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## Race, Gatekeeping, Magical Words, and the Rules of Evidence

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# Race, Gatekeeping, Magical Words, and the Rules of Evidence

*Bennett Capers\**

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## INTRODUCTION

Although it might not be apparent from the Federal Rules of Evidence themselves,<sup>1</sup> or the common law that preceded them,<sup>2</sup> there is a long history in this country of tying evidence—what is deemed relevant, what is deemed trustworthy—to race. And increasingly, evidence scholars are excavating that history.<sup>3</sup> Indeed, not just

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1. Forty-five states and Puerto Rico have adopted or modeled their own rules on the Federal Rules of Evidence. As such, for ease, I use the generic term “Rules of Evidence” or “the Rules” in this Essay. As I have written previously, “In a very real sense, the Federal Rules of Evidence *are* the Rules of Evidence.” Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 872 (2018).

2. Although the Rules of Evidence are of recent vintage—they were enacted in 1975—they codified and built upon centuries of common law. See DAVID ALAN SKLANSKY, EVIDENCE: CASES, COMMENTARY, AND PROBLEMS 5–6 (4th ed. 2016) (explaining the Rules of Evidence as a product of centuries of effort by lawyers and legal scholars resulting in the codification of common law).

3. See, e.g., Capers, *supra* note 1 (discussing the history of the Rules of Evidence and their relationship with race); Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243 (2017) (discussing the racial history of evidentiary rules); Montréal D. Carodine, *Contemporary Issues in Critical Race Theory: The Implications of Race as Character Evidence in Recent High-Profile Cases*, 75 U. PITT. L. REV. 679 (2014) (discussing recent high-profile cases as examples of the rising use of race as evidence and how race is litigated in the court system); Montréal D. Carodine, *“The Mis-characterization of the Negro”: A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521 (2009) (discussing the prior conviction impeachment rule and its relation to mass incarceration and race); Gabriel J. Chin, *“A Chinaman’s Chance” in Court: Asian Pacific Americans and Racial Rules of Evidence*, 3 U.C. IRVINE L. REV. 965 (2013) (discussing

excavating, but showing how that history has racial effects that continue into the present.

One area that has escaped racialized scrutiny—at least of the type I am interested in—is that of expert testimony. Even in my own work on race and evidence,<sup>4</sup> I have avoided discussion of expert testimony. In this brief Essay, I hope to rectify this omission. In a sense, my goal is twofold. I first seek to bring attention to the way expert testimony rules seem to play favorites along lines of race and thus entrench a kind of epistemic inequity. I then hope to reimagine expert testimony rules so that they are fairer—and even anti-racist.

To situate my argument, I begin by zooming out to look at the Rules as a whole. Part I provides a brief overview of the many ways evidence has always been raced,<sup>5</sup> from what is deemed relevant and why, to who is deemed credible and who is not. Part II narrows the focus to expert testimony, providing a racial reading of *Frye v. United States*,<sup>6</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>7</sup> and Rule 702.<sup>8</sup> This sets the stage for Part III, in which I imagine a better, different Rule 702 through a critical race theory (“CRT”) lens. Finally, in the Conclusion, I gesture toward a critique of evidence law in general and call attention to a different kind of gatekeeping that has for too long impoverished evidence scholarship.

As I have observed in prior work, one of the pleasures “of contributing to symposia—especially symposia where each contribution is brief—is the ability to engage in new explorations, test new ideas, and offer new provocations.”<sup>9</sup> Allow me to add another benefit: symposium essays have the potential to be uniquely generative, to be “conversation starters,” and to lay the groundwork for longer projects. I certainly hope that will be the case here for this Symposium, *Reimagining the Rules of Evidence at 50*.

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treatment of Asian Americans as witnesses and under statutory presumptions of foreignness); Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 874–77 (2016) (discussing the prevalence of implicit stereotyping in the assessment of witness credibility).

4. See, e.g., Capers, *supra* note 1; see also I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826 (2013).

5. As critical race theory scholar Kendall Thomas has observed, we should think of race as a verb rather than simply as a noun. See Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1261 (2011) (citing Kendall Thomas, Comments at Panel on Critical Race Theory, Conference on Frontiers of Legal Thought, Duke Law School (Jan. 26, 1990)).

6. 293 F. 1013 (D.C. Cir. 1923).

7. 509 U.S. 579 (1993).

8. FED. R. EVID. 702.

9. Bennett Capers, *The Racial Architecture of Criminal Justice*, 74 SMU L. REV. 405, 406 (2021); see Bennett Capers, *Punishment Without the State*, 2023 U. ILL. L. REV. (forthcoming).

## I. RACE-ING EVIDENCE

It would be easy to view the Rules of Evidence, and their common law precursors, as untainted by race, or to view any entanglement of evidence and race as merely a historical curiosity.<sup>10</sup> Indeed, even a diligent student of evidence law could assume, based on evidence casebooks,<sup>11</sup> that the issue of race is limited to the rules that governed competency prior to the Civil War—rules that made Blacks and other people of color incompetent to testify against whites.<sup>12</sup> Of course, looking outside of evidence books, students might notice other connections between race and evidence. For example, one might note there were laws that governed proof relating to race in rape cases, since many states explicitly tied the gravity of the offense to the race of the

10. I do not mean to suggest that race is the only thing that taints the Rules of Evidence. As Julia Simon-Kerr has noted, a “central claim of feminist accounts of evidence is that, contrary to accepted wisdom, this system of procedural rules is neither neutral nor value-free.” Julia Simon-Kerr, *Relevance Through a Feminist Lens*, in PHILOSOPHICAL FOUNDATIONS OF EVIDENCE LAW 364, 365 (Christian Dahlman et al. eds., 2021). For more on how gender applies “in the context of an evidentiary system designed by men,” see *id.* at 364; Kit Kinports, *Evidence Engendered*, 1991 U. ILL. L. REV. 413; Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN’S L.J. 127 (1996).

11. A brief survey reveals casebooks discuss race fleetingly, if at all. See, e.g., GEORGE FISHER, EVIDENCE (4th ed. 2022); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS (8th ed. 2015); JON R. WALTZ, ROGER C. PARK & RICHARD D. FRIEDMAN, EVIDENCE: CASES AND MATERIALS (11th ed. 2008); DAVID P. LEONARD, VICTOR J. GOLD, GARY C. WILLIAMS & KEVIN LAPP, EVIDENCE: A STRUCTURED APPROACH (5th ed. 2021).

12. See George Fisher, *The Jury’s Rise as Lie Detector*, 107 YALE L.J. 575, 671–97 (1997) (discussing laws preventing people of color from testifying against white people); see also Julia Simon-Kerr, *Credibility by Proxy*, 85 GEO. WASH. L. REV. 152, 162–66 (2017) (discussing early competency rules in part as a function of race but primarily based on criminality and infamy). Significantly, competency turned not only on whether one was enslaved or free, but on race itself, as evidenced by the fact that even freed Blacks, as well as other non-whites, were often deemed incompetent to testify. See Gonzales Rose, *supra* note 3, at 2247–48 (discussing the history of rules regarding race and witness competency in different states); Thomas D. Morris, *Slaves and the Rules of Evidence in Criminal Trials*, 68 CHI.-KENT L. REV. 1209, 1209–10 (1993) (discussing the history and evolution of race as a criterion for precluding a witness from testifying). As Fisher observes, these competency rules were not uniform:

Some barred testimony by all nonwhites, some only testimony by African Americans and those of mixed black-white blood. Some barred all testimony by the specified class, while some permitted such testimony when not offered against whites.

Louisiana did not have a racial exclusion law per se, but rather provided that nonwhite status could be used to impeach a witness. See LA. CIV. CODE ANN. art. 2261 (1857) (“The circumstances of the witness being . . . a free colored person, is not a sufficient cause to consider the witness as incompetent, but may, according to the circumstances, diminish the extent of his credibility.”)[.] An act of March 13, 1867, at once eliminated this provision of Louisiana’s code and made civil parties competent, with the same proviso that status as a party “may diminish the extent of [the witness’s] credibility.” An Act to Amend and Re-Enact Article Twenty-Two Hundred and Sixty-One of the Civil Code of the State of Louisiana, No. 70, § 1, 1867 La. Acts 141, 143.

Fisher, *supra*, at 671 n.451 (first and third alteration in original).

victim and the race of the accused. In *Grandison v. State*,<sup>13</sup> for example, the court ruled that the race of the female accuser “must be charged in the indictment and proved” at trial.<sup>14</sup> The court explained, “Such an act committed upon a black woman would not be punished with death,” since it is the white race of the victim that “gives to the offense its enormity.”<sup>15</sup> In *Pleasant v. State*,<sup>16</sup> the court reversed the conviction of a slave accused of raping a white woman where the issue of her whiteness was not proved to the jury. As the court put it, “[A] fair complexion is not inconsistent with the taint of negro blood”; were there proof that her grandfather was a “negro,” that would preclude the Defendant being sentenced to death.<sup>17</sup>

But even if a student of evidence learns about these antebellum laws, these examples will likely be the extent of any discussion of race. Indeed, the student might even be left with the impression that, to the extent evidence rules were linked to race, those rules became dead letters with the Reconstruction Amendments and the Civil Rights Act of 1866<sup>18</sup> and, as such, no longer matter.

The goal of this Part is to show that, even after the passage of the Fourteenth Amendment, race still mattered. Consider some of the instructions that judges gave fact finders about minority witnesses. North Carolina required that “whenever a person of color shall be examined as a witness, the court shall warn the witness to declare the truth.”<sup>19</sup> And the Oregon Supreme Court twice ruled that Chinese witnesses must be viewed with special scrutiny, stating in one case that “[e]xperience convinces every one that the testimony of Chinese witnesses is very unreliable.”<sup>20</sup> Or consider the role race continued to play in substantive law. Post-Reconstruction, race and evidence remained intertwined in rape cases, with race playing a role in whether the prosecutrix was in reasonable fear of death or serious injury and,

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13. *Grandison v. State*, 21 Tenn. (2 Hum.) 451 (1841) (enslaved party).

14. *Id.* at 452.

15. *Id.*

16. 13 Ark. 360 (1853) (enslaved party).

17. *Id.* at 376.

18. An Evidence course is unlikely to mention the Reconstruction case *Blyew v. United States*, which ruled that the Civil Rights Act of 1866 did not permit the federal government to intervene and take jurisdiction of a state case where state competency rules prevented the Black victims from testifying against the white Defendants. 80 U.S. 581, 593–95 (1871).

19. Fisher, *supra* note 12, at 685 (quoting ch. 40, § 10, 1866 N.C. Sess. Laws 99, 102).

20. *State v. Mah*, 10 P. 306, 306–07 (Or. 1886). In a second case, *State v. Ching Ling*, the Supreme Court of Oregon stated that the “[Chinamen] will not hesitate to conspire,” requiring juries to be “prudent, vigilant, and discriminating.” 18 P. 844, 847 (Or. 1888). For more on Asian Americans and the presumption against credibility, see generally Chin, *supra* note 3.

thus, whether she needed to resist to the utmost.<sup>21</sup> Well into the mid-twentieth century,<sup>22</sup> suggesting a white person was Black or had Black blood was treated as defamation per se;<sup>23</sup> the easiest defense was truth, proving that the plaintiff did in fact have Black blood.<sup>24</sup> Indeed, the student attuned to issues of race might realize that in a variety of cases, from cohabitation and marriage<sup>25</sup> to citizenship itself,<sup>26</sup> race itself functioned almost as an element of an offense, or a claim, or a defense, requiring proof. Requiring evidence. And requiring courts to determine what counted as evidence and what did not.

These days, evidence law continues to be entangled with race. Or as Jasmine Gonzales Rose puts it, “In courtrooms across the United States, certain evidence receives racially disparate admissibility treatment.”<sup>27</sup> This is not to suggest here that the drafters of the Rules of Evidence, who happened to all be white men,<sup>28</sup> had racial biases. I do not know. But it is to suggest that the drafters had racial blind spots;

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21. See I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1356–60 (2010) (noting that whether “the black letter law’s initial requirement of proof that the victim resisted to the utmost before a conviction of rape would be sustained” was not stringently applied where the accused was Black).

22. *E.g.*, *Bowen v. Indep. Publ’g Co.*, 96 S.E.2d 564, 564–65 (S.C. 1957).

23. See J.H. Crabb, Annotation, *Libel and Slander: Statements Respecting Race, Color, or Nationality as Actionable*, 46 A.L.R.2d 1287, § 1 (1956) (“According to the majority rule [erroneously stating that a white individual is Black] is libelous per se.”); Jonathan Kahn, *Controlling Identity: Plessy, Privacy, and Racial Defamation*, 54 DEPAUL L. REV. 755, 759 (2005) (“Racial defamation involved the unidirectional grant of rights to white people to contest their characterization as black.”); Samuel Brenner, “*Negro Blood in His Veins*”: *The Development and Disappearance of the Doctrine of Defamation Per Se by Racial Misidentification in the American South*, 50 SANTA CLARA L. REV. 333 (2010).

24. Tellingly, it was not defamation to be called white, since “it was presumed that no harm could flow” from being considered white. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1736 (1993).

25. See, e.g., *McLaughlin v. Florida*, 379 U.S. 184, 184 (1964) (finding unconstitutional a Florida law that criminalized cohabitation of any “negro man and white woman, or any white man and negro woman” (quotation omitted)); *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating statute barring interracial marriage).

26. For the longest time, naturalized citizenship was limited to those racialized as white. As such, it was not uncommon for petitioners to offer proof of whiteness in order to secure citizenship. See, e.g., *Ozawa v. United States*, 260 U.S. 178, 194–95 (1922); *United States v. Thind*, 261 U.S. 204, 206 (1923). This, in turn, led to cases on what constitutes proof of race. For more on this period in which whiteness was litigated, see IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996); Justin Driver, *Recognizing Race*, 112 COLUM. L. REV. 404 (2012).

27. Gonzales Rose, *supra* note 3, at 2243.

28. The Advisory Committee on the Rules of Evidence, which was made of a mixture of judges, professors, and practitioners, was comprised of Albert Jenner, Simon Sobeloff, Joe Estes, Robert Van Pelt, Jack Weinstein, Charles Joiner, Thomas Green, Herman Selvin, Robert Erdahl, David Berger, Egbert Haywood, Frank Raichle, Craig Spangenberg, Edward Bennett Williams, and Hicks Epton. See Paul F. Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 GEO. L.J. 125, 125 n.3 (1973); Julia Simon-Kerr, *A New Baseline for Character Evidence*, 76 VAND. L. REV. 1827, 1831 n.19 (2023). Edward Cleary was the reporter. Rothstein, *supra*, at 125 n.3.

failed to reckon with our racial history; and in failing to do so, codified rules that reify, rather than disrupt, racial hierarchies. (A point of comparison would be the approach taken by the drafters of the Model Penal Code; they explicitly drafted provisions to counter racial bias.<sup>29</sup>)

Rule 609 is a good example of this blind spot. Is it really possible that at the time the Rules of Evidence were enacted in 1975, the drafters were unaware that permitting witnesses to be impeached with prior convictions would disproportionately harm racial minorities?<sup>30</sup> Did it really not occur to the drafters the racial harm inherent in Rule 609?<sup>31</sup> If nothing else, the very stickiness of race—the fact that the current Advisory Committee has done little to repeal or limit Rule 609—speaks volumes.<sup>32</sup> A similar point could be made about Rule 404 and its ban on character and propensity evidence. Given the long history of Blacks being associated with criminality, and Asians with mendacity, and Latinos with hot-bloodedness, did the drafters really not realize that by banning explicit references to character evidence, they were allowing implicit references to character to flourish in a way that advantaged whites and disadvantaged minorities?<sup>33</sup> One could also add Rule 412—the rape shield, which in effect primes jurors to assume a complainant is a “good girl,” and not one with a sexual history—to this group. While Rule 412 may benefit some white women,

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29. See Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 588 (2009) (“Concern over the deployment of strong rape laws to oppress minority men led the Model Penal Code’s drafters to craft defense-friendly provisions . . .”); see also MODEL PENAL CODE § 213.1 cmt. 3(a) (AM. L. INST., Part II Commentaries 1980) (discussing racial history of rape law). This is not to suggest that the drafters’ progressive reviews always redounded to the benefits of racial minorities. See generally Luis Chiesa, *The Model Penal Code, Mass Incarceration, and the Racialization of American Criminal Law*, 25 GEO. MASON L. REV. 605 (2018) (discussing the ways in which the Model Penal Code has harmed racial minorities).

30. As just one data point, it is hard to imagine the rulemakers were unaware that Blacks were targets of overpolicing and overenforcement, which was confirmed by the President’s Commission on Law Enforcement and Administration of Justice. See PRESIDENT’S COMM’N ON L. ENF’T & ADMIN. OF JUST., TASK FORCE REPORT: THE POLICE 183 (1967).

31. James Macleod’s empirical work on jurors’ racial assumptions is revealing. His study of mock jurors demonstrates that when jurors are informed a Black defendant has a prior conviction, but not the nature of the conviction, jurors are significantly more likely to conclude that the defendant is guilty than when the same information is introduced against a white defendant. See generally James A. Macleod, *Evidence Law’s Blind Spots*, 109 IOWA L. REV. (forthcoming 2023). In short, jurors engage in “biased gap-filling.” *Id.* (manuscript at 1).

32. As Alex Nunn notes, even though there is an Advisory Committee tasked with considering changes to the Rules: “There has been no effort—nor even a suggestion—to fundamentally reshape evidence law to account for modern understandings. To borrow from the words of fellow commentators, rulemakers have instead chosen an ‘inherently conservative’ approach, expressing a simple affinity for the general status quo.” G. Alexander Nunn, *The Living Rules of Evidence*, 170 U. PA. L. REV. 937, 942–43 (2022) (quoting Michael Teter, *Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules of Evidence*, 58 CATH. U. L. REV. 153, 160 (2008)).

33. See Capers, *supra* note 1, at 833–85 (discussing ways in which jurors form inaccurate perceptions about character and remorse across racial lines).



did it never occur to the drafters that banning reference to a complainant's sexual history would permit, sub judice, jurors to assume the sexual history of women of color?<sup>34</sup> Even returning to competency, given our explicit history of tying first competency and then credibility to race, did it really not occur to the drafters that simply laying out "neutral" rules for challenging credibility—think Rule 608 and, again, Rule 609—would reinforce existing racial biases? Certainly, social science literature makes clear that race is still a factor in credibility determinations.<sup>35</sup>

Up to now, this overview has focused on the way the Rules of Evidence are entangled with race insofar as they "insidiously operate to perpetuate racial subordination."<sup>36</sup> But race is entangled with evidence in another way as well. As David Alan Sklansky recently observed, the transformation of the hearsay rule from "a flexible principle of preference"<sup>37</sup> for live testimony to what it is today, "a strict rule of evidentiary exclusion, subject only to a bounded series of exceptions,"<sup>38</sup> owes much to our racialized history. Specifically, this transformation owes much to what was once "the leading American case"<sup>39</sup> on hearsay, *Queen v. Hepburn*<sup>40</sup>—one of the many freedom petitions in which enslaved people sought their freedom in U.S. courts

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34. See Capers, *supra* note 4, at 881 ("Even with a rape shield, jurors might rely on default assumptions to assume that as a black woman, she was likely sexually active and less discriminating in her choice of partners.").

35. See James W. Neuliep, Stephanie M. Hintz & James C. McCroskey, *The Influence of Ethnocentrism in Organizational Contexts: Perceptions of Interviewee and Managerial Attractiveness, Credibility, and Effectiveness*, 53 COMM'N. Q. 41 (2005) (finding negative correlations between ethnocentrism and perceptions of attraction, competence, and general attitudes); Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 4 (2000) ("[J]urors of one race, even those well-intended and free of racial animus, will be unable to dependably judge the demeanor of a witness of a different race because they are unable to accurately decipher the cues that the witness uses to communicate sincerity."); Chet K.W. Pager, *Blind Justice, Colored Truths and the Veil of Ignorance*, 41 WILLAMETTE L. REV. 373, 394–96 (2005) ("The inability of jurors to differentiate honest from dishonest testimony, and the predilection for juries to express racial bias in verdict or sentencing, are phenomena that have been well documented and discussed in both the social science and legal literature."). Gonzales Rose puts the matter more bluntly: "In an instant, at first sight and without formally entering evidence or investing resources, the party calling the white witness [is] able to bolster the witness's credibility for truthfulness. Conversely, a witness of color is automatically considered less credible . . . ." Gonzales Rose, *supra* note 3, at 2259.

36. Gonzales Rose, *supra* note 3, at 2244.

37. David A. Sklansky, *The Neglected Origins of the Hearsay Rule in American Slavery: Recovering Queen v. Hepburn*, 2022 SUP. CT. REV. 413, 432.

38. *Id.* at 413.

39. *Id.* at 438 (quoting Comment, *Ancient Documents as an Exception to the Hearsay Rule*, 33 YALE L.J. 412, 412 n.2 (1924)).

40. 11 U.S. (7 Cranch) 290 (1813) (enslaved party).

by offering evidence of white maternal ancestry.<sup>41</sup> In holding that the Petitioner's proffered evidence was inadmissible hearsay<sup>42</sup> and closing a channel by which enslaved people could establish their right to freedom, the Court ushered in a new approach to hearsay, one that rejected flexibility and necessity. In other words, the rigidity of hearsay rules—the bane of many a law student—owes much to the Court's discomfort with permitting enslaved people to petition for their freedom. And yet to most students of evidence, this history—this racial history—is largely invisible: whitewashed. All of this brings to mind Jill Lepore's observation that “[f]or all the fascination with questions of evidence, very few scholars have investigated the nitty-gritty, stigmata-to-DNA history of the means by which, at different points in time, and across realms of knowledge, some things count as proof and others don't.”<sup>43</sup>

The question, at least for me, becomes: What do we do with this taint? W. Kerrel Murray has argued that, upon encountering a Rule with a “discriminatory taint,” we should at least view it with skepticism.<sup>44</sup> What would it truly mean to “un-race” evidence or, better yet, to make evidence anti-racist? Those questions must be part of a larger project. For now, allow me to turn to an aspect of the Rules of Evidence that has largely escaped racial scrutiny: the Rules governing the admission of expert testimony.

## II. *Frye*, *Daubert*, RULE 702, AND MAGICAL WORDS

Given the goal I have set for myself in this Essay—to reimagine Rule 702 so that it does not reify privileges and disadvantages along racial lines—it makes sense to begin with *Frye*. For starters, *Frye* ushered in the “general acceptance” standard that was the dominant approach for seventy years,<sup>45</sup> and in fact is still followed in six states.<sup>46</sup> But more importantly, it makes sense to begin with *Frye* because, in many ways, *Frye* is a race case.

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41. See Sklansky, *supra* note 37, at 435 (“*Queen v. Hepburn* . . . all but eliminated the practice of enslaved people suing for liberty based on the free status of their maternal ancestors.”).

42. *Queen*, 11 U.S. at 295–97.

43. Jill Lepore, Essay, *On Evidence: Proving Frye as a Matter of Law, Science, and History*, 124 *YALE L.J.* 1092, 1099 (2015).

44. See W. Kerrel Murray, *Discriminatory Taint*, 135 *HARV. L. REV.* 1190, 1190–95 (2022).

45. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); see *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 587 (1993) (overruling the “general acceptance” standard seventy years after *Frye* was decided).

46. In fact, six is likely a conservative number, since a handful of states follow a hybrid approach. See FISHER, *supra* note 11, at 817 (“Professors Edward Cheng and Albert Yoon . . . identified twenty-five *Daubert* states, thirteen *Frye* states, and twelve states that fell cleanly into neither camp.”).

Most students of evidence are familiar with the U.S. Court of Appeals for the D.C. Circuit's opinion in *Frye*. After being convicted of second-degree murder, James Frye appealed, claiming the trial court had improperly precluded him from introducing testimony from an expert witness who would have aided his defense.<sup>47</sup> The expert would have testified that Frye, who had always protested his innocence, had passed a systolic blood pressure deception test.<sup>48</sup> (This was almost exactly one hundred years ago, when the proffered test—what today we might incorrectly call a lie detector test—was a novel invention.<sup>49</sup>) In a terse two-page opinion, the D.C. Circuit rejected Frye's claim and affirmed the conviction.<sup>50</sup> "We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made."<sup>51</sup> To be admissible, scientific evidence "must be sufficiently established to have gained general acceptance in the particular field in which it belongs."<sup>52</sup> And with that sentence, the "general acceptance" test was born. Again, much of this is likely familiar to evidence students. What they might not know, however, since there is no mention of it in the opinion, is that Frye was Black.<sup>53</sup> He was a Black man arguing during a time of overt racial bias that expert testimony would exonerate him.<sup>54</sup> In a very real sense, our conception of when expert testimony is admissible, and for whom, has long been entangled with race.

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47. See *Frye*, 293 F. at 1013–14.

48. *Id.* (describing the expert's test).

49. Lepore, *supra* note 43, at 1107–08, 1122–25 (discussing the invention of the test and the use of the test on Frye). Moreover, the proffered expert, William Moulton Marston, was in fact the inventor of the test and eager to legitimate it in court. *Id.* at 1096, 1124, 1127 ("Marston must have hoped the case would establish his reputation . . .").

50. *Frye*, 293 F. at 1013–14.

51. *Id.* at 1014.

52. *Id.*

53. See Lepore, *supra* note 43, at 1148–49 (describing the lack of facts in the opinion); see also *Frye Convicted of Dr. Brown's Murder*, WASH. TRIB., July 22, 1922, at 1. The decedent was Black as well and, in fact, a prominent Black physician. *Id.*

54. While it is impossible to say whether Frye's race mattered to the court, it is perhaps telling that the same day the court decided *Frye*, it also issued a decision in *Laney v. United States*, another case permitting expert testimony on a novel technique of firearm identification, without so much as mentioning *Frye* or its "general acceptance" requirement. See 294 F. 412, 416 (D.C. Cir. 1923). In that case, the expert testimony was offered against the Defendant, a Black man who was fleeing a mob of whites shouting, "Kill the n\_\_\_\_." *Id.* at 413, 416. The court also ruled that the Defendant could not claim self-defense for firing his gun, since he had reached a place of safety when he darted into a house to hide, and the mob was looking for him in the opposite house. See *id.* at 414.

*Frye* continued to hold sway over the admission of expert testimony, even after the enactment of Rule 702 with the passage of the Federal Rules of Evidence in 1975.<sup>55</sup> That is, until the Supreme Court decided *Daubert*.<sup>56</sup> *Daubert*, of course, involved a claim against Merrell Dow Pharmaceuticals that its drug Bendectin caused birth defects.<sup>57</sup> The pharmaceutical company defended itself—and won in the lower courts—by moving for summary judgment on the basis that the Plaintiffs “would be unable to come forward with any admissible evidence”<sup>58</sup> to support their claim since the Plaintiffs’ proposed expert evidence was novel, not generally accepted, and thus inadmissible.<sup>59</sup> But the Supreme Court had a different view. Noting that “[n]othing in the text of [Rule 702] establishes ‘general acceptance’ as an absolute prerequisite to admissibility” or suggests the drafters intended to incorporate *Frye*,<sup>60</sup> the Court concluded that “the assertion that the Rules somehow assimilated *Frye* is unconvincing.”<sup>61</sup> Instead, Rule 702, and Rule 702 alone, controlled.<sup>62</sup> The result was a sea change—in theory at least<sup>63</sup>—in terms of the gatekeeping role judges should play in deciding the admissibility of expert testimony. Rather than looking to see whether proffered expert evidence was generally accepted—a standard that, by definition, would disadvantage novel scientific evidence—judges were to instead focus on whether the “reasoning or methodology underlying the [proposed expert] testimony is scientifically valid”<sup>64</sup> and “whether that reasoning or methodology properly can be applied to the facts in issue.”<sup>65</sup>

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55. As originally adopted, Rule 702 simply provided: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926, 1937.

56. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

57. *Id.* at 582.

58. *Id.*

59. *See id.* at 583 (describing the reasoning of the lower courts).

60. *Id.* at 588.

61. *Id.* at 589.

62. *Id.*

63. Ed Cheng and Albert Yoon conducted what is arguably the most rigorous study of *Daubert*’s effect and concluded that *Daubert*’s effect on admissibility has been negligible. *See* Edward K. Cheng & Albert H. Yoon, *Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471, 503 (2005); *see also* Eric Helland & Jonathan Klick, *Does Anyone Get Stopped at the Gate? An Empirical Assessment of the Daubert Trilogy in the States*, 20 SUP. CT. ECON. REV. 1, 31 (2012). For a contrary view, *see* Andrew W. Jurs & Scott DeVito, *A Tale of Two Dauberts: Discriminatory Effects of Scientific Reliability Screening*, 79 OHIO ST. L.J. 1107, 1124 (2018) (“[B]oth civil plaintiffs and defendants act in ways that demonstrate that *Daubert* is perceived as a stricter standard than the *Frye* standard.”).

64. *Daubert*, 509 U.S. at 592–93.

65. *Id.* at 593.

As such, when assessing the reliability of expert testimony now, especially scientific expert testimony, courts are encouraged to consider a host of factors:

- Whether the proposed evidence “can be (and has been) tested.”<sup>66</sup>
- Whether the proposed evidence “has been subjected to peer review and publication.”<sup>67</sup>
- Whether the proposed evidence has a known error rate.<sup>68</sup>
- Whether the proffered expert proposes to testify on matters growing out of their independent research, as opposed to opinions developed expressly for the purpose of testifying.<sup>69</sup>
- Whether the proffered expert has adequately accounted for alternative explanations for the effect whose cause is at issue.<sup>70</sup>
- Whether the proffered expert’s field is one capable of reliably reaching the results the expert claims.<sup>71</sup>
- Whether the proffered expert’s methodology is subjective.<sup>72</sup>
- Whether the proffered evidence has “general acceptance.”<sup>73</sup>

Later, in *Kumho Tire Co. v. Carmichael*,<sup>74</sup> the Court made clear that *Daubert*’s principles also extend to nonscientific expert evidence—that is, evidence based on technical or other specialized knowledge.<sup>75</sup>

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66. *Id.*

67. *Id.*

68. *Id.* at 594.

69. *See, e.g.*, *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 687 (8th Cir. 2001) (citing *Bogosian v. Mercedes-Benz of N. Am., Inc.*, 104 F.3d 472, 479 (1st Cir. 1997), as *Daubert*’s progeny providing additional factors); FED. R. EVID. 702 advisory committee’s notes to 2000 amendments (“Whether experts are ‘proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.’”).

70. *See, e.g.*, *Domingo ex rel. Domingo v. T.K.*, 289 F.3d 600, 606–07 (9th Cir. 2002) (affirming the district court’s exclusion of expert testimony because it assumed only one possible cause of Plaintiff’s injury and ignored that Plaintiff’s injury was a known risk of the operation they received); FED. R. EVID. 702 advisory committee’s notes to 2000 amendments (“Whether the expert has adequately accounted for obvious alternative explanations.”).

71. *See, e.g.*, *United States v. Mahone*, 453 F.3d 68, 71–72 (1st Cir. 2006) (affirming the district court’s admission of a forensic scientist’s testimony regarding footwear examination); FED. R. EVID. 702 advisory committee’s notes to 2000 amendments (“Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.”).

72. *See, e.g.*, *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 199–203 (4th Cir. 2001) (affirming the district court’s exclusion of expert testimony because “[the expert] asserted what amounted to a wholly conclusory finding based upon his subjective beliefs rather than any valid scientific method”).

73. *Daubert*, 509 U.S. at 584.

74. 526 U.S. 137 (1999).

75. *Id.* at 141, 148, 156–57.

There is much that could be said about the *Daubert* revolution and its emphasis on reliability. Indeed, much has already been said.<sup>76</sup> It remains one of the most written about evidence opinions. Since my interest here is race and evidence, I will also note that there has even been scholarship about *Daubert's* race effect.<sup>77</sup> Andrew W. Jurs and Scott DeVito created an extensive database of filing rates of civil cases in federal and state courts and evaluated it with a fixed regression analysis.<sup>78</sup> They concluded that *Daubert*, which in many ways is stricter than *Frye*,<sup>79</sup> has a “disproportionate and negative impact on filings from African-American plaintiffs along with a corresponding rise in filings from white plaintiffs.”<sup>80</sup> For Black plaintiffs, they concluded that *Daubert* acts “as a type of tort reform measure, restricting access to civil justice and stoking the crisis of the legitimacy for civil justice within those communities.”<sup>81</sup>

The findings of Jurs and DeVito are important. However, what interests me, as a CRT scholar and someone who “reads black,”<sup>82</sup> is something different. What interests me is that Rule 702, in its very language, plays racial favorites—that it reifies and entrenches a racial status quo.

Consider the current language of Rule 702, which was amended in 2000 to incorporate both *Daubert* and *Kumho*.<sup>83</sup> It provides:

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:

- (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

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76. See, e.g., Suedabeh Walker, *Drawing on Daubert: Bringing Reliability to the Forefront in the Admissibility of Eyewitness Identification Testimony*, 62 EMORY L.J. 1205 (2013) (arguing that *Daubert's* emphasis on reliability should be applied to evaluating eyewitness testimony).

77. See, e.g., Jurs & DeVito, *supra* note 63, at 1109.

78. *Id.*

79. See Lloyd Dixon & Brian Gill, *Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the Daubert Decision*, 8 PSYCH. PUB. POL'Y & L. 251, 298–99 (2002) (concluding that the shift to *Daubert* resulted in an increase in successful challenges to the admissibility of expert testimony and, consequently, an increase in both the number of motions for summary judgment and their success rate).

80. Jurs & DeVito, *supra* note 63, at 1109.

81. *Id.* at 1110.

82. See I. Bennett Capers, *Reading Back, Reading Black*, 35 HOFSTRA L. REV. 9, 12 (2006) (“[‘Reading black’] suggests a reading practice that is not only critical, but particularly attuned to the frequencies and registers of race.”).

83. See FED. R. EVID. 702 advisory committee's notes to 2000 amendment (“Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and to the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*.” (citations omitted)).

(d) the expert has reliably applied the principles and methods to the facts of the case.<sup>84</sup>

The Advisory Committee adds in its Notes to the 1972 proposed rules: “The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principals relevant to the case, leaving the trier of fact to apply them to the facts.”<sup>85</sup>

On one level, Rule 702 *seems* race neutral, nothing more than a necessary gatekeeping mechanism. But when one thinks about who gets to be an expert; the history of unequal access to education,<sup>86</sup> the unequal distribution of scientific, technical, or other specialized knowledge; or the unequal distribution of advanced degrees, the racial impact of Rule 702 suddenly comes into sharp relief. In 2021, for example, of the 52,250 engineering doctoral degree recipients in the United States, only 3,040 were Black.<sup>87</sup> The numbers are even more dire when it comes to degrees in economics. As one article puts it, in “the most recent year on record, out of the 1,219 economics doctorates awarded in the United States, two went to Native Americans. And five went to Black women.”<sup>88</sup> Even in the humanities, a racial gap exists. In 2015, for example, Blacks received only 3.5 percent of the doctorates in the humanities.<sup>89</sup> And of course, these numbers were even smaller in 1975 when Rule 702 was enacted. Indeed, “[f]rom 1975, when data on race/ethnicity were first collected . . . three groups accounted for almost 90 percent of all doctorates awarded in the United States: white U.S. citizens (68 percent), Asian foreign nationals (14 percent), and white foreign nationals (8 percent).”<sup>90</sup> And these numbers, which find their

84. FED. R. EVID. 702.

85. FED. R. EVID. 702 advisory committee’s notes to 1972 proposed rules.

86. See Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2390 (2021) (arguing—using school segregation as an example—that to maintain an advantage, insiders adopted policies and rules that closed off opportunities to other groups to facilitate social closure); see also DARIA ROITHMAYR, *REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE* 76–81 (2014) (arguing that whites created institutional rules in college and law school admissions that benefitted them over time).

87. NAT’L CTR. FOR SCI. & ENG’G STAT., *TRENDS IN RECENT DOCTOR RECIPIENT CHARACTERISTICS* tbl.1-8 (2021), <https://nces.nsf.gov/pubs/nsf23300/data-tables> [<https://perma.cc/9YL4-649G>].

88. Dick Startz, *Progress on Diversity in the Doctoral Pipeline Is Slow*, BROOKINGS INST. (Jan. 17, 2023), <https://www.brookings.edu/blog/brown-center-chalkboard/2023/01/17/progress-on-diversity-in-the-doctoral-pipeline-is-slow/> [<https://perma.cc/HP52-UXHP>].

89. *Racial/Ethnic Distribution of Advanced Degrees in the Humanities*, AM. ACAD. OF ARTS & SCIS., <https://www.amacad.org/humanities-indicators/higher-education/raciaethnic-distribution-advanced-degrees-humanities> (last visited Oct. 21, 2023) [<https://perma.cc/CFK4-39TL>].

90. LORI THURGOOD, MARY J. GOLLADAY & SUSAN T. HILL, NAT’L SCI. FOUND., U.S. DOCTORATES IN THE 20TH CENTURY 19–20 (June 2006), [https://dpcpsi.nih.gov/sites/default/files/opep/document/Final\\_Report\\_\(03-517-OD-OER\)%202006.pdf](https://dpcpsi.nih.gov/sites/default/files/opep/document/Final_Report_(03-517-OD-OER)%202006.pdf) [<https://perma.cc/UQH9-6HHM>].

start at the undergraduate level,<sup>91</sup> matter in terms of the knowledge that is produced. Consider again the small number of minority economists.<sup>92</sup> As one prominent Black economist recently observed, this paucity can contribute to blind spots resulting in erroneous policy decisions.<sup>93</sup>

To be sure, the drafters, who were no doubt aware of these racial disparities, noted that one does not *have to* have an advanced degree to qualify as an expert.<sup>94</sup> Nor does one *have to* have technical knowledge.<sup>95</sup> Indeed, the Supreme Court has even gone so far as to claim that Rule 702's "language makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge."<sup>96</sup> But this rings hollow. Even the order the drafters chose—"scientific" and then "technical" and then "other specialized knowledge"—reveals their hierarchy of what matters and how much. Beyond this, even in professing the Rule's openness to "other specialized knowledge," a type of elitism lies just below the surface. (Indeed, the elitism is on par with Justice Scalia's more overt elitism in *Jaffee v. Redmond*.<sup>97</sup>) Consider more language from the Advisory Committee Notes:

The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge. . . . [W]ithin the scope of the rule are not only experts in the strictest sense of

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91. A recent report on the underrepresentation of Black and Latinx students at selective public colleges and universities is particularly sobering. Focusing on 101 top public institutions, the study found almost sixty percent of these institutions decreased their percentage of the Black student population since 2000, and the study gave over seventy-five percent of the colleges examined an "F" grade for their representation of Black students given the percentage population of Blacks in their particular state. ANDREW HOWARD NICHOLS, EDUC. TRUST, "SEGREGATION FOREVER?: THE CONTINUED UNDERREPRESENTATION OF BLACK AND LATINO UNDERGRADUATES IN THE NATION'S 101 MOST SELECTIVE PUBLIC COLLEGES AND UNIVERSITIES 10, 15 (2020), <https://edtrust.org/wp-content/uploads/2014/09/Segregation-Forever-The-Continued-Underrepresentation-of-Black-and-Latino-Undergraduates-at-the-Nations-101-Most-Selective-Public-Colleges-and-Universities-July-21-2020.pdf> [<https://perma.cc/76S9-TMPT>].

92. See Startz, *supra* note 88 (detailing the statistics of this underrepresentation).

93. See Pedro Nicolaci da Costa, *Economists Must Recognize Racist Assumptions in Their Models: AFL-CIO's Spriggs*, FORBES (June 29, 2020, 10:46 PM), <https://www.forbes.com/sites/pedrodacosta/2020/06/29/economists-must-recognize-racist-assumptions-in-their-models-afl-cios-spriggs/?sh=5e87c0b4eb27> [<https://perma.cc/6RQR-6DY7>] ("Over time, [Black economist underrepresentation] has reinforced deeply racist assumptions in economic models that lead to terrible policy decisions like the violent over-policing of Black neighborhoods in the United States." (citing William Spriggs, *Is Now a Teachable Moment for Economists?*, HOW. UNIV., [https://www.minneapolisfed.org~/media/assets/people/william-spriggs/spriggs-letter\\_0609\\_b.pdf](https://www.minneapolisfed.org~/media/assets/people/william-spriggs/spriggs-letter_0609_b.pdf) (last visited Oct. 21, 2023) [<https://perma.cc/2T8U-53BN>])).

94. *Cf.* FED. R. EVID. 702 advisory committee's notes to 1972 proposed rules.

95. *Id.*

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

97. *Jaffee v. Redmond*, 518 U.S. 1, 28–32 (1996) (Scalia, J., dissenting) (dismissing the qualifications of a social worker compared to those who are normally accorded evidentiary privileges).



the word, e.g., physicians, physicists, and architects, but also the large group sometimes called “skilled” witnesses, *such as bankers or landowners testifying to land values*.<sup>98</sup>

Bankers or landowners? Again, one reaction might be that I am misreading the intent of the drafters of Rule 702. After all, the Committee Notes go on to say that expertise can be based on *experience*.<sup>99</sup> But read what the Advisory Committee offers as examples of qualifying experience, and again a troubling type of gatekeeping seems apparent:

Nothing in this amendment is intended to suggest that experience alone—or experience in conjunction with other knowledge, skill, training or education—may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony. *See, e.g., United States v. Jones*, 107 F.3d 1147 (6th Cir. 1997) (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail); *Tassin v. Sears Roebuck*, 946 F. Supp. 1241, 1248 (M.D. La. 1996) (design engineer’s testimony can be admissible when the expert’s opinions “are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches”). *See also Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167, 1178 (1999) (stating that “no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.”).<sup>100</sup>

A handwriting examiner? A design engineer? And from *Kumho*, an expert in tire failure analysis? If this is the gamut of what counts as qualifying experience, then it is a narrow and exclusionary one.

There are a few more things to say before moving on to what it might mean to reimagine Rule 702, and hence the admissibility of expert testimony, in a way that does not reify a racial privilege for some and a racial disadvantage for others. The first thing is to note that what passes for knowledge and expertise is often a proxy for power. This power to determine what passes for knowledge, and what value to give such knowledge, can often function to entrench “epistemic injustice,” to borrow a term from the philosopher Miranda Fricker.<sup>101</sup> Moreover, knowledge from the bottom—or what Michel Foucault called “subjugated knowledges”—is often dismissed precisely *because* it disrupts the balance of power.<sup>102</sup> As a younger generation of criminal

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98. FED. R. EVID. 702 advisory committee’s notes to 1972 proposed rules (emphasis added).

99. *Id.*

100. FED. R. EVID. 702 advisory committee’s notes to 2000 amendment.

101. MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 1 (2007).

102. MICHEL FOUCAULT, *Two Lectures*, in POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS, 1972-1977, at 78, 81–82 (Colin Gordon ed., Colin Gordon et al. trans., 1980). “I believe that by subjugated knowledges one should understand something else . . . namely, a whole set of knowledges that have been disqualified as inadequate to their task or insufficiently

legal scholars has pointed out—Jocelyn Simonson,<sup>103</sup> Ngozi Okidegbe,<sup>104</sup> M. Eve Hanan,<sup>105</sup> and Rachel Lopez<sup>106</sup> come immediately to mind—it is time to shift power to and listen to grounded knowledge from the bottom. Rule 702, at least in its current iteration, seems to run counter to such grounded knowledge and to what Black feminist thinker Patricia Hill Collins describes as “alternative ways of validating truth.”<sup>107</sup>

The second thing to say before moving on is this: We are all implicated in this valorization and privileging of certain types of knowledge. We, as the educated elites, may even have a vested interest in maintaining hierarchies of knowledge. Certainly, we have been socialized to value certain sources of knowledge over others. Thus, the expert with a degree from Harvard is almost automatically viewed as having more important things to say than the expert with the degree from, say, a lesser-known public college. That expert is also seen as having more important things to say than a person with first-hand experience who, despite holding no degree, might actually know more. In fact, we have been so socialized into privileging certain types of knowledge—a socialization in which the current Rule 702 plays a part—that we often fail to recognize laypersons as having any expertise at all. Allow me to provide an example. Recently, I was reading an impressive article by Blanche Bong Cook in which she calls for the use of more expert witnesses in sex trafficking prosecutions, especially those involving Black girls where jurors may be unsympathetic and may even blame the girls for their own vulnerability.<sup>108</sup> Bong Cook points to the availability of experts who study sex trafficking of

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elaborated: naive knowledges, located low down on the hierarchy, beneath the required level of cognition or scientificity.” *Id.*

103. See, e.g., Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 778, 788 (2021) (“[T]he power lens brings a critical eye to the ways in which the construction of the notion of ‘expertise’ often denies agency to the people who most often interact with police in the streets and on the roads.”).

104. See, e.g., Ngozi Okidegbe, *Discredited Data*, 107 CORNELL L. REV. 2007, 2024, 2048 (2022) (noting that pretrial risk assessment tools rely on carceral data and arguing for the crediting of community knowledge as an equally valuable input).

105. See, e.g., M. Eve Hanan, *Invisible Prisons*, 54 U.C. DAVIS L. REV. 1185, 1210 (2020) (arguing for consideration of prisoners’ knowledge in shaping prison policy).

106. See, e.g., Rachel López, *Participatory Law Scholarship*, 123 COLUM. L. REV. (forthcoming 2023) (advocating for the inclusion of voices with lived experience of injustice in legal scholarship).

107. PATRICIA HILL COLLINS, *Black Feminist Epistemology*, in BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 251, 271 (2d ed. 2000).

108. Blanche Bong Cook, *Stop Traffic: Using Expert Witnesses to Disrupt Intersectional Vulnerability in Sex Trafficking Prosecutions*, BERKELEY J. CRIM. L., Spring 2019, at 147, 202–04 (explaining that a sex trafficking expert witness can attest to “reinforcing layers” of a victim’s vulnerability and reasons behind victim’s seemingly counterintuitive behavior).

vulnerable populations and who could assist the trier of fact.<sup>109</sup> It is an insightful article. But I could not help but notice that Bong Cook failed to imagine that any of the sex trafficking victims, or former victims, might also be experts in their own right.<sup>110</sup> This is part of what Rule 702 does. It makes everyday experts not experts at all.<sup>111</sup>

The third thing to say concerns magical words, whether spoken aloud or just implied. It means something when a party “tenders” a witness to the court as an “expert” and the court recognizes the witness as such. It shifts how fact finders view that witness, as several courts have recognized.<sup>112</sup> Although the growing practice is for courts to forbear from certifying the expert witness in open court<sup>113</sup>—on par with saying abracadabra, or uttering magical words that open the gate to such testimony—there is little reason to think jurors do not hear the

109. *See id.* at 202–03.

110. *Id.* at 194–95. Indeed, Bong Cook advises:

In qualifying an expert, prosecutors should elicit the following information during direct examination: education; specialized training; publications; prior expert testimony; experience interviewing both victims and traffickers; number of interviews; consultations with law enforcement organizations, including police departments and prosecutor’s offices; review of academic literature, documentaries, government studies, reports, survivor memoirs, pimp “how-to” books, blogs, and videos; presentation and instructor experience; awards; and, where relevant, prior experience investigating sex trafficking cases as lead agent.

*Id.* at 196.

111. Another example is our treatment of law enforcement officers as experts. For example, as long ago as 1980, a California appellate court gave its blessing to a police officer being qualified as an expert in “the sociology and psychology of gangs” based on his six-and-a-half years in a sheriff’s gang detail in Los Angeles. *See People v. McDaniels*, 166 Cal. Rptr. 12, 14, 16 (Cal. Ct. App. 1980) (internal quotation marks omitted) (holding that defendant did not meet burden of showing why these credentials were insufficient for police officer to qualify as expert). Indeed, treating officers as experts is routine. *See Anna Lvovsky, Rethinking Police Expertise*, 131 YALE L.J. 475, 487 (2021) (“Today, prosecutors commonly offer policemen as expert witnesses, trusted to educate jurors on subjects including drug-trafficking patterns, street slang, gang activity, forensics, ballistics, and the indicia of criminal intent.”); *see also* Joëlle Anne Moreno, *What Happens When Dirty Harry Becomes an (Expert) Witness for the Prosecution?*, 79 TUL. L. REV. 1, 18 (2004) (“Judges are satisfied with nothing more than the prosecutor’s assertion that law enforcement expertise is required.”). At the same time, we have difficulty imagining gang members themselves being qualified as experts. Even more troubling, while we routinely permit police to testify as experts about crime within communities—for example, whether an area is a high-crime area—we rarely, if ever, permit community members to testify as experts about the behavior of cops.

112. *See, e.g., People v. Collins*, 438 P.2d 33, 33 (Cal. 1968) (en banc) (noting that expert testimony has the potential to “cast a spell” over jurors, who might be less likely to view the testimony critically); *Jinro Am., Inc. v. Secure Invs., Inc.*, 266 F.3d 993, 1004 (9th Cir. 2001) (noting that the witness “came before the jury cloaked with the mantle of an expert” and thus “his statements were likely to carry special weight with the jury”).

113. *See* FED. R. EVID. 702 advisory committee’s notes to 2000 amendment (“[T]here is much to be said for a practice that prohibits the use of the term ‘expert’ by both the parties and the court at trial.”); *cf.* Charles R. Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word “Expert” Under the Federal Rules of Evidence in Civil and Criminal Jury Trials*, 154 F.R.D. 537, 559 (1994) (“Banning the use of the term ‘expert’ in open court . . . ensures that trial courts do not inadvertently put their stamp of authority on ‘expert’ testimony.”).

magical words anyway. We would be deceiving ourselves to think fact finders do not realize a thumb has been placed on the scale, especially when the court gives special instructions about how jurors should evaluate the testimony of experts.<sup>114</sup>

The last thing I want to say here brings us back to *Frye* and *Daubert*. I said above that in many ways, *Frye* can be thought of as a “race case”—it prohibited a Black Defendant from introducing novel scientific evidence under a standard that was likely to disadvantage criminal defendants as a whole in a system where racial disparities were already rampant. But hopefully this Part makes clear that *Daubert*, too, can be viewed as a race case insofar as it gave its imprimatur to a standard—and indeed burnished a standard—that privileges some knowledge sources over other knowledge sources in ways that have very real racial consequences.

### III. REIMAGINING RULE 702

What might it mean to reimagine Rule 702 in a way that, instead of entrenching epistemic injustice, furthers epistemic equity? In a way that does not valorize some sources of knowledge at the expense of other sources, especially along lines that coincide with race? And building on Gonzales Rose’s intervention and my own work, what might it mean to reimagine Rule 702 through the lens of CRT? This is the task I have set for myself in this Symposium, *Reimagining the Rules of Evidence at 50*.

To situate this argument, I should first say a few words about CRT. For some readers, including some evidence scholars, it may seem strange to turn to CRT, which is usually associated with constitutional law, in an Essay on reimagining the Rules of Evidence. But in fact, CRT has “profoundly important things to say about law”<sup>115</sup> in general, and as Gonzales Rose points out,<sup>116</sup> that includes things about evidence. One of CRT’s central tenets seems particularly apt here: “[B]oth the procedures and the substance of American law . . . are structured to

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114. See, e.g., 3 FED. JURY PRAC. & INSTRUCTIONS § 104:40 (6th ed. 2023) (reflecting standard instruction). Even instructions that omit the word “expert” still ask jurors to evaluate the testimony differently, focusing on the witness’s qualifications. *Id.* (jury instructions of several different circuits).

115. Bennett Capers, Devon W. Carbado, R.A. Lenhardt & Angela Onwuachi-Willig, *Introduction to CRITICAL RACE JUDGMENTS: REWRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW* 1, 1 (Bennett Capers et al. eds., 2022).

116. See *supra* notes 3, 35.

maintain white privilege”<sup>117</sup> and to “keep insiders in power.”<sup>118</sup> And this design “typically works to disadvantage outsiders such as people of color, women, sexual minorities, and the poor.”<sup>119</sup> Even “colorblind” laws can function to “further insider privileges along the lines of race, gender, and class while marginalizing and obscuring social, political, and economic inequality.”<sup>120</sup> Or as CRT scholar Kimberlé Crenshaw bluntly puts it: The law is “thoroughly involved in constructing the rules of the game, in selecting the eligible players, and in choosing the field on which the game must be played.”<sup>121</sup>

There is another reason why turning to CRT seems especially well suited to reimagining Rule 702: CRT has always been about imagining a different, more equitable world.<sup>122</sup> As the CRT scholar Roy Brooks has noted, “The question always lurking in the background of CRT is this: What would the legal landscape look like today if people of color were the decision-makers?”<sup>123</sup>

So how might a CRT approach change evidence law? How might CRT’s commitment to confronting “the historical centrality and complicity of law in upholding white supremacy (and concomitant hierarchies of gender, class, and sexual orientation)”<sup>124</sup> inform what the Rules should be? How might CRT’s “commitment to radical critique of the law . . . and . . . radical emancipation by the law”<sup>125</sup> or its “fundamental interrogation of all power” help reshape evidence law?<sup>126</sup>

Answering these questions with respect to *all* of the Rules of Evidence is necessarily beyond the scope of this Essay. But as to Rule 702, it seems clear to me that a better, improved Rule 702 would

117. Francisco Valdes, Jerome McCristal Culp & Angela P. Harris, *Battles Waged, Won, and Lost: Critical Race Theory at the Turn of the Millennium*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 1, 1 (Francisco Valdes et al. eds., 2002).

118. Gonzales Rose, *supra* note 3, at 2250.

119. I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 24 (2019).

120. *Id.* at 25; *see also* Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 2–3 (1991) (“A color-blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans.”); Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753, 1758 (2001) (“[N]ot only does colorblindness not render race irrelevant; it ensures its visibility.”).

121. Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas, *Introduction* to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xiii, xxv (Kimberlé Crenshaw et al. eds., 1995) [hereinafter CRITICAL RACE THEORY].

122. *See* Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2239 (1992) (“Our work must respond to the immediate needs of the oppressed and subordinated.”).

123. Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 85–86 (1994).

124. Cornel West, *Foreword* to CRITICAL RACE THEORY, *supra* note 121, at xi, xi.

125. Derrick A. Bell, *Who’s Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 899.

126. Capers, *supra* note 119, at 27.

abandon its current language insofar as it implies a hierarchy of expertise. In other words, an improved Rule 702 would not, through its ordering, privilege scientific knowledge *ahead* of technical knowledge and *ahead* of “other specialized” knowledge based on experience.<sup>127</sup> At a minimum, under my proposal, Rule 702’s first requirement would omit those categories. Put differently, my proposed Rule 702 might begin as follows:

Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert may testify in the form of an opinion or otherwise if:

- (a) the expert’s proposed testimony will help the trier of fact to understand the evidence or to determine a fact in issue.

A more enlightened version of Rule 702’s gatekeeping function might even reject the requirement that the proposed testimony be based “on sufficient facts or data” or “reliable principles and methods”<sup>128</sup> since these requirements suggest a privileging of elite sources and types of knowledge. To make Rule 702 more inclusive, these requirements could instead be replaced with a requirement that the proposed testimony have a sufficient basis. In short, a better, improved Rule 702, recognizing how it has contributed to epistemic injustice, would make clear that knowledge is knowledge.

Thus far, I have offered modest suggestions for changing Rule 702, suggestions that hopefully widen the pool of individuals who would be recognized as experts. Of course, the problem with modest reforms is that they are, well, modest. They are “reformist reforms” that merely tinker with the status quo rather than “non-reformist reforms”<sup>129</sup> that have as their ambition structural transformation.<sup>130</sup> And the problem with merely allowing more individuals to claim expert status is that it still implies a hierarchy of knowledge. Or as Benjamin Levin recently put it: “Expertise as a frame and vocabulary implies exclusivity: calling someone an expert both presumes and also establishes that others are nonexperts. Indeed, the power of the expertise claim generally rests on its exclusivity. Expertise presupposes

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127. FED. R. EVID. 702.

128. *Id.*

129. This distinction originated with André Gorz in the context of labor reform. ANDRÉ GORZ, STRATEGY FOR LABOR: A RADICAL PROPOSAL 6–8 (Martin A. Nicolaus & Victoria Ortiz trans., 1967) (1964). For its discussion in the context of abolishing the criminal system, see, for example, Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781 (2020).

130. Marina Bell, *Abolition: A New Paradigm for Reform*, 46 LAW & SOC. INQUIRY 32, 45–47 (2021).

that expert knowledge is of worth because other nonexperts do not possess it.”<sup>131</sup>

For some readers, this exclusivity is desirable. And yet for me (and for Levin, I am sure), “this logic of expertise cannot help but stand in tension against norms or values of broader participation.”<sup>132</sup>

Accordingly, allow me to offer something more radical, something more consistent with CRT’s commitment to equality; to “looking to the bottom”;<sup>133</sup> and to recognizing the importance of “counter-accounts,” “antithetical knowledge,” and the perspectives of outsiders.<sup>134</sup> Allow me to offer something in recognition of Audre Lorde’s observation that “the master’s tools will never dismantle the master’s house.”<sup>135</sup> This more radical suggestion is that we abandon Rule 702 altogether—and the binary distinction between “expert” testimony and “lay” testimony<sup>136</sup>—given that the distinction means people are “systemically . . . undervalued as . . . knower[s].”<sup>137</sup> After all, if knowledge would assist the trier of fact and its probative value is not substantially outweighed by the risk of unfair prejudice,<sup>138</sup> is that not all that matters? Or at least what really matters, rather than the designation “expert”?

To be sure, the devil is in the details. Would abandoning the expert/lay witness distinction mean that we also need to rethink Rule 703, which allows experts but not lay witnesses to rely on inadmissible facts or data?<sup>139</sup> And how can we prioritize experience and recognize that all knowledge matters without further enabling problematic “expert” police testimony about, for example, gangs and

131. Benjamin Levin, *Criminal Justice Expertise*, 90 *FORDHAM L. REV.* 2777, 2833 (2022).

132. *Id.*

133. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 *HARV. C.R.-C.L. L. REV.* 323, 324 (1987) (“Looking to the bottom . . . can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice.”).

134. Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas, *Introduction to CRITICAL RACE THEORY*, *supra* note 121, at xiii, xiii; *see also* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 *MICH. L. REV.* 2411, 2415 (1989) (examining “the use of stories in the struggle for racial reform”).

135. AUDRE LORDE, *The Master’s Tools Will Never Dismantle the Master’s House*, in *SISTER OUTSIDER* 110, 110–12 (1984) (emphasis omitted).

136. *Compare* FED. R. EVID. 701 (requirements for nonexpert, or “lay,” witnesses), *with id.* at 702 (requirements for expert witnesses).

137. Kristie Dotson, *Tracking Epistemic Violence, Tracking Practices of Silencing*, 26 *HYPATIA* 236, 242 (2011).

138. *See* FED. R. EVID. 403. Of course, one concern with abandoning the expert/lay distinction is that it would open the doors too wide, treating Covid deniers as having the same expertise as, say, Dr. Anthony Fauci. But this ignores that there would still have to be a finding that the proposed testimony is relevant and not unfairly prejudicial. *See id.* In other words, Rules 401 and 403 can do much of the work necessary to make sure a trial does not devolve into a free-for-all.

139. *Id.* at 703.

high crime areas and so much else that is raced and classed? Beyond these details, there is an even broader issue. We are living in a time of deep inequality. Indeed, given the Supreme Court's recent decision in *Students for Fair Admissions, Inc. v. President of Harvard College* rejecting the direct consideration of applicant race in college admissions,<sup>140</sup> ongoing efforts to disenfranchise minority voters, and the Court's acceptance of these efforts absent smoking gun evidence of discriminatory purpose,<sup>141</sup> one could easily conclude we are living in a time of retrenchment, again.<sup>142</sup> As such, given this deep inequality and our larger societal structures—the way the world is already raced and classed and gendered and so on—would abandoning the expert witness/lay witness distinction in fact matter in terms of which evidence judges let in or which witnesses jurors credit more? Maybe not. But we should at least try it. We should at least open ourselves to the possibility that something better is possible.

#### CONCLUSION

At a time when “[e]vidence law is stagnating” and “has grown torpid,”<sup>143</sup> the goal of this Essay has been to call attention to Rule 702's race problem, to reimagine Rule 702, and, consistent with CRT, to do so radically.

But if I can lay my cards on the table, my goal has been broader. Just as we should be troubled by the elitism in Rule 702—let me just say it: its whiteness—we should be troubled by the elitism, and whiteness, of all of the Rules, and indeed the rulemakers themselves. In a way, my very focus on who is an “expert” under Rule 702 suggests a related question: Who counted as an “expert” to serve on the Advisory Committee when the Rules of Evidence were crafted?<sup>144</sup> Who had a seat at the table, and who did not? And as a result, what was missed, and what inequities were codified?

Which brings me to my final observation. Rule 702 exists so that courts can play the role of gatekeeper, determining whether proffered

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140. 143 S. Ct. 2141, 2175–76 (2023).

141. See *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1863 (2018) (Sotomayor, J., dissenting) (characterizing the majority's opinion as “ignoring” a “backdrop of substantial efforts by States to disenfranchise low-income and minority voters” against which a federal statute was enacted).

142. See generally Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (arguing that while antidiscrimination law has effectively combatted formal discrimination, it has not ended material racial inequality).

143. Nunn, *supra* note 32, at 980–81.

144. See *supra* note 28 and accompanying text.



testimony is indeed “expert” and, thus, whether the jury will get to hear it. My final observation is about a different kind of gatekeeping—one that almost functions in tandem with Rule 702. This other kind of gatekeeping is about evidence scholarship in general, which too often seems like an old boys’ club, caring primarily about “Analyzing the Process of Proof”;<sup>145</sup> incorporating “mathematics, psychology and philosophy”;<sup>146</sup> wondering what “a successful evidentiary theory [might] look like”;<sup>147</sup> and bringing economic theory to bear on evidence.<sup>148</sup> In short, evidence scholarship, however unintentionally, has been privileging certain types of knowledge. In doing so, it has for too long seemed indifferent to issues of race, gender, and class—and for that matter justice.<sup>149</sup> Luckily, those gates, too, have begun to open. When we have more voices, not fewer, we are all beneficiaries.

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145. Richard Lempert, *The New Evidence Scholarship: Analyzing the Process of Proof*, 66 B.U. L. REV. 439, 439–40 (1986).

146. *Id.*

147. Michael S. Pardo, *The Nature and Purpose of Evidence Theory*, 66 VAND. L. REV. 547, 553 (2013). For more on what is often called “New Evidence Scholarship,” see Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 47 B.C. L. REV. 949, 984–98 (2006) (citing Lempert, *supra* note 145, at 439–40).

148. See, e.g., Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430, 431, 451 (2000).

149. On how scholarship “involving the interaction of law with race, gender” and other statuses is sometimes not treated as real scholarship, see MEERA E. DEO, UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA 89 (2018).