, are reduced down to only a racialized lens. These current scholarly approaches demonstrate the one-dimensional focus on race as it pertains to addressing bias and evidence in the legal system. Race-based solutions are a starting point to the issue of implicit biases because that is the common way of understanding how implicit biases function.[83] The problem of intersectionality is much broader than just race. Going beyond those solutions and addressing those who are, for example, Black, female, and part of the LGBTQIA+ community is critical to reducing or eliminating discrimination in the legal system. Someone with intersecting identities that are traditionally marginalized is at a higher risk of particular implicit biases against them. If race-based solutions are proposed, then they only capture part of the person's identity, and deny the complexities of a person's lived experience and their relationship to systems of power. In relation to the example given above, only the individual's race would be addressed with critical race theory and not the individuals sex, sexual

orientation, socio-economic status, et al. Focusing on race poses a possible threat, that without an intersectional lens applied to evidentiary discourse, this individual's counsel may not object to certain pieces of evidence that may be unfairly prejudicial and spark jurors or the judges' implicit biases around not only their race but their sex, sexual orientation, socio-economic status, citizenship status, et al.

IV. Proposal for an Intersectional Lens to be Integral to the Federal Rules of Evidence 403

A. Proposed Intersectional Lens to FRE 403

The Federal Rules of Evidence 403 requires a piece of evidence to be evaluated through a balancing test that weighs the probative value of that piece of evidence against the prejudicial effect that piece of evidence might have. The most frequently used objection to the admissibility of a piece of evidence is that it is prejudicial.[84] As previously discussed, the advisory notes of the federal rule define unfair prejudice as an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.[85] This note proposes that unfair prejudice should be explicitly defined within the rule of FRE 403; intersectionality must be a key component of that definition. FRE 403 currently reads, "the court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[86]

This Note's proposed revision to this rule would be to add after "needlessly presenting cumulative evidence" the following definitions should apply under this article:[87]

(a) Unfair Prejudice: within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one;[88]when analyzing unfair prejudice, intersectional identities of a plaintiff, defendant, witness, co-party, petitioner, respondent, cross-complainant, cross-defendant, and/or any other party must be taken into consideration to account for specific implicit biases that are likely to arise."

Furthermore, this proposal includes a clear and concise definition of intersectionality within FRE 403's advisory committee notes:

"Intersectionality is the interconnected nature of social categorizations, such as race, class, gender, religion, sexuality, LGBTQIA+ involvement, disability, et al, regarded as creating overlapping and interdependent systems of discrimination or disadvantage".[89]

This proposal for an explicit definition of unfair prejudice that includes intersectionality within FRE 403 has the likelihood of addressing common implicit biases that are likely in the adversarial process. Attorneys and judges will be mandated to consider intersectionality within their understanding of FRE 403. This standard will cause attorneys to explicitly consider how their client's intersecting identity can lend to the argument of unfair prejudice when trying to make a piece of evidence inadmissible. For example, if a working-class Black transgender female is on trial, her attorney will be sparked by this proposed explicit inclusion of intersectionality to consider how their client's intersecting identities of Transgender, Black, working class, and Female can cause unique implicit biases within the jury. Thus, attorneys will be in a better place to advocate for their clients in regard to how to object to pieces of evidence, thanks to the consideration of all aspects of their client's identity and the emotional response that intersecting identities may cause. Further, if mandated to do so, judges are more likely to consider not only how a party's lived experience could be vastly different from their own, but how their lived experience and intersectional identity needs to be considered when using their discretion and analyzing a piece of evidence under FRE 403. This proposal is not suggesting a limitation of a judges' discretion. However, since judges tend to exercise their discretion based on their own perceptions and lived experiences (which, based on the demographics of judges, are often from a white, heterosexual male perspective), this proposal will require them to think about intersectionality and thus the lived experiences of those outside whiteness, heteronormativity, the male perspective, and more.

B. How Intersectionality can Lend to Either Side of the FRE 403 Balancing Scale

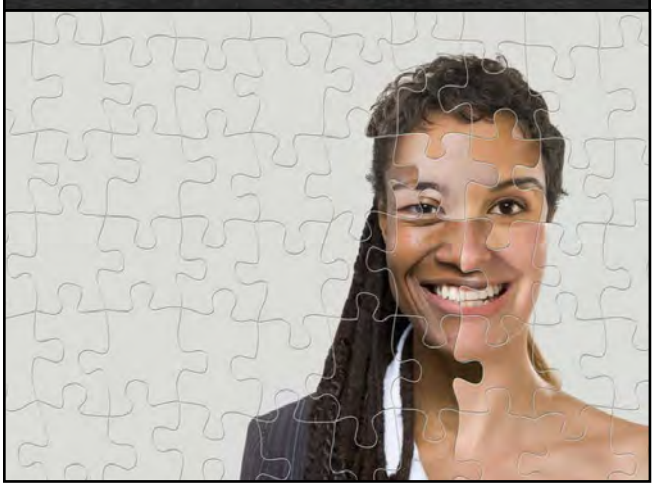
This proposal does not state that intersectionality can only be considered on the unfair prejudicial side of the FRE 403 balancing test. An intersectional analysis would also weigh to the other side of the balancing scale. For instance, defendants in United States v. Armstrong filed a motion to dismiss the indictment for selective prosecution. They argued that the U.S. Attorney prosecuted virtually all African Americans charged with crack offenses in federal court but left all White crack defendants to be prosecuted in state court, resulting in much longer sentences for identical offenses.[90] To make their claim the court ruled that "defendant must produce credible evidence that similarly situated defendants of other races could have been prosecuted, but were not; and (2) to establish a discriminatory effect of prosecution in a race case, defendant must show that similarly situated individuals of a different race were not prosecuted…"[91] The defendants motion was denied.[92] Had the attorneys and judges been mandated to explicitly consider intersectionality within the consideration of the admissibility of the evidence presented, the defendants in the *Armstrong* case may have been more successful in their motion. Defendants' lived experiences with policing and drugs, along with their intersecting identities, may have been considered widely probative to the evidence. Additionally, if the attorneys had taken into consideration the Defendants' intersecting identities, the attorneys may have been better suited to articulate the Defendants' cases that were tried unfairly compared to that of their white counterparts. Furthermore, this proposal can affirmatively allow parties' identities to be considered because with intersectionality in mind by the advocates their intersecting identity will likely add probative value; it may "lobby" the jury by educating them about the party's identity if the evidence of their lived experience is admitted.

Thus, intersectionality does not only have to be on the side of unfair prejudice. However, intersectionality will likely be considered more on the unfairly prejudicial end of the balancing scale because that is where jurors' implicit

biases are more likely to be an issue that needs to be addressed. Additionally, the inclusion of an intersectional analysis each time an FRE 403 balancing test is done will mandate that attorneys consider their clients' intersectionality when objecting on the basis of unfair prejudice.

C. Possibility for Efficient Arguments based on Intersecting Identities

An intersectional framework within FRE 403 will cause judges and attorneys to consider a person's intersecting identities when considering any piece of evidence. Furthermore, it will have legal advocates consider the possible emotional response of jurors, which is pointed to in the advisory notes of the rule [93] more in-depth because they will see how an intersectional identity can spark implicit biases within certain jurors. For instance, if intersectionality is explicitly considered when looking at a piece of evidence and its potential prejudicial effect, the party's identity and the implicit biases that come with that identity, can be explicitly considered when raising the FRE 403 objection.



The court ruled in the well-known case *Old Chief v. United States,* that *Old Chief*'s prior conviction could be stipulated to and not described in detail because its prejudicial effect substantially outweighed the probative value of disclosing the felony.[94] Although *Old Chief* was successful in his defense by limiting the implicit biases that could have been sparked in the jury had his felony been fully disclosed, the opinion after the decision, in large, was a victory for the prosecution.[95] The opinion states that although a piece of evidence may be stipulated to by the defense, the "prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away."[96] This commonly occurs in cases that are not factually similar to the *Old Chief* case itself.[97]

If we look at this case through the view of the proposed rule that this Note suggests, then the negative effects that the opinion has on future defendants may be limited. First, having intersectionality as explicitly part of FRE 403 would allow defendants more ground to objecting on the basis of unfair prejudice. Intersectionality will likely cause the judge to consider the intersecting lived experiences of the defendant, including the implicit biases and negative attitudes that can be incited in jurors against people of color, men, women, members of LGBTQIA+, disabled individuals, working class individuals, et al.

The prejudice and implicit biases that arise from jurors based on a party's intersecting identities are not commonly addressed risks under FRE 403.[98] Furthermore, the proposal of intersectionality as part of the rule would allow defendants, such as those post *Old Chief*, to introduce evidence of their unique lived experiences. Those lived experiences can combat an admissible piece of evidence's prejudicial effect. Furthermore, the proposed addition of intersectionality to FRE 403 would mandate that judges consider an individual's intersectionality and how those intersections may spark the emotions of the jury through implicit biases. If the judge is mandated to consider this, they are able to conduct the balancing test of FRE 403 with the lived experiences of the party's identities in mind. Thus, the judge is more likely to see how a defendant's intersecting identities may lend to a piece of evidence being unfairly prejudicial and if it sparks an emotional response in some jury members. Although a judge can consider these intersections of identity now, it is up to their discretion. If an intersectional framework is explicitly part of the FRE 403, judges will be mandated to consider it. This is beneficial because tapping into the lived experiences of individuals, especially those with multiple marginalized identities,[99] can continue inclusivity-based reform efforts in our legal system.[100]

Intersectionality includes a person's socio-economic status. People of color, within class distinctions, do not experience oppressive systems of capitalism within the legal field the same way that whites do. The intense intersections of wealth and race can be seen when looking at individuals' advantages and disadvantages in the workforce. Additionally, class works differently when looking at how racial stratification is maintained, how wealth is passed among generations, and how legal policy is targeted to benefit whites.[101] With intersectionality in the mind of advocates, the class struggles that follow racial and ethnic minority groups can be considered, resulting in a more complete representation of these individuals within the legal system.

D. Expected Critiques and Responses

There will be critiques of this proposal for an intersectional framework as a part of an FRE 403 balancing test analysis. One example being that implicit biases may not be uniform or standard across the board; thus, how will they be adequately addressed? Intersectionality calls for the consideration of all the aspects of an individual's identity. This also allows for a consideration of how those distinct intersections of a person's identity may spark implicit biases in others. Thus, intersectionality does not cover one uniform form of implicit bias but allows for intersecting

identities of people to be considered and the implicit biases that those identities may spark.

Another critique may be that not all aspects of an individual's identity are relevant to the case at hand. However, judges, attorneys, and jurors "draw assumptions about reality as they understand it based on the way they perceive it."[102] Therefore, identity is constantly being subconsciously factored into a person's perception if not done consciously. As previously mentioned, implicit biases are inevitable to be within jury pools and legal advocates.[103] These implicit biases largely go unrecognized because they are subconscious biases. Scott Wilson states in his article on implicit biases, "the most dangerous racial prejudice is not an overt call to racial hatred, which most people would find repugnant; it is subtler, invidious racism that persuades while going unrecognized."[104] Therefore, identities are almost always relevant to cases because implicit biases and assumptions of the world from a personal perspective are always occurring.[105] With the addition of intersectionality as an explicit part of the rule, jurors, attorneys, and judges can better account for these biases by considering how intersecting identities of an individual and pieces of evidence may be prejudicial if they spark those implicit biases.

V. Conclusion

Attorneys are able to advocate with consideration for a person's intersectionality within the adversarial process, but they are not mandated to. Evidence and evidence law are pivotal in what gets presented in legal cases and what cases are successful or not. People deserve for the wholeness of their identity to be considered in the legal system, and that evidence law incorporates an intersectional framework. Although this proposal for intersectionality within FRE 403 will not eradicate racism and implicit biases within the legal system, it is a steppingstone to mandating that the complexity of an individual's life experiences and identities be considered. An intersectional consideration will obligate attorneys and judges to contemplate perspectives outside the white norm. This consideration by attorneys and judges has the prospect for these advocates to ruminate an individual's intersecting identities and see how they may elicit implicit biases and emotional responses in the jury. I am hopeful this Note will spark more inclusive and innovative ways for evidentiary law to advocate for all identities.

[1]Cornel West,*The Role of Law in Progressive Politics*, 43 Vand. L. Rev. 1797, 1797 (1990).

[2]*See* Florence Ashley, *Queering Our Vocabulary – A (Not So) Short Introduction to LGBTQIA2S+ Language,* Medium (Aug 17, 2018), https://medium.com/@florence.ashley/queering-our-vocabulary-a-not-so-short-introduction-to-lgbtqia2s-language-997ca6c8b657 (The pride acronym LGBTQIA+ stands for lesbian, gay, bisexual, transgender, queer, intersex, asexual, and the plus is encompassing for those who do not adhere to just one of those groups.)

[3]Kimberlé W. Crenshaw, On Intersectionality: Essential Writings (2017) (Kimberlé Crenshaw is a pioneering scholar and writer on civil rights, critical race theory, Black feminist ideology, and race, racism and the law. She is a distinguished Professor of Law at the University of California, Los Angeles and Columbia Law School.)

[4]National Association of Independent Schools, *Kimberlé Crenshaw: What is Intersectionality?*, Youtube (June 22, 2018), http://www.youtube.com/watch?v=ViDtnfQ9FHc.

[5]Fed. R. Evid. 403.

[6]*See* George Lipsitz,The Possessive Investment in Whiteness: How White People Profit from Identity Politicsviii (2006).

[7]*Id.*

[8]*See* Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 Minn L. Rev. 2243, 2257 (2017).

[9]Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 139 (1989).

[10]Jane Coaston,*The Intersectionality Wars*,Vox, http://www.vox.com/the-highlight/2019/5/20/18542843/intersectionality-conservatism-law-race-gender-discrimination (May 28, 2019, 9:09 AM).

[11]*Crenshaw Elected to American Academy of Arts and Sciences*, UCLA L. (Apr. 23, 2021) http://law.ucla.edu/news/crenshaw-elected-american-academy-arts-and-sciences.

[12]*Id.*

[13]Tom Bartlett, *When a Theory Goes Viral*, The Chronicle of Higher Education (May 21, 2017), https://www.chronicle.com/article/when-a-theory-goes-viral/.

[14]Oxford English Dictionary, www.oed.com/defintion/intersectinality (last visited Oct. 1, 2020).

[15]Meriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/intersectionality (Oct. 1, 2020).

[16]Crenshaw, *supra* note 9, at 140.

[17]*Id.* at 141.

[18]Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 479 (1983).

[19]Crenshaw, *supra* note 9, at 144.

[20]*Id.*

[21]Andrew Dolan, *Rule 403: The Prejudice Rule in Evidence,* 49 S. Cal. L. Rev. 220, 221 (1976).

[22]*Id.* at 225.

[23]Mary Mikva, *An Indelicate Balance: Rule 403 of the Federal Rules of Evidence*, 30 Litig. 36 (2003).

[24]Fed. R. Evid. 403.

[25]Fed. R. Evid. 403 advisory committee's notes.

[26]State v. Phillips, 156 P.3d 583, 587–88 (Idaho Ct. App. 2007) ("Appeals to emotion, passion or prejudice of the jury through use of inflammatory tactics are impermissible.").

[27]Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 Wash. L. Rev. 497, 503 (1983).

[28]*See* Robert B. Zajonc, *Feeling and Thinking: Preferences Need No Inferences*, 35 Am. Psychol. 151 (1980).

[29]Susan Bandes & Jessica Salerno, *Emotion, Proof, and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements,* 46 Ariz. St. L. J. 1003, 1007 (2014).

[30]*Id.* at 1008.

[31]Mikva, *supra* note 23.

[32]*Id.*

[33]*Id.* at 37.

[34]*See* Elizabeth Phelps, *Emotion's Impact on Memory,* in memory and Law 7 (Lynn Nadel & Walter P. Sinnott-Armstrong eds., 2012).

[35]Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 Cornell L. Rev. 1487, 1504–06 (2005).

[36]*Onujiogu v. United States*, 817 F. 2d 3, 6 (1st Cir. 1987).

[37]*See* Calvin John Smiley & David Fakunle, *From "Brute" to "Thug": The Demonization and Criminalization of Unarmed Black Male Victims in America*, 26 J. Hum. Behav. Soc. Env't 350, 357–61 (2016).

[38]Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. Rev. 1555, 1572 (2013).

[39]*Id*. at 1567.

[40]*Id.* at 1555.

[41]*See* Smiley & Fakunle, *supra* note 37, at 357–61 (2016).

[42]Bryant Stevenson, Just Mercy: A Story of Justice and Redemption 155 (2014).

[43]*Id.*

[44]*Stop-and-Frisk Data*, NYCLU, http://www.nyclu.org/en/stop-and-frisk-data (last visited Mar. 22, 2021).

[45]*QuickFacts New York City, New York*, United States Census Bureau, http://www.census.gov/quickfacts/table/SEX205210/3651000 (last visited Mar. 22, 2021).

[46]*Stop-and-Frisk Data*, NYCLU, http://www.nyclu.org/en/stop-and-frisk-data (last visited Feb. 20, 2021).

[47]*Id.*

[48]*See* U.S. v. Windsor, 570 U.S. 744 (2013).

[49]Christy Mallory, *Discrimination and Harassment by Law Enforcement Officers in the LGBT Community*, The Williams Institute (Mar. 2015), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-by-Law-Enforcement-Mar-2015.pdf.

[50]Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Though,* 85 Cal L. Rev. 1213 (1997).

[51]Intersecting identities are the multiple suspect classes that individuals fit in such as their; race, gender, sex, sexuality, disabilities, ethnicity, religion, *etc.*

[52]*Lawyers, and Judges, Magistrates, & Other Judicial Workers,* Data USA http://datausa.io/profile/soc/lawyers-judges-magistrates-other-judicial-workers#:~:text=The%20average%20age%20of%20male,White%20(Non%2DHispanic) (last visited Apr. 6, 2021).

[53]George Lipsitz, The Possessive Investment in Whiteness: How White People Profit from Identity Politicsviii (2006).

[54]*Id*. at 236.

[55]*See* Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence,* 176 Minn L. Rev. 2243, 2246 (2017) (quoting People v. Howard, 17 Cal. 63, 64 (1860) (quoting the California Crimes and Punishments Act of 1850, § 14).

[56]Evan P. Apfelbaum et al, Racial Color Blindness: Emergence, Practice, and Implications 205 (2012).

[57]*See* Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence,* 176 Minn L. Rev. 2243, 2251 (2017) (quoting Martha R. Mahoney, Segregation, Whiteness, and Transformation, 143 U. PA. L. REV. 1659, 1659 (1995) ("The concept of race has no natural truth, no core content or meaning other than those meanings created in a social system of white privilege and racist domination.")).

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

[59]Patricia Williams, Seeing aColor-blindFuture: the Paradox of Race: the 1997 Reith Lectures 6 (1997).

[60]Note, *Black Lives Discounted: Altering the Standard for Voire Dire and the Rules of Evidence to Better Account for Implicit Biases Against Black Victims in Self-Defense Cases,* 134 Harv. L. Rev 1521 (2021).

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

[62]*Illegal Racial Discrimination in Jury Selection: A Continuing Legacy,* Equal Justice Initiative (Aug. 2010), http://eji.org/reports/illegal-racial-discrimination-in-jury-selection/.

[63]*Id.*

[64]Batson v. *Kentucky*., 476 U.S. 79, 106 (1986) (Marshall, G., concurring).

[65]Andrew Cohen, *New Report Shows Ongoing Racial Discrimination in CA Jury Selection*, Berkley Law (June 12, 2020) http://www.law.berkeley.edu/article/new-report-shows-ongoing-racial-discrimination-in-ca-jury-selection/.

[66]*Id.*

[67]*See* George Lipsitz, The Possessive Investment in Whiteness: How White People Profit from Identity Politicsviii (2006).

[68]*Pena-Rodriguez v. Colorado,*137 S. Ct. 855, 856 (2017).

[69]*Id.* at 869.

[70]Bobby Allyn, *N.C. Supreme Court Hears Arguments on Racial Bias in Death Penalty Cases*, NPR (Aug. 16, 2019), http://www.npr.org/2019/08/26/754410571/n-c-supreme-court-hears-arguments-on-racial-bias-in-death-penalty-cases.

[71]*Id.*

[72]*See* George Anastaplo, *The O.J Simpson Case Revisited,* 28 Loyola L.J. 461, 465 (1997).

[73]Allyn, *supra note 7*0.

[74]Smiley & Fakunle, *supra* note 37, at 357–61.

[75]Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence,* 101 Minn L. Rev. 2243, 2244 (2017).

[76]*Id.* at 2308.

[77]Harv. L. Rev., Harvard Univ. Note, *Black Lives Discounted: Altering the Standard for Voire Dire and the Rules of Evidence to Better Account for Implicit Biases Against Black Victims in Self-Defense Cases,* 134 Harv. L. Rev 1521, 1521 (2021).

[78]*Id.* at 1523.

[79]*Id.* at 1535.

[80]*See* discussion *supra* Section I.

[81]Harv. L. Rev., Harvard Univ. Note, *Black Lives Discounted: Altering the Standard for Voire Dire and the Rules of Evidence to Better Account for Implicit Biases Against Black Victims in Self-Defense Cases,* 134 Harv. L. Rev 1521, 1534 (2021).

[82]*See* Smiley & Fakunle, *supra* note 37, 357–61.

[83]See Anthony G. Greenwald & Mahzarin R. Banaji,*Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 Psychol. Rev. 4, 20 (1995).

[84]Mikva, *supra* note 23, at 37.

[85]Fed. R. Evid. 403 advisory committee's notes.

[86]Fed. R. Evid. 403.

[87]This proposed rule is drafted similarly to the definitions found in Fed. R. Evid. 801.

[88]Fed. R. Evid. 403 advisory committee's notes.

[89]Formatted after Fed. R. Evid. 403 advisory committee's notes.

[90]U.S. v. Armstrong, 517 U.S. 456, 460–61 (1996).

[91]U.S. v. Armstrong, 517 U.S. at 469.

[92]*Id.*

[93]Fed. R. Evid. 403 advisory committee's notes.

[94]519 U.S 172, 173 (1997).

[95]Old Chief v. U.S., 519 U.S 172, 175 (1997).

[96]*Id.* at 189.

[97]*Id.*

[98]Charles Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 323 (1987) (because racism is so deeply engrained in our culture, it is likely to be transmitted by tacit understandings.).

[99]"Multiple intersections" are referring to individuals to face intersecting identities that are usually considered as part of minority groups, for example a Black Transgender Woman faces the biases that come with being Black, Transgender, and a Women in America.

[100]Jessica Colarossi, *Tapping into the Lived Experiences of People in Black Communities is Key to Police Reform*, The Brink Boston University (June 10, 2020), http://www.bu.edu/articles/2020/tapping-into-lived-experiences-of-black-communities-police-reform-efforts/.

[101]See Melvin Oliver & Thomas Shapiro," nondiscriminatory" perpetuation of racial subordination black wealth/ white wealth a new perspective on racial inequality, 76 B.U.L. Rev 2nd ed. (1996).

[102]Susan M. Behuniak, *How Race, Gender, and Class Assumptions Enter the Supreme Court*, 10 Race, Jean Ait Belkhir, Race, Gender, & C.J.79, (2003).

[103]*Id.*

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

[105]*See supra* note, at 175.